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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

183, 184, 185, 186 U. S.

BOOK 46,
LAWYERS' EDITION,
CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

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v. 183-186

JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

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HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,	HON. GEORGE SHIRAS, JR.,
HON. HORACE GRAY,	HON. EDWARD DOUGLASS WHITE,
HON. DAVID JOSIAH BREWER,	HON. RUFUS W. PECKHAM,
HON. HENRY BILLINGS BROWN,	HON. JOSEPH MCKENNA.

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MARSHAL,
JOHN MONTGOMERY WRIGHT, ESQ.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

AS THEY STOOD DURING THE TIME OF THESE REPORTS, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

Allotment, Feb. 21, 1898, see Appendix VII. Book 42.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1900, 1901.	COMMISSIONED.	SWORN IN.
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ASSOCIATE JUSTICE JOSEPH MCKENNA, California.	President MCKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA,* HAWAII.*	1893. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

VOLUMES 183, 184, 185, 186.

A.		Baker, Munn v. (mem.).....	1260
Adam v. New York L. Ins. Co. (mem.) (186 U. S. 481).....	1261	Baldwin v. United States (mem.) (184 U. S. 700).....	765
Ætna Ins. Co. v. Langan (mem.) (183 U. S. 701).....	397	Bank, Atlanta Nat., Southern R. Co. v. (mem.)	765
Ainsa v. United States (184 U. S. 639)	727	Central Nat., Haseltine v.....	117
Alaska United Min. Co., McKinley Creek Min. Co. v.....	331	Central Nat., Haseltine v.....	118
Alexandroff, Tucker v.	264	Citizens', Whitman v. (mem.) .	394
American Aristotype Co. v. United States (mem.) (184 U. S. 697)	764	Commercial Nat., v. Consum- ers' Brewing Co. (mem.)..	1262
American Mutoscope Co., Edison v. (mem.)	1261	First Nat., Covington v.....	906
American Ordnance Co. v. Driggs- Seabury Gun & Ammuni- tion Co. (mem.) (183 U. S. 698)	396	First Nat., v. Hindman (mem.) (186 U. S. 481).....	1261
Ames, Terlinden v.....	534	First Nat., v. Klug (186 U. S. 203)	1127
Anderson, Elliott v. (mem.).....	1262	First Nat., Talbot v.....	857
Anderson Foundry & Mach. Works, Potts v. (mem.).....	765	First Nat., v. Watt (184 U. S. 151)	475
Anglo-American Land Mortg. & Agen- cy Co., Nashua Sav. Bank v. (mem.)	395	Hanover Nat., v. Moyses (186 U. S. 181)	1113
Animarium Co. v. Mahler (mem.)...	1266	Keene Five Cent Sav., Lake County Comrs. v. (mem.)	1264
Arivaca Land & Cattle Co. v. United States (184 U. S. 649)....	731	Mercantile Nat., Lander v....	1247
Arizona, Schuerman v.....	580	Nashua Sav., v. Anglo-Ameri- can Land Mortg. & Agency Co. (mem.) (183 U. S. 697)	395
Arkansas v. Kansas & T. Coal Co. (183 U. S. 185).....	144	of Iron Gate v. Brady (184 U. S. 665)	739
Armstrong v. Mayer (mem.) (183 U. S. 693)	393	of Topeka v. Eaton (mem.) (183 U. S. 697).....	395
Ashtabula, Stewart v. (mem.).....	394	Ohio Nat., v. Central Constr. Co. (mem.)	1262
Assyrian Asphalt Co., United States Repair & Guaranty Co. v.	342	People's, Martin v. (mem.)....	765
Atlanta Nat. Bank, Southern R. Co. v. (mem.)	765	Sioux Nat., Talbot v.....	862
Atlantic & E. S. S. Co., Simpson's Patent Dry Dock Co. v. (mem.)	395	State Nat., Frankfort v. (mem.)	763
Atlantic Lumber Co., L. Bucki & Son Lumber Co. v. (mem.)....	1266	State Nat., Gallaway v.....	1111
Attorney General, Ohio ex rel., Capital City Dairy Co. v.....	171	Union, v. Oxford Comrs. (mem.) (184 U. S. 701).....	766
Aubrey, McIntosh v.....	834	Barker v. Mutual F. Ins. Co. (mem.)	1262
Aultman & T. Co. v. Brumfield (mem.)	1265	Barlow, United States v.....	463
Austin v. Bartholomew (mem.) (183 U. S. 698).....	395	v. United States (184 U. S. 123)	463
		Barr Car Co. v. Chicago & N. W. R. Co. (mem.) (186 U. S. 481)	1261
		Bartholomew, Austin v. (mem.).....	395
		Barton, Dayton Coal & Iron Co. v...	61
		Bear v. Chase (mem.).....	1263
		Beard, Phelps v. (mem.).....	1265
		Beatty, Philbrook v. (mem.).....	1262
		Bell v. Commonwealth Title Ins. & T. Co. (mem.) (183 U. S. 699)	396
		Southern P. R. Co. v.....	383
		Bement v. National Harrow Co. (186 U. S. 70).....	1058
B.			
Baca, United States v.....	733		
Baer v. Kerr (mem.) (183 U. S. 700)	397		

CASES REPORTED.

Bendinger, Central Stock & Grain Exch. v. (mem.).....	396	Carling, Seymour Lumber Co. v. (mem.)	1261
Bernard v. Michigan (mem.) (184 U. S. 697)	764	Carnegie Steel Co. v. Cambria Iron Co. (185 U. S. 403).....	968
Beyer v. LeFevre (186 U. S. 114)....	1080	Carter v. McLaughry (183 U. S. 365)	236
Bidwell, Smith v. (mem.)	1265	Central Constr. Co., Ohio Nat. Bank v. (mem.)	1262
Bienville Water Supply Co. v. Mobile (186 U. S. 212).....	1132	Central Nat. Bank, Haseltine v.	117
Bigger v. Ryker (mem.) (184 U. S. 696)	763	Haseltine v.	118
Bird, Kirkman v. (mem.).....	1262	Central of Georgia R. Co. v. Charleston & W. C. R. Co. (mem.) (186 U. S. 480).....	1260
Bissert v. Hagan (mem.) (183 U. S. 694)	393	Central Ohio R. Co. v. Mahoney (mem.) (183 U. S. 694) ..	393
Blythe Co. v. Hinkley (mem.) (184 U. S. 701).....	766	Central Stock & Grain Exch. v. Bendinger (mem.) (183 U. S. 699)	396
Bogy v. Daugherty (mem.) (184 U. S. 696)	763	Chapin-Hall Lumber Co., United States use of, Fidelity & D. Co. v. (mem.).....	1266
Booth v. Illinois (184 U. S. 425).....	623	Charles, Marion v. (mem.).....	1264
Borcherling, United States v.	884	Charleston & W. C. R. Co., Central of Ga. R. Co. v. (mem.)....	1260
Boston & M. R. Co., Hurd v. (mem.)	765	Chase, Bear v. (mem.).....	1263
Botkin v. California (mem.).....	1266	v. Thompson (mem.)	1263
Bowker v. United States (186 U. S. 135)	1090	Chattanooga Nat. Bldg. & Loan Asso. v. Denson (mem.) (183 U. S. 700)	396
Brady, Bank of Iron Gate v.	739	Chesapeake & O. R. Co., McChord v.	289
Patton v.	713	Chesapeake & P. Teleph. Co. v. Manning (186 U. S. 238).....	1144
Bragg v. Wright (mem.) (186 U. S. 481)	1261	Chicago & N. W. R. Co., Barr Car Co. v. (mem.)	1261
Brainard v. Buck (184 U. S. 99)....	449	Chicago, B. & Q. R. Co., Interstate Commerce Commission v.	1182
Brill v. Peekham Motor Truck & Wheel Co. (mem.) (183 U. S. 698)	395	Walters v. (mem.).....	1266
Brinkerhoff v. Brumfield (mem.)....	1265	Chicago Cripple Creek Gold Min. Co. v. Matoa Gold Min. Co. (mem.)	1264
Brown v. Denver (mem.) (186 U. S. 479)	1259	Chicago, R. I. & P. R. Co. v. Eaton (183 U. S. 589)	341
Brumfield, Aultman & T. Co. v. (mem.)	1265	v. Zernecke (183 U. S. 582)...	339
Brinkerhoff v. (mem.).....	1265	Chin Bak Kan v. United States (186 U. S. 193).....	1121
Buchanan, Nelson v. (mem.).....	394	Chin Leong Goon v. United States (mem.)	1267
Buck, Brainard v.	449	Chin Ying v. United States (186 U. S. 202)	1126
Bunker Hill & S. Min. & Concentrating Co. v. Empire State Idaho Min. & Developing Co. (mem.) (186 U. S. 480)	1260	Chormann, New Jersey Steel & Iron Co. v. (mem.).....	1267
Busch v. Jones (184 U. S. 598).....	707	Christie v. United States (185 U. S. 256)	898
C.			
Cadwalader v. Meyer (mem.).....	1263	Cincinnati, N. O. & T. P. R. Co., McChord v.	289
California, Botkin v. (mem.).....	1266	Citizens' Bank, Whitman v. (mem.)..	394
Rodley v. (mem.).....	393	Clark v. Herington (186 U. S. 206) ..	1128
California & O. Land Co. v. United States (mem.) (186 U. S. 479)	1259	v. Titusville (184 U. S. 329) ..	569
United States v. (mem.).....	1259	Clarksburg, Clarksburg Electric Light Co. v. (mem.).....	1267
Calin, Frazier Borate Min. Co. v. (mem.)	1265	Clarksburg Electric Light Co. v. Clarksburg (mem.)	1267
Callender, Texas & P. R. Co. v.	362	Cleveland Trust Co. v. Lander (184 U. S. 111)	456
Cambria Iron Co., Carnegie Steel Co. v.	968	Cole v. Garland (183 U. S. 693) (mem.)	393
Camou, United States v.	694	Coleman, Tootle v. (mem.).....	394
Campbell, McGhee v. (mem.).....	1265	Coler, Stanley County Comrs. v. (mem.)	1261
Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. (mem.) (183 U. S. 696) ..	394	Wilkes County Comrs. v. (mem.)	1260
Campbellsville Lumber Co., Hubbert v. (mem.)	1260	Colorado, Kansas v.	838
Capital City Dairy Co. v. Ohio ex rel. Attorney General (183 U. S. 238)	171	Colorado Fuel & Iron Co. v. Southern P. Co. (mem.).....	1264
Capital City Light & Fuel Co. v. Tal-lahassee (186 U. S. 401) . .	1219		

CASES REPORTED.

Columbian Equipment Co. v. Mercantile Trust & D. Co. (mem.) (186 U. S. 481).....	1261	Dillon, Weber v. (mem.).....	1262
Columbus, Hutchinson v. (mem.)....	1265	Dingley, Mutual L. Ins. Co. v. (mem.)	763
Colwell, French-Glenn Live Stock Co. v.	804	Dinsmore v. Southern Exp. Co. (183 U. S. 115).....	111
Cominger, Louisville Trust Co. v....	413	District of Columbia v. Eslin (183 U. S. 62)	85
Commercial Nat. Bank v. Consumers' Brewing Co. (mem.).....	1262	Dix, Michigan Sugar Co. v.....	829
Commonwealth Title Ins. & T. Co., Bell v. (mem.).....	396	Dobbs v. Kansas (184 U. S. 697) (mem.)	764
Compagnie Francaise De Navigation A Vapeur v. State Bd. of Health (186 U. S. 380)...	1209	Dooley v. United States (183 U. S. 151).....	128
Connecticut, Travelers' Ins. Co. v. . .	949	Downs v. United States (mem.) (186 U. S. 481).....	1261
Connolly v. Union Sewer Pipe Co. (184 U. S. 540).....	679	Driggs-Seabury Gun & Ammunition Co., American Ordnance Co. v. (mem.)... .	396
Considine v. United States (mem.) (184 U. S. 699).....	765	Dudley v. Lake County Comrs. (mem.)... .	1264
Consolidated Coal Co. v. Illinois (185 U. S. 203).....	872	Duplex Printing Press Co., Campbell Printing Press & Mfg. Co. v. (mem.)... .	394
Consumers' Brewing Co., Commercial Nat. Bank v. (mem.)....	1262	Dwyer v. Nixon (mem.) (183 U. S. 698).....	395
Copper Queen Consol. Min. Co., United States v.	1008	E.	
Cotting v. Godard (183 U. S. 79)....	92		
Courtney, Fidelity & D. Co. v.....	1193	Eastern Bldg. & Loan Asso. v. Ebaugh (185 U. S. 114).....	830
Covington v. First Nat. Bank (185 U. S. 270)	906	Eaton, Bank of Topeka v. (mem.)...	395
Cowen v. Merriman (mem.).....	1263	Chicago, R. I. & P. R. Co. v....	341
Cramer, Singer Mfg. Co. v. (mem.)..	764	Midway Co. v.....	347
Cromwell v. Gedge (mem.) (184 U. S. 701)	766	Midway Co. v.....	357
Cumberland Teleph. & Teleg. Co., Louisiana ex rel., Texas & P. R. Co. v. (mem.).....	1265	Ebaugh, Eastern Bldg. & Loan Asso. v.....	830
D.		E. Bement & Sons v. National Harrow Co. (186 U. S. 70).....	1058
		Edison v. American Mutoscope Co. (mem.) (186 U. S. 481)...	1261
Daggs v. Walker (mem.).....	1262	Eggleston, Tracy v. (mem.)	396
Daniel, Yellow Poplar Lumber Co. v. (mem.)	395	Eidman v. Martinez (184 U. S. 578)	697
Daugherty, Bogy v. (mem.).....	763	Elliott v. Anderson (mem.).....	1262
Davey Pegging Mach. Co. v. Isaac Prouty & Co. (mem.) (184 U. S. 698)	764	Missouri, K. & T. R. Co. v....	673
Davies, Morse v. (mem.).....	1264	Missouri, K. & T. R. Co. v. (mem.).....	763
Dayton Coal & Iron Co. v. Barton (183 U. S. 23).....	61	Ellison, Louisville & N. R. Co. v. (mem.)... .	1260
De Gignac v. United States (mem.)..	1266	Emblen v. Lincoln Land Co. (184 U. S. 660).....	736
Delaware Ins. Co., S. S. White Dental Mfg. Co. v. (mem.) . . .	396	Empire State Idaho Min. & Developing Co., Bunker Hill & S. Min. & Concentrating Co. v. (mem.).....	1260
Delmar Jockey Club, Missouri ex rel., v. Zachritz (mem.) (184 U. S. 697).....	764	Empire Transp. Co. v. Parsons (mem.) (183 U. S. 699)...	396
De Loach, New Orleans P. R. Co. v (mem.).....	1264	Emsheimer v. New Orleans (186 U. S. 33).....	1042
Deming, McClaghry v.	1049	Erie Railroad Co. v. Moore (mem.) (184 U. S. 701).....	766
Denison & N. R. Co., Ranney-Alton Mercantile Co. v. (mem.)..	1265	v. Purdy (185 U. S. 148).....	847
Denson, Chattanooga Nat. Bldg. & Loan Asso. v. (mem.)....	396	Eslin, District of Columbia v.....	85
Denver, Brown v. (mem.).....	1259	Eubank, Louisville & N. R. Co. v....	416
Detroit v. Detroit Citizens' Street R. Co. (184 U. S. 368).....	592	Evans-Snyder-Buel Co., McFaddin v..	1012
Goodrich v.	627	Ewing, United States v.....	471
Voigt v.	459	Excelsior Wooden Pipe Co. v. Pacific Bridge Co. (185 U. S. 282)	910
Detroit Citizens' Street R. Co., Detroit v.	592	F.	
Diamond Rings, The (183 U. S. 176).	138		
Dickerson, Maurer v. (mem.).....	1266	Fairgrieve v. Marine Ins. Co. (mem.) (186 U. S. 481).....	1261

CASES REPORTED.

Farmers' Loan & Trust Co. v. Penn Plate Glass Co. (186 U. S. 434).....	1234
Felsenheld v. United States (186 U. S. 126)	1085
Fidelity & D. Co. v. Courtney (186 U. S. 342).....	1193
v. L. Bueki & Son Lumber Co. (mem.) (184 U. S. 698) ..	764
v. United States use of Chapin-Hall Lumber Co. (mem.) ..	1266
Fidelity Mut. Life Asso. v. Mettler (185 U. S. 308).....	922
Filhiol v. Maurice (185 U. S. 108)...	827
Finnell, United States v.....	890
First Nat. Bank, Covington v.....	906
v. Hindman (mem.) (186 U. S. 481).....	1261
v. Klug (186 U. S. 203)	1127
Talbot v.	857
v. Watt (184 U. S. 151).....	475
Florida C. & P. R. Co. v. Melver (mem.).....	1265
v. Reynolds (183 U. S. 471) ..	283
Fok Young Yo v. United States (185 U. S. 296).....	917
Frankfort v. State Nat. Bank (mem.) (184 U. S. 696).....	763
Frazier Borate Min. Co. v. Calin (mem.) ..	1265
Freel, United States v.....	1177
French-Glenn Live Stock Co. v. Colwell (185 U. S. 54).....	804
v. Springer (185 U. S. 47)....	800
Fuller, Mayer v. (mem.).....	394
Furry, St. Louis & S. F. R. Co. v. (mem.).....	1267

G.

Galeton Cotton Mills, Huguley Mfg. Co. v.....	546
Gallaway v. State Nat. Bank (186 U. S. 177).....	1111
Gallup v. Schmidt (183 U. S. 300) ..	207
Galveston v. United States Mortg. & Trust Co. (mem.) (183 U. S. 695).....	394
Garland, Cole v. (mem.).....	393
Gates, Wisconsin ex rel. v. Public Lands Comrs. (mem.) (183 U. S. 693).....	393
Gaylord, Williams v.....	1102
Gedge, Cromwell v. (mem.).....	766
Georgia, Minder v.....	328
Gilman, Orr v.	196
Githens, Wheeler v. (mem.).....	1262
Godard, Cotting v.	92
Godfrey, Warner v.....	1203
Goodrich v. Detroit (184 U. S. 432) ..	627
Goss Printing Press Co., Scott v. (mem.).....	396
Grand Island & W. C. R. Co. v. Sweeney (mem.)	1263
Grand View Bldg. Asso., Northern Assur. Co. v.....	213
Gray v. United States (mem.) (184 U. S. 700).....	765
Green, United States v.....	898
Greene v. Henkel (183 U. S. 249)....	177
Groek v. Southern P. R. Co. (183 U. S. 690).....	390

Grotrian, Guaranty Trust Co. v. (mem.).....	1261
Guarantee Co. of N. A. v. Mechanics' Sav. Bank & Trust Co. (183 U. S. 402).....	253
Guaranty Trust Co. v. Grotrian (mem.) (186 U. S. 481) ..	1261
Guggenheim Smelting Co., United States v. (mem.).....	1260
Gulf & S. I. R. Co. v. Hewes (183 U. S. 66).....	86
Gwin v. United States (184 U. S. 669).....	741

H.

Hagan v. Scottish Union & Nat. Ins. Co. (186 U. S. 423).....	1229
Hale, Kumler v. (mem.)	394
Hall v. Johnson (mem.) (186 U. S. 479).....	1259
Hamilton County, Zane v. (mem.) ..	395
Hanifen v. Price (mem.) (186 U. S. 480).....	1260
Hanley, Sweeny v. (mem.).....	397
Hanover Nat. Bank v. Moyses (186 U. S. 181).....	1113
Harbison, Knoxville Iron Co. v.....	55
Harding v. Hart (mem.) (186 U. S. 481).....	1261
Hardy v. United States (186 U. S. 224).....	1137
Hart, Harding v. (mem.).....	1261
Haseltine v. Central Nat. Bank (183 U. S. 130).....	117
v. Central Nat. Bank (183 U. S. 132).....	118
Hatfield v. King (184 U. S. 162)....	481
v. King (186 U. S. 178).....	1112
Henderson v. Hughes County (mem.)	1265
McFadden v. (mem.) ..	765
Henkel, Greene v.....	177
Herbst v. The Asiatic Princee (mem.) (183 U. S. 697).....	395
Hering, Northern C. R. Co. v. (mem.)	1259
Herington, Clark v.....	1128
Herman, Maese v.....	335
Hewes, Gulf & S. I. R. Co. v.....	86
Hiekman, Missouri, K. & T. R. Co. v.	78
Hilloek, Tallman v. (mem.).....	1265
Hinekley, Blythe Co. v. (mem.).....	766
Hindman, First Nat. Bank v. (mem.)	1261
Hingston v. The Vulcan (mem.) (183 U. S. 700).....	396
Hitehoek, Minnesota v.....	954
Hitz v. Jenks (185 U. S. 155).....	851
Hoffeld v. United States (186 U. S. 273).....	1160
Holyoke Mach. Co., Swain v. (mem.)	765
Holzappel's Compositions Co. v. Rahtjen's American Composition Co. (183 U. S. 1).....	49
Hotema v. United States (186 U. S. 413).....	1225
Howard v. United States use of Stewart (184 U. S. 676).....	754
Howells, Pacific States Sav. Loan & Bldg. Co. v. (mem.).....	1263
Hubbert v. Campbellsville Lumber Co. (mem.) (186 U. S. 480) ..	1260
Hughes County, Henderson v. (mem.)	1265

CASES REPORTED.

Huguley Mfg. Co., Re (184 U. S. 297) 549	King v. Portland (184 U. S. 61)..... 431
v. Galetton Cotton Mills (184 U. S. 290)..... 546	Kirkman v. Bird (mem.)..... 1262
Hunt, Illinois ex rel., v. Illinois C. R. Co. (184 U. S. 77)..... 440	Kitselman, Kokomo Fence Mach. Co. v. (mem.) 395
Hurd v. Boston & M. R. Co. (mem.) (184 U. S. 700)..... 765	Klipstein, United States v. (mem.).. 1266
Hutchinson v. Columbus (mem.).... 1265	Klug, First Nat. Bank v..... 1127
	Knight, Rothschild v..... 573
	Knoxville Iron Co. v. Harbison (183 U. S. 13)..... 55
	Kokomo Fence Mach. Co. v. Kitselman (mem.) (183 U. S. 697) 395
	Kumler v. Hale (mem.) (183 U. S. 696) 394
I.	
Illinois, Booth v..... 623	
Consolidated Coal Co. v..... 872	
Illinois ex rel. Hunt v. Illinois C. R. Co. (184 U. S. 77) 440	
Illinois C. R. Co. Illinois ex rel. Hunt v. 440	
Indiana, D. & W. R. Co., Sharkey v. (mem.)..... 1266	
Insurance Co., Aetna, v. Langan (mem.) (183 U. S. 701).. 397	
Delaware, S. S. White Dental Mfg. Co. v. (mem.)..... 396	
Marine, Fairgrieve v. (mem.).. 1261	
Mutual F., Barker v. (mem.).. 1262	
Mutual L., v. Dingley (mem.) (184 U. S. 695)..... 763	
New York L., Adam v. (mem.) 1261	
New York L., McMaster v..... 64	
Northwestern Mut. L., Woodworth v..... 945	
of N. A. v. The Harrogate (mem.) (184 U. S. 698).. 764	
Potomac, Mitchell v..... 74	
Scottish Union & Nat., Hagan v..... 1229	
Travelers', v. Connecticut (185 U. S. 364)..... 949	
Interstate Commerce Commission v. Chicago, B. & Q. R. Co. (186 U. S. 320)..... 1182	
Isaac Prouty & Co., Davey Pegging Mach. Co. v. (mem.)..... 764	
Iseminger, Wilson v..... 804	
J.	
Jackson, New Orleans v. (mem.).... 395	
Jenkins v. Neff (186 U. S. 230).... 1140	
Jenks, Hitz v..... 851	
Johnson, Hall v. (mem.)..... 1259	
Jones, Busch v..... 707	
Joslin, Ward v..... 1093	
Ju Fook Pun v. United States (mem.) 1267	
K.	
Kansas v. Colorado (185 U. S. 125) .. 838	
Dobbs v. (mem.)..... 764	
Kansas & T. Coal Co., Arkansas v. . . 144	
Keene Five Cent Sav. Bank, Lake County Comrs. v. (mem.).. 1264	
Kennard v. Nebraska (186 U. S. 304) 1175	
Kensington, The (183 U. S. 263).... 190	
Kentucky, Louisville & N. R. Co. v... 298	
Kerr, Baer v. (mem.)..... 397	
King, Hatfield v..... 481	
Hatfield v. 1112	
	L.
	Ladd, Quinn v. (mem.)..... 1262
	Lake County Comrs., Dudley v. (mem.) 1264
	v. Keene Five Cent Sav. Bank (mem.) 1264
	v. Sutliff (mem.) 1264
	Lakeland Transp. Co. v. Miller (mem.) (183 U. S. 699).. 396
	v. Miller (mem.) (184 U. S. 698) 764
	Miller v. (mem.)..... 765
	Lander, Cleveland Trust Co. v..... 456
	v. Mercantile Nat. Bank (186 U. S. 458)..... 1247
	Langan, Aetna Ins. Co. v. (mem.).... 397
	L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (mem.)... 1266
	Fidelity & Deposit Co. v. (mem.) 764
	League v. Texas (184 U. S. 156).... 478
	Leavenworth, Leavenworth City & Ft. L. Water Co. v. (mem.).. 1263
	Leavenworth City & Ft. L. Water Co. v. Leavenworth (mem.)... 1263
	Lee Gon Yung v. United States (185 U. S. 306)..... 921
	Lee Lui Sing v. United States (mem.) 1267
	Lee Lung v. Patterson (186 U. S. 168) 1108
	Lee Yen Tai, United States v. 878
	Le Fevre, Beyer v..... 1080
	Lincoln Land Co., Emblen v..... 736
	Ling Ming v. United States (mem.).. 1267
	Ling Quong v. United States (mem.) 1267
	Louisiana, New Orleans Waterworks Co. v. 936
	Louisiana ex rel. Cumberland Teleph. & Teleg. Co., Texas & P. R. Co. v. (mem.)..... 1265
	Louis Pang Lung v. United States (mem.) 1267
	Louisville & N. R. Co. v. Ellison (mem.) (186 U. S. 481).. 1260
	v. Eubank (184 U. S. 27)..... 416
	v. Kentucky (183 U. S. 503).. 298
	McChord v. 289
	Stuber v. (mem.)..... 395
	Louisville, H. & St. L. R. Co., McChord v. 289
	Louisville Trust Co. v. Cominger (184 U. S. 18)..... 413
	Lui Tsy Tsin v. United States (mem.) 1267
	Lykins v. McGrath (184 U. S. 169).. 485

CASES REPORTED.

M.

McBride, Southwestern Coal & Improv. Co. v.	1010	Mercantile Nat. Bank, Lander v.	1247
McChord v. Chesapeake & O. R. Co. (183 U. S. 483)	289	Mercantile Trust & D. Co., Columbian Equipment Co. v. (mem.)	1261
v. Cincinnati, N. O. & T. P. R. Co. (183 U. S. 483)	289	Mercantile Trust Co., Metropolitan Trust Co. v. (mem.)	396
v. Louisville & N. R. Co. (183 U. S. 483)	289	Merchants' Loan & Trust Co., Wilson v.	113
v. Louisville, H. & St. L. R. Co. (183 U. S. 483)	289	Merriman, Cowen v. (mem.)	1263
v. Southern R. Co. (183 U. S. 483)	289	Metropolitan Trust Co. v. Mercantile Trust Co. (mem.) (183 U. S. 700)	396
McClain, Provident Sav. Assur. Soc. v. (mem.)	765	Mettler, Fidelity Mut. Life Asso. v. Meyer, Cadwalader v. (mem.)	922
McClaughry, Carter v.	236	Michigan, Bernard v. (mem.)	1263
v. Deming (186 U. S. 49)	1049	Michigan C. R. Co. Richards v. (mem.)	764
McCormick, National Surety Co. v. (mem.)	1260	Michigan Sugar Co. v. Dix (185 U. S. 112)	1259
McDonald v. Thompson (184 U. S. 71)	437	Midway Co. v. Eaton (183 U. S. 602) v. Eaton (183 U. S. 619)	829
McFadden v. Henderson (mem.) (184 U. S. 700)	765	Miller, Lakeland Transp. Co. v. (mem.)	347
McFaddin v. Evans-Snyder-Buel Co. (185 U. S. 505)	1012	v. Lakeland Transp. Co. (mem.) (184 U. S. 699) ..	357
McGhee v. Campbell (mem.)	1265	Lakeland Transp. Co. v. (mem.) v. United States (mem.)	396
McGrath, Lykins v.	485	Milliken v. Sullivan (mem.) (184 U. S. 699)	765
McIntosh v. Aubrey (185 U. S. 122) .	834	Minder v. Georgia (183 U. S. 559) ..	764
McIver, Florida C. & P. R. Co. v. (mem.)	1265	Minneapolis & St. L. R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission (186 U. S. 257)	1267
McKinley Creek Min. Co. v. Alaska United Min. Co. (183 U. S. 563)	331	Minnesota v. Hitchcock (185 U. S. 373)	1151
McMaster v. New York L. Ins. Co. (183 U. S. 25)	64	v. Northern Securities Co. (184 U. S. 199)	954
Maese v. Herman (183 U. S. 572)	335	Minnesota ex rel. Mohler v. Megaarden (mem.)	499
Mahler, Animarium Co. v. (mem.) ...	1266	Railroad & Warehouse Commission, Minneapolis & St. L. R. Co. v.	1263
Mahoney, Central Ohio R. Co. v. (mem.)	393	Missouri ex rel. Delmar Jockey Club v. Zachritz (mem.) (184 U. S. 697)	1151
Malcolmson, The Styria v.	1027	Missouri, K. & T. R. Co. v. Elliott (184 U. S. 530)	764
Manning, Chesapeake & P. Teleph. Co. v.	1144	v. Elliott (mem.) (184 U. S. 695)	673
Marande v. Texas & P. R. Co. (184 U. S. 173)	487	v. Hickman (183 U. S. 53)	763
Marine Ins. Co., Fairgrieve v. (mem.)	1261	v. Truskett (mem.) (186 U. S. 479)	78
Marion v. Charles (mem.)	1264	Mitchell v. Potomac Ins. Co. (183 U. S. 42)	1259
Martin v. People's Bank (mem.) (184 U. S. 699)	765	Mobile, Bienville Water Supply Co. v. Mohler, Minnesota ex rel. v. Megaarden (mem.)	74
v. The Southwark (mem.) (184 U. S. 698)	764	Monroe v. United States (184 U. S. 524)	1132
Martinez, Eidman v.	697	Montana Min. Co. v. St. Louis Min. & Mill. Co. (186 U. S. 24)	1263
United States v.	632	Moore, Erie R. Co. v. (mem.)	1039
Massachusetts, Nutting v.	324	v. Ruckgaber (184 U. S. 593) ..	766
Storti v.	120	Sun Printing & Pub. Asso. v. Morgan, Stockard v.	705
Storti v. (mem.)	1264	The Styria v.	366
Massachusetts Homeopathic Hospital, Powers v. (mem.)	394	United States v. (mem.)	785
Matoa Gold Min. Co., Chicago Cripple Creek Gold Min. Co. v. (mem.)	1264	Morgan's L. & T. R. & S. S. Co. v. The Robert Graham Dun (mem.) (183 U. S. 697) ..	1027
Maurer v. Dickerson (mem.)	1266	Morse v. Davies (mem.)	1263
Maurice, Filhiol v.	827	Moses v. United States (mem.)	1267
Mayer, Armstrong v. (mem.)	393		
v. Fuller (mem.) (183 U. S. 695)	394		
Mayes v. Southern R. Co. (mem.) (186 U. S. 480)	1260		
Mechanics' Sav. Bank & Trust Co., Guarantec Co. of N. A. v.	253		
Megaarden, Minnesota ex rel. Mohler v. (mem.)	1263		

CASES REPORTED.

Moyes, Hanover Nat. Bank v.....	1113
Mueller v. Nugent (184 U. S. 1).....	405
Mulvane, Tullock v.....	657
Munn v. Baker (mem.) (186 U. S. 481)	1260
Munroe, The Styria v.....	1027
Munson, Swing v. (mem.).....	1262
Murphy v. Utter (186 U. S. 95).....	1070
Mutual F. Ins. Co., Barker v. (mem.) v. Dingley (mem.) (184 U. S. 695)	1262 763

N.

Nashua Sav. Bank v. Anglo-American Land Mortg. & Agency Co. (mem.) (183 U. S. 697) ..	395
National Foundry & Pipe Works v. Oconto City Water Supply Co. (183 U. S. 216)	157
National Harrow Co., Bement v.	1058
National Nickel Co. v. Nevada Nickel Syndicate (mem.) (184 U. S. 700)	765
National Surety Co. v. McCormick (mem.) (186 U. S. 480) ..	1260
Nebraska, Kennard v.	1175
Nell, Jenkins v.	1140
Nelson v. Buchanan (mem.) (183 U. S. 696)	394
Pinney v.	125
Wilson Bros. v.	147
Nesbitt v. United States (186 U. S. 153)	1100
Nevada Nickel Syndicate, National Nickel Co. v. (mem.)	765
New Jersey Steel & Iron Co. v. Chor- mann (mem.)	1267
Newman, Philbrook v. (mem.)	1262
New Mexico, United States Trust Co. v.	315
v. United States Trust Co. (183 U. S. 535)	315
Newmyer v. Slingsluff (mem.)	1264
New Orleans, Emsheimer v.	1042
v. Jackson (mem.) (183 U. S. 698)	395
New Orleans P. R. Co. v. De Loach (mem.)	1264
New Orleans Waterworks Co. v. Loui- siana (185 U. S. 336)	936
New York, New York C. & H. R. R. Co. v.	1158
v. Pine (mem.) (183 U. S. 700) ..	396
v. Pine (185 U. S. 93)	820
New York C. & H. R. R. Co. v. New York (186 U. S. 269)	1158
New York L. Ins. Co., Adam v. (mem.)	1261
McMaster v.	64
Nicholls, United States v.	1173
Nixon, Dwyer v. (mem.)	395
North American Transp. & Trading Co. v. Ransberry (mem.) ..	1263
Northern Assur. Co. v. Grand View Bldg. Asso. (183 U. S. 308)	213
Northern C. R. Co. v. Hering (mem.) (186 U. S. 480)	1259
Northern Securities Co., Minnesota v. Washington v.	499 897

Northwestern Life Assur. Co. v. Ville- neuve (mem.)	1263
Northwestern Mut. L. Ins. Co., Wood- worth v.	945
Norton, Whitman v. (mem.)	394
Nugent, Mueller v.	405
Nutting v. Massachusetts (183 U. S. 553)	324

O.

O'Brien v. Wheelock (184 U. S. 450)	636
Oconto City Water Supply Co., National Foundry & Pipe Works v.....	157
Ohio ex rel. Attorney General, Capital City Dairy Co. v.....	171
Ohio Nat. Bank v. Central Constr. Co. (mem).....	1262
Orr v. Gilman (183 U. S. 278).....	196
Oxford Comrs., Union Bank v. (mem.)	766

P.

Pacific Bridge Co., Excelsior Wooden Pipe Co. v.....	910
Pacific States Sav. Loan & Bldg. Co. v. Howells (mem.).....	1263
Parramore, Taylor v. (mem.).....	1261
Parsons, Empire Transp. Co. v. (mem.).....	396
The Styria v.....	1027
Patterson, Lee Lung v.....	1108
Patton v. Brady (184 U. S. 608)....	713
v. Southern R. Co. (mem.) (186 U. S. 481).....	1261
Peckham Motor Truck & Wheel Co., Brill v. (mem.).....	395
Pendell, United States v.....	866
Penn Plate Glass Co., Farmers' Loan & Trust Co. v.....	1234
Pennsylvania, Van Dyke v. (mem.)..	1262
People's Bank, Martin v. (mem.)....	765
Perrin v. United States (mem.).....	1266
Perry, Studebaker v.....	528
Phelps v. Beard (mem.)	1265
Philbrook v. Beatty (mem.).....	1262
v. Newman (mem.).....	1262
Pine, New York v.....	820
New York v. (mem.).....	396
Pine River Logging & Improv. Co. v. United States (186 U. S. 279).....	1164
Pinney v. Nelson (183 U. S. 144)....	125
Portland, King v.....	431
Potomac Ins. Co., Mitchell v.....	74
Potts v. Anderson Foundry & Mach. Works (mem.) (184 U. S. 700).....	765
Powers v. Massachusetts Homeopathic Hospital (mem.) (183 U. S. 695).....	394
Price, Hanifen v. (mem.).....	1260
Provident Sav. Assur. Soc. v. McClain (mem.) (184 U. S. 699)....	765
Public Lands Comrs., Wisconsin ex rel. Gates v. (mem.).....	393
Purdy, Erie R. Co. v.....	847

Q.

Quinn v. Ladd (mem.) 1262

CASES REPORTED.

R.

Rahtjen's American Composition Co., Holzapfel's Compositions Co. v.	49
Railroad & Warehouse Commission, Minnesota ex rel., Minne- apolis & St. L. R. Co. v. . . .	1151
Railroad Co., Boston & M., Hurd v. (mem.)	765
Central Ohio, v. Mahoney (mem.) (183 U. S. 694) . . .	393
Chicago, B. & Q., Interstate Commerce Commission v. . . .	1182
Chicago, B. & Q., Walters v. (mem.)	1266
Erie, v. Moore (mem.) (184 U. S. 701)	766
Erie, v. Purdy (185 U. S. 148)	847
Florida C. & P., v. McIver (mem.)	1265
Florida C. & P., v. Reynolds (183 U. S. 471)	283
Grand Island & W. C., v. Sweeney (mem.)	1263
Gulf & S. I., v. Hewes (183 U. S. 66)	86
Illinois C., Illinois ex rel. Hunt v.	440
Louisville & N., v. Ellison (mem.) (186 U. S. 481) . . .	1260
Louisville & N., v. Eubank (184 U. S. 27)	416
Louisville & N., v. Kentucky (183 U. S. 503)	298
Louisville & N., McChord v. . .	289
Louisville & N., Stuber v. (mem.)	395
Michigan C., Richards v. (mem.)	1259
Minneapolis & St. L., v. Minne- sota ex rel. Railroad & Warehouse Commission (186 U. S. 257)	1151
New York C. & H. R. v. New York (186 U. S. 269)	1158
St. Louis & S. F., v. Furry (mem.)	1267
Southern P., v. Bell (183 U. S. 675)	383
Southern P., Groeck v.	390
Southern P., United States v. . .	425
Southern P., United States v. . .	307
Southern P., v. United States (183 U. S. 519)	307
Railway Co., Central of Ga., v. Charleston & W. C. R. Co. (mem.) (186 U. S. 480) . . .	1260
Charleston & W. C., Central of Ga. R. Co. v. (mem.)	1260
Chesapeake & O., McChord v. . .	289
Chicago & N. W., Barr Car Co. v. (mem.)	1261
Chicago, R. I. & P., v. Eaton (183 U. S. 589)	341
Chicago, R. I. & P., v. Zerneke (183 U. S. 582)	339
Cincinnati, N. O. & T. P., Mc- Chord v.	289
Denison & N., Ranney-Alton Mercantile Co. v. (mem.) . .	1265
Detroit Citizens' Street, De- troit v.	592

Indiana, D. & W., Sharkey v. (mem.)	1266
Louisville, H. & St. L., Me- Chord v.	289
Missouri, K. & T., v. Elliott (184 U. S. 530)	673
Missouri, K. & T., v. Elliott (mem.) (184 U. S. 695) . . .	3
Missouri, K. & T., v. Hickman (183 U. S. 53)	78
Missouri, K. & T., v. Truskett (mem.) (186 U. S. 479) . . .	1259
New Orleans P., v. De Loach (mem.)	1264
Northern C., v. Hering (mem.) (186 U. S. 480)	1
Savannah, T. & I. of H., v. Savannah (mem.)	1
Southern, v. Atlanta Nat. Bank (mem.) (184 U. S. 700) . . .	1
Southern, McChord v.	1
Southern, Mayes v. (mem.) . . .	1260
Southern, Patton v. (mem.) . .	1261
Southern, Sansom v. (mem.) . .	1260
Texas & P., v. Callender (183 U. S. 632)	362
Texas & P., v. Louisiana ex rel. Cumberland Teleph. & Tele. Co. (mem.)	1265
Texas & P., Marande v.	487
Texas & P., v. Reiss (183 U. S. 621)	358
Texas & P., v. Wilder (mem.)	1264
Texas & P., v. Wineland (mem.)	1263
Ranney-Alton Mercantile Co. v. Deni- son & N. R. Co. (mem.) . . .	1265
Ransberry, North American Transp. & Trading Co. v. (mem.) . .	1263
Re Huguley Mfg. Co. (184 U. S. 297)	549
Reiss, Texas & P. R. Co. v.	358
Reloj Cattle Co. v. United States (184 U. S. 624)	721
Re Wilder's S. S. Co. (183 U. S. 545)	321
Reynolds, Florida C. & P. R. Co. v. . .	283
Richards v. Michigan C. R. Co. (mem.) (186 U. S. 479) . . .	1259
Richmond, Southern Bell Teleph. & Tele. Co. v. (mem.)	1264
Rio Grande Dam & Irrig. Co., United States v.	619
Rodgers v. United States (185 U. S. 83)	816
Rodley v. California (mem.) (183 U. S. 694)	393
Rothschild v. Knight (184 U. S. 334)	573
Ruckgaber, Moore v.	705
Ryker, Bigger v. (mem.)	763

S.

St. Louis, Sweringen v.	795
St. Louis & M. Valley Transp. Co., United States v.	520
St. Louis & S. F. R. Co. v. Furry (mem.)	1267
St. Louis Min. & Mill Co., Montana Min. Co. v.	1039
Sandoval v. United States (mem.) . .	1267
Sansom v. Southern R. Co. (mem.) (186 U. S. 481)	1260

CASES REPORTED.

Santa Cruz, Waite v.....	552	Stewart, United States use of, How-	
Savannah, Savannah, T. & I. of H. R.		ard, v.	754
Co. v. (mem.).....	1266	Stockard v. Morgan (185 U. S. 27)	785
Savannah, T. & I. of H. R. Co. v.		Stockton, Schrimpscher v.....	203
Savannah (mem.)... ..	1266	Storti v. Massachusetts (mem.).....	1264
Schmidt, Gallup v.....	207	Storti v. Massachusetts (183 U. S.	
Schrimpscher v. Stockton (183 U. S.		138).....	120
290).....	203	Stuber v. Louisville & N. R. Co.	
Shuerman v. Arizona (184 U. S. 342)	580	(mem.) (183 U. S. 698) ..	395
Scott v. Goss Printing Press Co.		Studebaker v. Perry (184 U. S. 258)	528
(mem.) (183 U. S. 699) ..	396	Sullivan, Milliken v. (mem.).....	765
Scottish Union & Nat. Ins. Co., Hagan		Sun Printing & Pub. Asso. v. Moore	
v.	1229	(183 U. S. 642).....	366
Seymour Lumber Co. v. Carling		Sutliff, Lake County Comrs. v.	
(mem.) (186 U. S. 481) ..	1261	(mem.).....	1264
Sharkey v. Indiana, D. & W. R. Co.		Swafford v. Templeton (185 U. S. 487)	1005
St.	1266	Swain v. Holyoke Mach. Co. (mem.)	
Shpard, Tulare Irrig. Dist. v.....	773	(184 U. S. 699).....	765
Sharborne, Wilcox & G. Sewing Mach.		Sweeney, Grand Island & W. C. R. Co.	
Co. v. (mem.).....	394	v. (mem.).....	1263
Simpson's Patent Dry Dock Co. v. At-		Sweeny v. Hanley (mem.) (183 U.	
lantic & E. S. S. Co.		S. 700).....	397
(mem.) (183 U. S. 697) ..	395	Sweringen v. St. Louis (185 U. S. 38)	795
Singer Mfg. Co. v. Cramer (mem.)		Swing v. Munson (mem.).....	1262
(184 U. S. 698) ..	764		
Sioux Nat. Bank, Talbot v.....	862		
Sisler v. Slingluff (mem.) ..	1264		
Skaneateles, Skaneateles Waterworks			
Co. v.	585		
Skaneateles Waterworks Co. v. Skane			
ateles (184 U. S. 354) ..	585		
Slingluff, Newmyer v. (mem.) ..	1264		
Sisler v. (mem.).....	1264		
Smith v. Bidwell (mem.).....	1265		
Southern Bell Teleph. & Teleg. Co. v.			
Richmond (mem.).....	1264		
Southern Exp. Co., Dinsmore v.....	111		
Southern P. Co., Colorado Fuel & Iron			
Co. v. (mem.) ..	1264		
v. Yeargin (mem.) (183 U. S.			
695) ..	394		
Southern P. R. Co. v. Bell (183 U. S.			
675) ..	383		
Groeck v.....	390		
United States v.....	425		
United States v.....	307		
v. United States (183 U. S.			
519) ..	307		
Southern R. Co. v. Atlanta Nat. Bank			
(mem.) (184 U. S. 700) ..	765		
Mayes v. (mem.) ..	1260		
McChord v.	289		
Patton v. (mem.).....	1261		
Sansom v. (mem.).....	1260		
Southwestern Coal & Improv. Co. v.			
McBride (185 U. S. 499)	1010		
Springer, French-Glenn Live Stock			
Co. v.....	800		
S. S. White Dental Mfg. Co. v. Dela-			
ware Ins. Co. (mem.) (183			
U. S. 700) ..	396		
Standefer, Wilson v.....	612		
Stanley County Comrs. v. Coler			
(mem.) (186 U. S. 481)	1261		
State Bd. of Health, Compagnie Fran-			
caise De Navigation A Va-			
peur v.....	1209		
State Nat. Bank, Frankfort v. (mem.)	763		
Gallaway v.....	1111		
Stewart v. Ashtabula (mem.) (183 U.			
S. 696).....	394		

T.

Talbot v. First Nat. Bank (185 U. S.	
172).....	857
v. Sioux Nat. Bank (185 U. S.	
182).....	862
Tallahassee, Capital City Light &	
Fuel Co. v.....	1219
Tallman v. Hilolek (mem.) ..	1265
Taylor v. Parramore (mem.) (186 U.	
S. 481) ..	1261
Templeton, Swafford v.....	1005
Terlinden v. Ames (184 U. S. 270) ..	534
Texas, League v.....	478
Texas & P. R. Co. v. Callender (183 U.	
S. 632) ..	362
v. Louisiana ex rel. Cumberland	
Teleph. & Teleg. Co.	
(mem.) ..	1265
Marande v.	487
v. Reiss (183 U. S. 621).....	358
v. Wilder (mem.) ..	1264
v. Wineland (mem.) ..	1263
The Asiatic Prince, Herbst v. (mem.)	395
The Diamond Rings (183 U. S. 176) ..	138
The Harrogate, Insurance Co. of N. A.	
v. (mem.) ..	764
The Kensington (183 U. S. 263).....	190
The Laurada, United States v. (mem.)	394
The Robert Graham Dun, Morgan's	
L. & T. R. & S. S. Co. v.	
(mem.) ..	395
The Southwark, Martin v. (mem.) ..	764
The Styria v. Malsolmson (186 U. S.	
1) ..	1027
v. Morgan (186 U. S. 1).....	1027
v. Munroe (186 U. S. 1).....	1027
v. Parsons (186 U. S. 1).....	1027
Thompson, Chase v. (mem.).....	1263
McDonald v.	437
Tierney, Weston v. (mem.).....	763
Titusville, Clark v.....	569
Tottle v. Coleman (mem.) (183 U. S.	
695) ..	394
Tracy v. Eggleston (mem.) (183 U.	
S. 699) ..	396

CASES REPORTED.

Train v. United States (mem.) (186 U. S. 480).....	1260
Travelers' Ins. Co. v. Connecticut (185 U. S. 364).....	949
Truskett, Missouri, K. & T. R. Co. v. (mem.) ..	1259
Tucker v. Alexandroff (183 U. S. 424)	264
Tulare Irrig. Dist. v. Shepard (185 U. S. 1).....	773
Tullock v. Mulvane (184 U. S. 497) .	657

U.

Union Bank v. Oxford Comrs. (mem.) (184 U. S. 701).....	766
Union Sewer Pipe Co., Connolly v...	679
United States, Ainsa v.....	727
American Aristotype Co. v. (mem.) ..	764
Arivaca Land & Cattle Co. v.	731
v. Baca (184 U. S. 653).....	733
Baldwin v. (mem.).....	765
v. Barlow (184 U. S. 123)....	463
Barlow v.	463
v. Borchering (185 U. S. 223)	884
Bowker v.	1090
v. California & O. Land Co. (mem.) (186 U. S. 479)..	1259
California & O. Land Co. v. (mem.) ..	1259
v. Camou (184 U. S. 572).....	694
Chin Bak Kan v.....	1121
Chin Leong Goon v. (mem.)...	1267
Chin Ying v.....	1126
Christie v.	898
Considine v. (mem.).....	765
v. Copper Queen Consol. Min. Co. (185 U. S. 495).....	1008
De Gignac v. (mem.).....	1266
Dooley v.	128
Downs v. (mem.).....	1261
v. Ewing (184 U. S. 140).....	471
Felsenheld v.	1085
v. Finnell (185 U. S. 236)....	890
Fok Young Yo v.....	917
v. Freel (186 U. S. 309).....	1177
Gray v. (mem.) ..	765
v. Green (185 U. S. 256).....	898
v. Guggenheim Smelting Co. (mem.) (186 U. S. 480)	1260
Gwin v.....	741
Hardy v.....	1137
Hoffeld v.....	1160
Hotema v.....	1225
Ju Fook Pun v. (mem.).....	1267
v. Klipstein (mem.).....	1266
Lee Gon Yung v.....	921
Lee Lui Sing v. (mem.).....	1267
v. Lee Yen Tai (185 U. S. 213)	878
Ling Ming v. (mem.).....	1267
Ling Quong v. (mem.).....	1267
Louis Pang Lung v. (mem.)..	1267
Lui Tsy Tsin v. (mem.).....	1267
v. Martinez (184 U. S. 441) ...	632
Miller v. (mem.).....	1267
Monroe v.....	670
v. Morgan (mem.).....	1263
Moses v. (mem.).....	1267
Nesbitt v.....	1100
v. Nicholls (186 U. S. 298)...	1173
v. Pendell (185 U. S. 189)....	866

United States, Perrin v. (mem.).....	1266
Pine River Logging & Improv. Co. v.....	1164
Reloj Cattle Co. v.....	721
v. Rio Grande Dam & Irrig. Co. (184 U. S. 416).....	619
Rodgers v.....	816
v. St. Louis & M. Valley Transp. Co. (184 U. S. 247).....	520
Sandoval v. (mem.).....	1267
v. Southern P. R. Co. (184 U. S. 49).....	425
Southern P. R. Co. v.....	307
v. Southern P. R. Co. (183 U. S. 519).....	307
v. The Laurada (mem.) (183 U. S. 694).....	394
Train v. (mem.).....	1260
v. Van Duzee (185 U. S. 278) ..	909
Vetter v. (mem.).....	1267
Wing Long v. (mem.).....	1267
Wong Ah Sin v. (mem.).....	1267
Wong Chow v. (mem.) ..	1267
Wong Fat v. (mem.).....	1267
Wong Hong Yip v. (mem.)....	1267
Wong King v. (mem.).....	1267
Wong Sic Chung v. (mem.)...	1267
Wong Sic Loon v. (mem.)....	1267
Wong Soo Bow v. (mem.).....	1267
Wong Sow Sin v. (mem.)....	1267
Young Shang Lee v. (mem.)...	1267

United States use of Chapin-Hall Lumber Co., Fidelity & D. Co. v. (mem.).....	1266
Stewart, Howard v.....	754
United States Mortg. & Trust Co., Galveston v. (mem.).....	394
United States Repair & Guaranty Co. v. Assyrian Asphalt Co. (183 U. S. 591).....	342
United States Trust Co. v. New Mexico (183 U. S. 535).....	315
New Mexico v.....	315
Utter, Murphy v.....	1070

V.

Van Duzee, United States v.....	909
Van Dyke v. Pennsylvania (mem.)..	1262
Vetter v. United States (mem.).....	1267
Vicksburg, Vicksburg Waterworks Co. v.....	808
Vicksburg Waterworks Co. v. Vicksburg (185 U. S. 65).....	808
Villeneuve, Northwestern Life Assur. Co. v. (mem.).....	1263
Voigt v. Detroit (184 U. S. 115)...	459
Vulcan, The, Hingston v. (mem.)....	396

W.

Waite v. Santa Cruz (184 U. S. 302)	552
Walker, Daggs v. (mem.).....	1262
Walters v. Chicago, B. & Q. R. Co. (mem.).....	1266
Ward v. Joslin (186 U. S. 142).....	1093
Warner v. Godfrey (186 U. S. 365) ..	1203
Washington v. Northern Securities Co. (185 U. S. 254).....	897
Watt, First Nat. Bank v.....	475

CASES REPORTED.

Watts, Whitman v. (mem.)	394	Wong Chow v. United States (mem.)	1267
Weber v. Dillon (mem.)	1262	Wong Fat v. United States (mem.)	1207
Weston v. Tierney (mem.) (184 U. S. 695)	763	Wong Hong Yip v. United States (mem.)	1267
Wheeler v. Githens (mem.)	1262	Wong King v. United States (mem.)	1267
Wheelock, O'Brien v.	636	Wong Sic Chung v. United States (mem.)	1267
Whitman v. Citizens' Bank (mem.) (183 U. S. 695)	394	Wong Sic Loon v. United States (mem.)	1267
v. Norton (mem.) (183 U. S. 695)	394	Wong Soo Bow v. United States (mem.)	1267
v. Watts (mem.) (183 U. S. 695)	394	Wong Sow Sin v. United States (mem.)	1267
Wilcox & G. Sewing Mach. Co. v. Sherborne (mem.) (183 U. S. 696)	394	Woodworth v. Northwestern Mut. L. Ins. Co. (185 U. S. 354)	945
Wilder, Texas & P. R. Co. v. (mem.)	1264	Wright, Bragg v. (mem.)	1261
Wilder's S. S. Co., Re (183 U. S. 545)	321		
Wilkes County Comrs. v. Coler (mem.) (186 U. S. 480)	1260	Y.	
Williams v. Gaylord (186 U. S. 157)	1102	Yeargin, Southern P. Co. v. (mem.)	394
Wilson v. Iseminger (185 U. S. 54)	804	Yellow Poplar Lumber Co. v. Daniel (mem.) (183 U. S. 696)	395
v. Merchants' Loan & Trust Co. (183 U. S. 121)	113	Young Shang Lee v. United States (mem.)	1267
v. Standefer (184 U. S. 399)	612		
Wilson Bros. v. Nelson (183 U. S. 191)	147	Z.	
Wineland, Texas & P. R. Co. v. (mem.)	1263	Zachritz, Missouri ex rel. Delmar Jockey Club v. (mem.)	764
Wing Long v. United States (mem.)	1267	Zane v. Hamilton County (mem.) (183 U. S. 698)	395
Wisconsin ex rel. Gates v. Public Lands Comrs. (mem.) (183 U. S. 693)	393	Zernecke, Chicago, R. I. & P. R. Co. v.	339
Wong Ah Sin v. United States (mem.)	1267		11

CASES

ARGUED AND DECIDED

IN THE

S U P R E M E C O U R T

OF THE

UNITED STATES

AT

OCTOBER TERM, 1901.

Vol. 183.

REFERENCE TABLE
OF SUCH CASES
DECIDED IN U. S. SUPREME COURT,
OCTOBER TERM, 1901,
AND REPORTED HEREIN,
VOLUME 183,
AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 183 U. S.	Title.	Here in.	Off. Rep. 183 U. S.	Title.	Here in.
1-2	Holzappel's Compositions Co. v. Rahtjen's American Com- position Co.	49	67-68	Gulf & S. I. R. Co. v. Hewes	87
2-5	" "	50	68-70	" "	88
5-7	" "	51	70-73	" "	89
7	" "	52	73-76	" "	90
8	" "	53	76-78	" "	91
8-11	" "	54	78	" "	92
11-13	" "	55	79	Cotting v. Kansas City Stock Yards Co. ("Cotting v. Godard")	92
13	Knoxville Iron Co. v. Harbi- son	55	79-81	" "	93
13-16	" "	56	81-83	" "	94
16-17	" "	57	83	" "	95
17	" "	59	83-86	" "	95
17-20	" "	60	86-88	" "	100
20-22	" "	61	88-91	" "	101
23	Dayton Coal & Iron Co. v. Bar- ton	61	91-93	" "	101
23	" "	62	93-96	" "	103
24-25	" "	64	96-99	" "	104
25	McMaster v. New York Life Ins. Co.	64	99-101	" "	105
26-28	" "	65	101-104	" "	106
28-30	" "	66	104-107	" "	107
30-33	" "	67	107-109	" "	108
33-35	" "	68	109-112	" "	109
35-36	" "	71	112-114	" "	110
36-39	" "	72	114-115	" "	111
39-42	" "	73	115-117	Dinsmore v. Southern Express Co.	111
42	" "	74	117-119	" "	112
42	Mitchell v. Potomac Ins. Co.	74	119-121	" "	112
43-46	" "	75	121	Wilson v. Merchants' Loan & T. Co.	113
46-48	" "	76	121-123	" "	114
48-51	" "	77	124-126	" "	115
51-53	" "	78	126-129	" "	116
53	Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. ("Missouri, K. & T. R. Co. v. Hickman")	78	129	" "	117
54-56	" "	79	130-131	Haseltine v. Central Bank (No. 1.) ("Haseltine v. Central Nat. Bank")	117
56-58	" "	80	131-132	" "	118
58-59	" "	83	132-133	Haseltine v. Central Bank (No. 2.) ("Haseltine v. Central Nat. Bank")	118
59-61	" "	84		" "	119
61	" "	85		" "	120
62-64	District of Columbia v. Eslin	85	133-135	" "	120
64-66	" "	86	135-137	" "	120
66	Gulf & S. I. R. Co. v. Hewes	86	138	Storti v. Massachusetts	120
183 U. S.					489

REFERENCE TABLE.

Off. Rep. 183 U. S.	Title.	Here in.	Off. Rep. 183 U. S.	Title.	Here in.
138-140	Storti v. Massachusetts	121	251	Greene v. Henkel	181
140-141	" "	122	251-252	" "	182
141	" "	123	252-253	" "	183
141-144	" "	124	253-254	" "	184
144-146	Pinney v. Nelson	125	254-255	" "	185
146	" "	126	255-256	" "	186
146-149	" "	127	256-257	" "	187
149-151	" "	128	257-259	" "	188
151	Dooley v. United States	128	259-262	" "	189
152	" "	129	262	" "	190
152-155	" "	130	263-264	The Kensington	190
155-158	" "	131	264-265	" "	191
158-160	" "	132	266-267	" "	192
160-163	" "	133	267-270	" "	193
163-165	" "	134	270-273	" "	194
165-168	" "	135	273-275	" "	195
168-171	" "	136	275-277	" "	196
171-173	" "	137	278	Orr v. Gilman	196
173-176	" "	138	278-280	" "	197
176	Fourteen Diamond Rings v. United States ("The Diamond Rings")	138	280	" "	198
177-179	" "	141	281-282	" "	199
179-181	" "	142	282-285	" "	200
181-184	" "	143	285-287	" "	201
184-185	" "	144	287-290	" "	202
185-186	Arkansas v. Kansas & T. Coal Co.	144	290	" "	203
186-187	" "	144	290-291	Schrimpscher v. Stockton	203
187-189	" "	145	291-293	" "	204
189-191	" "	146	293-296	" "	205
191	Wilson v. Nelson ("Wilson Bros. v. Nelson")	146	296-298	" "	206
191-193	" "	147	298-299	" "	207
193-194	" "	147	300-301	Gallup v. Schmidt	207
194-197	" "	147	301-303	" "	208
197-200	" "	148	303-304	" "	211
200-203	" "	148	304-306	" "	212
203-205	" "	149	306-307	" "	213
205-208	" "	150	308-309	Northern Assur. Co. v. Grand View Bldg. Asso.	213
208-211	" "	151	309-310	" "	214
211-213	" "	152	310-311	" "	215
213-216	" "	153	311-313	" "	216
216	National Foundry & Pipe Works v. Oconto Water Supply Co. ("National Foundry & Pipe Works v. Oconto City Water Supply Co.")	154	313-316	" "	217
217-218	" "	155	316-319	" "	218
218-221	" "	156	319-321	" "	219
221-223	" "	157	321-324	" "	220
223-226	" "	158	324-326	" "	221
226-228	" "	159	326-329	" "	222
228-231	" "	160	329-332	" "	223
231	" "	161	332-334	" "	224
232-234	" "	162	334-337	" "	225
234-237	" "	163	337-340	" "	226
237	" "	164	340-342	" "	227
238	Capital City Dairy Co. v. Ohio ("Capital City Dairy Co. v. Ohio, Attorney General")	165	342-345	" "	228
238-241	" "	166	345-348	" "	229
241-244	" "	167	348-350	" "	230
244-246	" "	168	350-353	" "	231
246-249	" "	169	353-356	" "	232
249	" "	170	356-358	" "	233
249	Greene v. Henkel	171	358-361	" "	234
250	" "	171	361-363	" "	235
250-251	" "	171	363-365	" "	236
251		171	365	Carter v. McClaughry	236
		173	366-367	" "	237
		174	367-369	" "	238
		175	369-372	" "	239
		176	372-375	" "	240
		177	375-378	" "	241
		177	378-380	" "	242
		177	380-381	" "	245
		177	381-384	" "	246
		179	384-386	" "	247
		180	386-389	" "	248

REFERENCE TABLE.

Off. Rep. 183 U. S.	Title.	Here in.	Off. Rep. 183 U. S.	Title.	Here in.
389-391	Carter v. McClaughry	249	535	United States Trust Co. v.	
391-394	" "	250		New Mexico	315
394-397	" "	251	536-537	" "	316
397-399	" "	252	537-539	" "	317
399-401	" "	253	539-542	" "	319
402	Guarantee Co. v. Mechanics'		542-545	" "	320
	Savings Bank & T. Co.	253	545	" "	321
402-404	" "	254	545-547	Wilder's Steamship Co., Ex	
404-407	" "	255		parte	321
407-410	" "	256	547-549	" "	322
410-412	" "	257	549-551	" "	323
412-415	" "	258	551-552	" "	324
415-416	" "	259	553	Nutting v. Massachusetts	324
416-418	" "	261	553-556	" "	325
418-421	" "	262	556-558	" "	327
421-423	" "	263	558	" "	328
423-424	" "	264	559	Minder v. Georgia	328
424-426	Tucker v. Alexandroff	264	559-560	" "	329
426-427	" "	265	560-562	" "	330
427-428	" "	266	563-565	McKinley Creek Min. Co. v.	
428-430	" "	267		Alaska United Min. Co.	331
430-433	" "	268	565-566	" "	332
433-435	" "	269	566-568	" "	333
435-438	" "	270	568-571	" "	334
438-441	" "	271	571-572	" "	335
441-443	" "	272	572-573	Maese v. Herman	335
443-446	" "	273	573-576	" "	336
446-448	" "	274	576-578	" "	337
448-451	" "	275	578-581	" "	338
451-454	" "	276	581-582	" "	339
454-456	" "	277	582-583	Chicago, R. I. & P. R. Co. v.	
456-459	" "	278		Zernecke	339
459-461	" "	279	583-586	" "	340
462-464	" "	280	586-588	" "	341
464-467	" "	281	589	Chicago, R. I. & P. R. Co. v.	
467-469	" "	282		Eaton	341
469-470	" "	283	589-590	" "	342
471	Florida C. & P. R. Co. v. Rey-		591	United States Repair & G. Co.	
	nolds	283		v. Assyrian Asphalt Co.	342
471-473	" "	284	591-593	" "	343
473-475	" "	285	593-595	" "	344
475-478	" "	286	595-598	" "	345
478-480	" "	287	598-600	" "	346
480-483	" "	288	601	" "	347
483-485	McChord v. Louisville & N. R.		602-603	Midway Co. v. Eaton (No. 1)	347
	Co.	289	603-605	" "	348
485-487	" "	290	606-607	" "	349
487-490	" "	291	607	" "	352
490-493	" "	292	607-610	" "	353
493-494	" "	293	610-613	" "	354
494-497	" "	295	613-615	" "	355
497-499	" "	296	615-618	" "	356
499-502	" "	297	618-619	" "	357
502	" "	298	619-620	Midway Co. v. Eaton (No. 2)	357
503	Louisville & N. R. Co. v. Ken-		620	" "	358
	tucky	298	621-622	Texas & P. R. Co. v. Reiss	358
504-506	" "	301	622-625	" "	359
506-509	" "	302	625-628	" "	360
509-511	" "	303	628-630	" "	361
511-514	" "	304	630-631	" "	362
514-516	" "	305	632	Texas & P. R. Co. v. Callender	362
516-519	" "	306	633-635	" "	363
519	Southern P. R. Co. v. United		635-638	" "	364
	States	307	638-641	" "	365
520-521	" "	309	641-642	" "	366
521-524	" "	310	642	Sun Printing & Pub. Asso. v.	
524-526	" "	311		Moore	366
526-528	" "	312	643-644	" "	367
528-531	" "	313	644	" "	368
531-534	" "	314	645-648	" "	371
534-535	" "	315	648-649	" "	372

REFERENCE TABLE.

Off. Rep. 183 U. S.	Title.	Here ln.	Off. Rep. 183 U. S.	Title.	Here ln.
649-651	Sun Printing & Pub. Asso. v. Moore	373	675-677	Southern P. R. Co. v. Bell	383
651-654	" "	374	677-678	" "	384
654-657	" "	375	678-681	" "	386
657-659	" "	376	681-683	" "	387
659-662	" "	377	683-686	" "	388
662-664	" "	378	686-688	" "	389
664-667	" "	379	688-690	" "	390
667-669	" "	380	690-691	Groeck v. Southern P. R. Co.	390
669-672	" "	381	691-692	" "	391
672-674	" "	382	693-701	Memorandum Cases	393-397
483					183 U. S.

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1901.

[1]*HOLZAPFEL'S COMPOSITIONS COMPANY (Limited), *Petitioner*,
v.
RAHTJEN'S AMERICAN COMPOSITION COMPANY, *Respondent*.

(See S. C. Reporter's ed. 1-13.)

Trademarks—use of word "patent"—right to use name after patent expires.

1. No right to a trademark which includes the word "patent" and which describes the article as "patented" can arise when there is and has been no patent; nor is the claim a valid one for the other words used, where it is based upon their use in connection with that word.
2. The right to use the word "patent" as part of the name of an article for which a patent has been obtained ceases on the expiration of the patent.
3. The name "Rahtjen's Composition" for paint first prepared by Rahtjen, and which was for years covered by a patent, becomes common property after the expiration of the patent, where that name has always been given to the article and is the only name by which it is possible to describe it.

[No. 54.]

Argued April 25, 26, 1901. Decided October 21, 1901.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decision reversing a decree of the Circuit Court for the Southern District of New York which dis-

missed a bill to restrain the use of an alleged trademark. *Reversed.*

See same case below, 41 C. C. A. 329, 101 Fed. 257.

Statement by Mr. Justice **Peckham**:

The respondent, a New York corporation, commenced this suit in equity in the circuit court for the southern district of *New York, [2] against the petitioner, which is a foreign corporation organized under the laws of the Kingdom of Great Britain and having a place of business in the city of New York, to restrain it from the use of the trademark which the respondent averred it had acquired in the name "Rahtjen's Composition," and to obtain an accounting of the profits and income which the petitioner had unlawfully derived from the use of such trademark, and which it had by reason thereof diverted from the respondent. Issue was taken on the various allegations in the bill, and upon the trial the circuit court dismissed the same (97 Fed. 949), but upon appeal to the circuit court of appeals the decree of the circuit court was reversed and the case remanded to that court, with instructions to enter a decree enjoining the petitioner from selling or offering to sell Rahtjen's Composition under that name, and from using the name upon its packages or in its advertisements. 41 C. C. A. 329, 101 Fed. 257.

Judge Wallace dissented from the judgment and opinion of the circuit court of appeals, holding that the case was properly decided in the court below, and that the decree ought to be affirmed.

NOTE.—On the effect of deception in a trademark to defeat right of action for its infringement—see notes to *Raymond v. Royal Baking Powder Co.* 29 C. C. A. 250, and *Joseph v. Macowsky* (Cal.) 19 L. R. A. 53.

As to trademarks: right to; what may be;
183 U. S. U. S., Book 46.

transfer of; use of; infringement—see notes to *Dr. S. A. Richmond Nervine Co. v. Richmond*, 40 L. ed. U. S. 155; *Coats v. Merrick Thread Co.* 37 L. ed. U. S. 847; and *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 34 L. ed. U. S. 997.

The defendant and petitioner then prayed this court for a writ of certiorari, which was granted, and the case thus brought here.

The trademark in regard to which this contest arises pertains to a certain kind of paint for the protection of ships' bottoms from rust and from vegetable or animal growth thereon, either in salt or fresh water. The paint was of three kinds, numbered, respectively, Nos. 1, 2, and 3. The evidence in the record shows that some time between the years 1860 and 1865 one John Rahtjen invented in Germany a particular kind of paint for the purpose above mentioned. In connection with his sons he began in 1865 to manufacture the paint for general use, and it speedily acquired a high reputation among owners of shipping as valuable for the purposes intended. The elder Rahtjen never obtained a patent for the article in Germany; neither did he or his sons apply for or obtain one in the United States. They first shipped some of the paint manu-
[3] factured by them in Germany *to the United States in 1870, consigned to Henry Gelien. They did not put it upon the market by sending generally to those who might wish to use it, but all their consignments from 1870 to 1878 were made to Gelien. • Under what marks he sold the article does not appear.

On November 19, 1869, one of the firm wrote to Mr. Gelien from Bremerhaven, making him the sole agent of the firm for the sale of its paint in the United States, and informing him that they had not obtained a patent for their composition in America, nor applied for one in the United States, as there was no danger in introducing the composition in America, the invention not being of a nature facilitating good imitations. The father died in 1873, after which the sons continued the business.

Gelien was succeeded as the consignee of the paint in the United States, in 1878, by the firm of Hartmann, La Doux, & Maecker, to whom for a short time the paint was consigned from Germany, and then it was sent them from England through Rahtjen's assigns there. The Hartmann firm was succeeded in July, 1886, by Emil Maecker, as agent for the sale of the paint in the United States, and on January 1, 1889, Maecker was succeeded by one Otto L. Petersen, and in 1891 Petersen was succeeded by the respondent corporation, and was made its president.

On January 15, 1878, "Joh" Rahtjen assigned to "Messrs. Suter, Hartmann, & Co., in London, the exclusive right of sale of my patent composition paint for the United States of North America, for the period of twelve years from the commencement of 1878 to the end of 1889." After 1870 the firm of Hartmann Brothers, or Suter, Hartmann, & Co., manufactured the composition for themselves in England, by the license of the Rahtjens, and for a time after 1874 Rahtjen also manufactured in England as well as in Germany. During this time the composition when manufactured by Hartmann was marked "Rahtjen's Patent Com-

position, Hartmann's Manufacture." Up to the time of the above assignment the Rahtjens had consigned their paint to New York in barrels or casks addressed to Gelien, and with labels affixed thereon, in which the article *was described as "Rahtjen's Patent [4] Composition;" and after Hartmann, La Doux, & Maecker became agents, the casks were addressed to that firm at New York, and labeled the same way.

While Gelien acted as consignee he prepared and issued a show card and also letter heads and circulars with "Rahtjen's Composition Paint, known as the German Paint," on the cards and on the heading of his letters and circulars, and also directly underneath was the picture of a vessel. The show cards and circulars were issued for the purpose of advertising the paint, and the show card was copyrighted by Gelien for himself.

After the assignment to Suter, Hartmann, & Co. of the exclusive right of sale in the United States, and up to the year 1883, that firm sent the paints to the United States under the description of "Rahtjen's Patent Composition," and the Rahtjens themselves sent no more paint to the United States from Germany.

In 1873 they entered into negotiations with Suter, Hartmann, & Co., in England, for the sale of their paint in that country, and on November 29, 1873, Heinrich Rahtjen obtained in England a patent for the paint for the term of fourteen years from the date thereof, provided, among other conditions, he should at the end of seven years pay a stamp duty of £100, and in case he did not pay, the patent was to "cease, determine, and become void." It remained in existence for seven years, or until November 29, 1880, and then ceased because of the failure to pay the £100 stamp duty as provided for in the patent.

The label used by Suter, Hartmann, & Co. in sending the paint to their different agents and customers contained the words "Rahtjen's Patent Composition" and "None genuine without this signature, Suter, Hartmann, & Co." These words were used by them from the outset of their career as consignees for the composition.

In May, 1883, two years and a half after the expiration of the English patent, the predecessors of the petitioner commenced in England to make and sell this paint, and in 1884 they sent it to the United States under the name of "Rahtjen's Composition, Holzapfel's Manufacture."

*On June 25, 1883, John Rahtjen filed with [5] the English office an application for registration as a trademark of the words "Genuine Rahtjen's Composition for Ships' Bottoms," &c. This application was opposed by Holzapfel & Co., through their solicitors, and no counter statement having been filed by Rahtjen the application was deemed to be withdrawn.

On July 7, 1883, Rahtjen filed another application for registration of the words "Rahtjen Composition." This, too, was op-

posed, and the application thereafter held to be withdrawn.

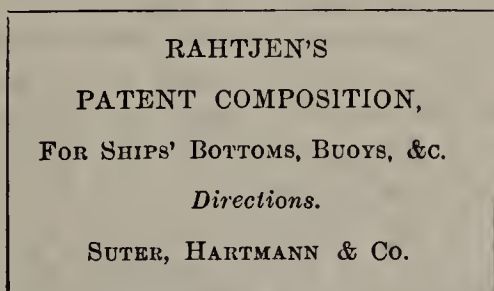
On June 28, 1883, Suter, Hartmann, & Co. filed an application for registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoy, &c. None genuine without this signature, Suter, Hartmann, & Co." This application was opposed by defendant's predecessors, Holzapfel & Co., and was withdrawn.

On the 25th of April, 1883, Hartmann Brothers filed an application for a trademark in this form:



The application was granted, and from that time they had an exclusive right to use that mark. It is not charged that the defendant has ever in any way imitated or infringed upon it.

On January 9, 1884, Suter, Hartmann, & Co. filed an application for the registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoy, &c. Directions. Suter, Hartmann, & Co." In their application for registration they said: "We do not claim the exclusive use of the words 'Rahtjen's *Patent Composition for Ships' Bottoms, Buoy, &c., Directions,' or any of such words, except as part of the combination constituting our trademark, as represented annexed, and to which we claim exclusive right." This trademark was registered. The following is a copy:



There has never been any inringement of it by defendant, but it has used the words "Rahtjen's Composition" in connection with the statement that it was manufactured by Holzapfel & Co., and it has so used them on goods sold in the United States, and did so at the time of the commencement of this suit.

Before the assignment to Suter, Hartmann, & Co. of the exclusive right to sell the composition in the United States, Rahtjen had transferred to Hartmann Brothers

in England the exclusive right to manufacture it there, and so in their manufacture it was described as "Rahtjen's Composition. Hartmann Brothers' Manufacture."

In 1888 Suter, Hartmann, & Rahtjen's Composition Company (Limited) was formed, and Suter, Hartmann, & Co. assigned their rights and interests in the paint and trademark to that company, and in 1891 the respondent company was formed and the English company transferred to it all rights to the trademarks belonging to and used by the English company in America, and agreed not to carry on any business of a like character in the United States.

In 1899 complaint was made before the court of commerce sitting at Antwerp, by Rahtjen and by Suter, Hartmann, & Co., *against defendant W. Wright, in which they [7] complained of the defendant that he had put on the sign of his house the inscription "Manufacturers of Rahtjen's Composition," and that in his prospectus and other publications he announced that he sells the "Original Rahtjen's Composition for Ships' Bottoms, manufactured by the London Oil & Colour Co., Limited." This use of the name of the complainant by the defendant, the court held, constituted an illegal act, and, even if the complainants had not retained their right to the use of the words "Rahtjen's Composition," that the defendant had not acquired the right to use the name in such a way as to cause the public to believe that his product was the product of Rahtjen or of his delegates. The defendant was therefore condemned in judgment and enjoined from the use of the words in future. An appeal was taken from this decision and the court above reversed the judgment, holding that the name "Rahtjen's Composition" had become the property of the public, which had the right to "offer it for sale under the name generally used to describe it, because any other name would completely mislead the purchaser, always supposing that the public is not to be led astray as to the individuality of the manufacturer, or as to the source of the said products. As it is shown by the documents deposited in the present process that the varnish invented by the associate is generally known in England and in Belgium under the name of Rahtjen's Composition, so that in the eyes of the public this name of Rahtjen has become a sort of qualifying adjective indicative of this special product; as the appellant has always in his sign and in his circulars been careful to announce that the product that he sells was manufactured by the 'London Oil & Colour Company,'"—the court held that the intention of bad faith which constitutes an element necessary to the establishment of breach of faith had no actual existence, and the judgment was therefore reversed.

Complaint had also been made by Mr. John Rahtjen in the court at Hamburg against Holzapfel and others for the wrongful use of the words "Rahtjen's Composition," and that court held in substance

that there was no longer any exclusive property in the words used, and that the defendants should therefore be discharged.

Messrs. William McAdoo and John G. Carlisle argued the cause, and, with **Mr. R. B. McMaster**, filed a brief for petitioner:

It has been uniformly held by our courts that the name given to the article during the life of the patent becomes public property when the patent expires.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Singer Mfg. Co. v. Riley*, 11 Fed. 706; *Singer Mfg. Co. v. Stanage*, 6 Fed. 279; *Singer Mfg. Co. v. Larsen*, 8 Biss. 151, Fed. Cas. No. 12,902; *Ex parte Yale & T. Mfg. Co.* 81 Off. Gaz. 801; *Fairbanks v. Jacobus*, 14 Blatchf. 337, Fed. Cas. No. 4,608; *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; *Goodyear Rubber Co. v. Day*, 22 Fed. 44; *Leclanché Battery Co. v. Western Electric Co.* 21 Fed. 538, 23 Fed. 276; *Centaur Co. v. Heinsfurter*, 28 C. C. A. 581, 56 U. S. App. 7, 84 Fed. 955; *Centaur Co. v. Killenberger*, 87 Fed. 725; *Centaur Co. v. Neathery*, 34 C. C. A. 118, 62 U. S. App. 557, 91 Fed. 891; *Centaur Co. v. Marshall*, 92 Fed. 605.

And the same rule has been laid down in England.

Cheavin v. Walker, L. R. 5 Ch. Div. 850; *Wheeler & W. Mfg. Co. v. Shakespear*, 39 L. J. Ch. N. S. 36; *Linoleum Mfg. Co. v. Nairn*, 47 L. J. Ch. N. S. 431.

The complainant, surely, cannot have a trademark in this country in a name which is common property everywhere else.

The foreign history and status of a trademark claimed in this country may be considered in our courts.

Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; *Dadirrian v. Yacubian*, 39 C. C. A. 321, 98 Fed. 872, Affirming 90 Fed. 812, 72 Fed. 1010.

The act of the predecessors of the complainant in disclaiming the exclusive use of the word "Rahtjen" when they applied for the registration of a trademark in England estops complainant from claiming such exclusive right now in this country.

Rosenthal v. Reynolds, 61 L. J. Ch. N. S. 508; *Richter v. Anchor Remedy Co.* 52 Fed. 455.

The name "Rahtjen's Composition" has long ceased to denote the source of manufacture, and has become the generic description of the article.

Elgin National Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; *Edison v. Hawthorne*, 106 Fed. 172.

The complainant, having stood silently by for many years and allowed the defendant's predecessors to build up an established business in "Rahtjen's Composition," and the business having been subsequently incorporated with a large capital and numerous stockholders, is forever estopped from enjoining or interfering with the petitioner's use of the word "Rahtjen's."

Mackall v. Casilear, 137 U. S. 556, 34 L.

ed. 776, 11 Sup. Ct. Rep. 178; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Abraham v. Ordway*, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; *Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. 938, Affirming 53 Fed. 493; *La République Française v. Schultz*, 94 Fed. 500; *Starrett v. J. Stevens Arms & Tool Co.* 96 Fed. 244; *Richardson v. D. M. Osborne & Co.* 36 C. C. A. 610, 93 Fed. 828, Affirming 82 Fed. 95.

Messrs. Timothy D. Merwin and Thomas B. Kerr argued the cause and filed a brief for respondent:

A trademark, or a name originally adopted and used as a trademark, does not become public property merely because the name is subsequently adopted and applied geographically.

Atwater v. Castner, 32 C. C. A. 77, 50 U. S. App. 394, 88 Fed. 642.

The trademark is unaffected by the fact that it subsequently becomes the common name of the article.

Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169; *Burton v. Stratton*, 12 Fed. 696; *Celluloid Mfg. Co. v. Read*, 47 Fed. 712; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94.

A subsequently granted patent on the article cannot affect the established trademark.

Batcheller v. Thomson, 35 C. C. A. 532, 93 Fed. 660.

The general statement of the rule as laid down in *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002, in view of the comments upon the cases in foreign courts, cannot be understood to mean that the expiration of a patent in one country makes the name public property in another country.

No presumption of the abandonment of the trademark by respondent's predecessors arises from their application for the British patent.

Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

The respondent has not been guilty of laches.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

If "Rahtjen's Composition" was a trademark, and was conveyed by him to the respondent, and was not abandoned, and the petitioner was not licensed to use it, then the petitioner had no right to appropriate it, even though it used it in connection with the name "Holzapfel" and the symbol of a propeller.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143.

During the life of a patent the name or mark as truly indicates origin and ownership as if there were no patent. If the patent proves invalid the trademark right is preserved, because there has never been a legal patent monopoly to limit the duration of a trademark monopoly.

Sawyer v. Kellogg, 7 Fed. 720; *Lorillard v. Wight*, 15 Fed. 383.

There is no authority for holding that the unauthorized invasion of the rights of the trademark owner by a single infringer can make the trademark generic in character.

In strict trademark cases a fraudulent intent to injure the complainant, or an actual misleading of the public, need not be proved, as it will be presumed.

Mcenndes v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; *Elgin National Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

Gelien in the years prior to the date of the English patent had so established his business as to entitle him to appeal to a court of equity for the protection of the trademark, and hence the trademark had become so established as to be unaffected by the patent.

Kathreiner's Malzkaffee, etc. v. Pastor Knipp Medicine Co. 27 C. C. A. 351, 53 U. S. App. 425, 82 Fed. 321; *Hall v. Barrows*, 32 L. J. Ch. N. S. 548.

In the registration of trademarks it is immaterial whether the registrant can become the exclusive owner of the trademark abroad.

Ex parte Portland-Cement-Fabrik "Germania," 64 Off. Gaz. 858.

By analogous rule a prior foreign patent does not prevent the issuance of a broader American patent.

2 Robinson, Patents, § 461; *Faure v. Bradley*, 44 Off. Gaz. 945.

A trademark may be lost to its owner in a foreign country and become public property there without affecting the rights in this country.

J. & P. Baltz Brewing Co. v. Kaiserbrauerei, B. & Co. 20 C. C. A. 402, 39 U. S. App. 229, 74 Fed. 222; *Sarlechner v. Eisner & M. Co.* 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

Neither the records of foreign trademark registration proceedings, nor the records of proceedings and decisions in foreign courts, should have been put in evidence, and, having been erroneously included, should not now be considered by this court. All such matters are irrelevant and immaterial.

Carlsbad v. Kutnow, 18 C. C. A. 24, 35 U. S. App. 753, 71 Fed. 167.

Even if this court shall find that there was such laches on the part of respondent in bringing its suit that it must be deprived of an accounting for infringing sales prior to suit, we can see no reason why it should be deprived of an accounting from the date of bringing suit.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143.

Where a defendant has committed infringing acts after notice of the complainant's assertion of his exclusive rights he cannot be heard to object to the proper penalty for such acts, whether injunction or damages.

Edison Electric Light Co. v. Sawyer-Man Electric Co. 3 C. C. A. 605, 11 U. S. App. 712, 53 Fed. 592; *Campbell Printing-Press & Mfg. Co. v. Manhattan R. Co.* 49 Fed. 930; *Thomson-Houston Electric Co. v. Union R.* 183 U. S.

Co. 78 Fed. 365; *Williams v. Rome, W. & O. R. Co.* 18 Blatchf. 181, 2 Fed. 702; *Bispham, Eq.* § 404, p. 517.

It is well settled that a writ of injunction carries with it, as incident to it and as part of the relief, the right to damages.

Shepard v. Manhattan R. Co. 117 N. Y. 442, 23 N. E. 30; *Henderson v. New York C. R. Co.* 78 N. Y. 423; *Williams v. New York C. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Beach, Inj.* § 1400, see also § 10; *Canton Steel Roofing Co. v. Kanneberg*, 51 Fed. 599.

Marks applied to goods of foreign origin in the foreign country, and under which they were marketed in this country, have been treated as having the same legal force and effect as if they had been applied to the goods in this country.

Sarlechner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; *Kathreiner's Malzkaffee, etc. v. Pastor Kneipp Medicine Co.* 27 C. C. A. 351, 53 U. S. App. 425, 82 Fed. 321; *J. & P. Baltz Brewing Co. v. Kaiserbrauerei, B. & Co.* 20 C. C. A. 402, 39 U. S. App. 229, 74 Fed. 222; *Richter v. Reynolds*, 8 C. C. A. 220, 17 U. S. App. 427, 59 Fed. 580; *La Republique Francaise v. Saratoga Vichy Springs Co.* 46 C. C. A. 418, 107 Fed. 459.

*Mr. Justice Peckham, after making the [8] above statement of facts, delivered the opinion of the court:

We are of opinion that no valid trademark was proved on the part of the Rahtjens, in connection with the paint sent by them from Germany to their agents in the United States prior to 1873, when they procured a patent in England for their composition. It appears from the record that from 1870 to 1879, or late in 1878, the paint was manufactured in Germany by Rahtjen, and sent to the United States in casks or packages marked "Rahtjen's Patent Composition Paint."

Prior to November, 1873, the article was not patented anywhere, and a description of it as a patented article had no basis in fact, and was a false statement tending to deceive a purchaser of the article. No right to a trademark which includes the word "patent," and which describes the article as "patented," can arise when there is and has been no patent; nor is the claim a valid one for the other words used, where it is based upon their use in connection with that word. A symbol or label claimed as a trademark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 225, 27 L. ed. 706, 708, 2 Sup. Ct. Rep. 436; *Allan B. Wrisley Co. v. Iowa Soap Co.* 104 Fed. 548.

In 1873 an English patent had been obtained, and from that time to 1878, when the Rahtjens assigned the exclusive right of sale in the United States to Suter, Hartmann, & Co., the words "Rahtjen's Patent Composition" were used on casks containing the paint sent by the Rahtjens to the United States, and must have referred to the Eng-

lish patent, as there was no other, and the right to use those words depended upon the existence of the patent, although up to 1878 [9] the article sent to the *United States was manufactured in Germany. As the right to use the word depended upon the English patent, the right to so designate the composition fell with the expiration of that patent, and from that time (1880) until 1883, when the trademark was obtained by Suter, Hartmann, & Co., there can be no claim made of an exclusive right to designate the composition as Rahtjen's composition, because from 1880 that right became public as a description of the article, and not of the name of the manufacturer. During its whole existence the name had been given to the article, and that was the only name by which it was possible to describe it.

The labels used by Suter, Hartmann, & Co. from the outset of their career as sole consignees contained the description "Rahtjen's Patent Composition, None genuine without signature, Suter, Hartmann, & Co." These labels were affixed to the packages, and were sent to Rahtjen in Germany when he manufactured for them, to be placed on packages, and when he subsequently made the composition in England the labels were sent to him there to be affixed. This way of designating the composition was employed by Rahtjen in Germany for his own sales, and Suter, Hartmann, & Co. simply copied his method of describing the same. How else could this article thereafter be described? When the right to make it became public, how else could it be sold than by the name used to describe it? And when a person having the right to make it described the composition by its name, and said it was manufactured by him, and said it so plainly that no one seeing the label could fail to see that the package on which it was placed was Rahtjen's composition manufactured by Holzapfel & Co., or Holzapfel's Composition Company (Limited), how can it be held that there was any infringement of a trademark by employing the only terms possible to describe the article the manufacture of which was open to all? Of necessity when the right to manufacture became public, the right to use the only word descriptive of the article manufactured became public also.

This rule held good when at the expiration of the patent, in November, 1880, Suter, Hartmann, & Co. continued to send the paint to the United States as "Rahtjen's [10] Patent Composition, *Hartmann's Manufacture," because it is plain that the name of Rahtjen had, as we have said, become descriptive of the article itself, and was not a designation of the manufacturer. It had been manufactured both in Germany and in England at the same time, and that which was manufactured in England by Hartmann Brothers or Suter, Hartmann, & Co. had been distinguished from the German article by the statement that it was "Rahtjen's Genuine Composition, Hartmann's Manufacture." If anyone had desired to use this paint, and had called for it in the market,

he would necessarily have been compelled to describe it as "Rahtjen's Composition," as there was no other name for the article, and though in England while the patent lasted no one but the patentee or his licensees could manufacture the article, yet the description would still have been "Rahtjen's Composition;" but when the patent expired the exclusive right to manufacture the article expired with it, while the name which described it became, under the facts of this case, necessarily one of description, and did not designate the manufacturers. There was no other name for the article, and in order to obtain it a person would have to describe it by the words "Rahtjen's Composition." The words thus became public property descriptive of the article, and the right to manufacture it was open to all by the expiration of the English patent. After Suter, Hartmann, & Co. obtained the trademark of an open hand, originally painted red, together with the name "Rahtjen's Patent Composition," which was some time in 1883, the paint was sent to the United States under that designation; but the trademark was not obtained without the positive disclaimer by the plaintiffs of the right of exclusive use of the words "Rahtjen's Composition," and unless they disclaimed that exclusive right they could have obtained no trademark.

The registration of the trademark of Hartmann, La Doux, & Maecker in the United States in June, 1885, was not only subsequent to the expiration of the English patent, but also subsequent to the time when the defendant company had commenced to manufacture the paint as "Rahtjen's Composition, Holzapfel's Manufacture," and had sent the same to the United States under that description, at least as early as 1884. The United *States registered trademark [11] could not, therefore, interfere with the prior (but not exclusive) right of the defendant to the use of those words.

The respondent company advertised and sold in the United States the composition under the name of "Rahtjen's Composition, Hartmann's Manufacture," while the petitioner advertised and sold its composition as "Holzapfel's Rahtjen's," or "Holzapfel's Improved Rahtjen's Composition," or "Holzapfel's Improved American Rahtjen's," so it is seen there is no room for the claim that the composition manufactured by the petitioner purports to be manufactured by Rahtjen or Hartmann. It is a clear-cut description of the name of the article which it manufactures, and there is no pretense of deceit as to the person who in fact manufactures it.

The trademarks which have been spoken of, and which were obtained in 1883 and 1884, do not cover the right to use the name "Rahtjen" exclusively. The trademark obtained in April, 1883, by Hartmann Brothers, described as the "red hand symbol," does not purport to contain any name, while that issued to Suter, Hartmann, & Co., while it contained the name "Rahtjen's Patent Composition," was obtained only by the dis-

claim on the part of the applicants of the right to the exclusive use of those words, except as part of the combination constituting the trademark. Prior to the English patent, the respondent's predecessors or assigns had no valid trademark in England for the same reason the Rahtjens had acquired none in the United States, viz., they had no right to designate the composition as a patented article when in fact there was no patent. From 1873 to 1880, while the patent was in life, they were entirely justified in calling it a patented article, and when that patent expired it seems clear they had no right to retain the exclusive use of the only name which described the composition, and that no such right could be claimed by virtue of a valid trademark antedating the patent, for there was none, assuming even that such fact, if it had existed, would have justified the claim to the exclusive use of the descriptive words after the patent had expired.

[12] The judgments in the Antwerp and Hamburg courts simply *showed that in those countries the use of the words "Rahtjen's Composition" or "Rahtjen's Patent Composition" had become descriptive of the article itself, and did not in any way designate the persons who manufactured it; but even without those judgments the record shows beyond question that when the English patent expired the use of the words became open to the world as descriptive of the article itself, and to manufacture an article under that name was a right open to the world. There was no trademark in that name in the United States.

The principles involved in *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002, apply here.

It is said there is a distinction between the case at bar and the one cited, because in the latter the patent and the trademark were both domestic, while here the trademark is domestic and the patent foreign. The respondent claims the right to use these words by virtue of assignments from the Messrs. Rahtjen and also Suter, Hartmann, & Co. in England, and also by virtue of a domestic trademark which it or its predecessors had acquired from user and registration in the United States. The rights of Suter, Hartmann, & Co. to the exclusive use of these words had been disclaimed by them in 1883, long before any assignment of their rights to the respondent, and we do not see why that disclaimer should be confined to England. It was a general disclaimer of any right whatever to the exclusive use of these words, and it was only upon the filing of that disclaimer that they obtained the trademark which they did in England. The disclaimer, however, was as broad as it could be made. When they assigned their rights the assignment did not include a right to an exclusive use which, in order to obtain the trademark registration, they had already disclaimed. The assignment of the Rahtjen firm could not convey the exclusive right to the use of such words, because they had no valid trademark in those words prior

183 U. S.

to 1873, and by the expiration of the English patent, in 1880, the right to that use had become public. These various assignors, therefore, did not convey by their assignment a right to the exclusive use of the words in the United States. The domestic trademark, which the respondent also claims gives it that right, was not used until after the sale of *the composition by [13] the petitioner in the United States under the name of "Rahtjen's Composition, Holzappel's Manufacture." We think the principle which prohibits the right to the exclusive use of a name descriptive of the article after the expiration of a patent covering its manufacture applies here.

In the manufacture and sale of the article, of course, no deceit would be tolerated, and the article described as "Rahtjen's Composition" would, when manufactured by defendant, have to be plainly described as its manufacture. The proof shows this has been done, and that the article has been sold under a totally different trademark from any used by respondent, and it has been plainly and fully described as manufactured by defendant or its assignors, the Holzappels.

We are of opinion that no right to the exclusive use in the United States of the words "Rahtjen's Composition" has been shown by respondent, and that the decree of the Circuit Court of Appeals for the Second Circuit should be reversed, and that of the Circuit Court for the Southern District of New York affirmed.

And it is so ordered.

KNOXVILLE IRON COMPANY, Plff. in
Err.,
v.

SAMUEL HARBISON.

(See S. C. Reporter's ed. 13-22.)

Constitutionality of statute—redemption of store orders in money—interference with right of contract.

The provision for the redemption of store orders, scrip, etc., in money, which is made by Tenn. act March 17, 1899, requiring all persons who issue such orders to employees in payment of wages to redeem them in money on any regular pay day or at any time within thirty days after they are issued, if presented and payment in money demanded by such employees or by bona fide holders, is not unconstitutional as an arbitrary interference with the right of contract, but is a legitimate exercise of the general legislative power as well as of the police power.

[No. 22.]

Argued and Submitted March 7, 1901. Decided October 21, 1901.

NOTE.—On the validity and effect of statutes requiring wages to be paid in lawful money—see *Avent-Beattyville Coal Co. v. Com.* (Ky.) 28 L. R. A. 273, and note.

IN ERROR to the Supreme Court of the State of Tennessee to review a decision affirming a decree of the Chancery Court of Appeals which affirmed a decree of the Chancery Court of Knox County in favor of complainant in a bill to enforce the redemption in money of certain orders for coal issued to employees in payment of wages. *Affirmed.*

See same case below, 103 Tenn. 421, 53 S. W. 955.

Statement by Mr. Justice Shiras:

[13] *In the chancery court of Knox county, Tennessee, Samuel Harbison, a citizen of said state, on June 2, 1899, filed a bill of complaint against the Knoxville Iron Company, a corporation organized under the

[14] laws of the state of Tennessee, alleging *that he was the bona fide holder by purchase in due course of trade of certain specified accepted orders for coal that had been issued by the defendant company in payment of wages due to its employees; that he had made due demand for their redemption in cash according to law, which demand had been refused; and that he was entitled to a decree for the amount of said orders, with interest. The company filed an answer denying that the complainant was a bona fide holder of the orders in question, and alleging an agreement between the company and its employees that the latter would accept coal in payment of said orders, etc.

Proof was taken and the case heard by the chancellor, who rendered a decree in favor of the complainant for \$1,702.66 as principal and interest of said orders, with costs. An appeal was taken by the defendant company to the court of chancery appeals of Tennessee, an intermediate court of reference in equity causes, where the decree of the chancery court of Knox county was affirmed.

The facts as found by the court of chancery appeals are as follows:

"The defendant is a corporation chartered under chapter 57, Acts of 1867-68. The following powers are given by § 4: 'To purchase, hold, and dispose of such real estate, not to exceed 70,000 acres, leases, minerals, iron, coal, oil, salt, and personal property as they may desire, or as they may deem necessary for the legitimate transaction of their business; to mine, bore, forge, smelt, work, and manufacture, transport, refine, and vend the same. The company to have and enjoy and exercise all the rights, privileges, and powers belonging to or incidental to corporations, which may be convenient to carry out any business they are in this act authorized to engage in.'

"The defendant has its principal office at Knoxville, where it is engaged in the manufacture of iron. As an incident to this business it also mines and sells coal. Its mines are located in Anderson county. It works about 200 employees. It has now and has had for many years a regular pay day, being that Saturday in every month which is nearest the 20th day of the month. Upon

[15] this pay day each employee is paid *in cash

the amount then due him, excepting what may be due him from the first of the month, up to said pay day; that is, the company keeps in arrears with its employees all the time to the extent of their wages for about twenty days' time, so far as concerns the matter of cash payments, but they may collect this sum and all sums that may be due them in coal orders, as stated below. It does not and will not pay cash to its employees for wages at any other time than upon said regular pay days. Defendant, however, nearly always has on hand in its Knoxville yard a large amount of coal which it sells to all persons who are willing to purchase, whether such persons are its laborers or the public generally. For some time prior to the filing of the bill and at the time the bill was filed the defendant was and had been accustomed to accept from its laborers, after work had been performed, orders for coal in the following form:

"Let bearer have — bushels of coal and charge to my account.

"—, —, —."

"The defendant's employees are accustomed to sign orders, and in this form they are accepted by a stamp in these words:

"Accepted — 1899.

"Knoxville Iron Company."

"Many of the defendant's employees have never drawn an order on the defendant, and many others have used them only in the purchase of coal for themselves; but the defendant in this way pays off about 75 per cent of the wages earned by its employees. Many of the employees who draw these orders get small wages, 90 cents to \$1.20 per day, and sell these orders to get money to live on, but those who get the largest wages, \$65 to \$175 per month, draw more of such coal orders in proportion than do those who get small wages. Defendant has never insisted upon any of its laborers giving any such orders, but has been willing to accept such orders when any employee would draw them and ask their acceptance. Defendant, however, sets apart every Saturday afternoon, from 1 o'clock to 5 o'clock, for the acceptance of such orders. It makes some profit in accepting said orders in that, instead of paying the wages of its employees in cash, it *pays them in coal at 12 cents [16] per bushel, and also, to some extent, its coal business is increased thereby. On the other hand, such orders are a convenience to the defendant's employees in the way of enabling them to realize on their wages before the regular monthly pay day and up to that pay day. When these orders are drawn by defendant's employees and accepted, defendant credits itself with said orders on its accounts with the persons so drawing them at the rate of 12 cents per bushel for the amount of coal called for by said orders. There is no proof of an express agreement between the defendant and its employees that the orders should be paid only in coal, unless the face of the order shall be construed as setting forth such an agreement. The only proof of any implied agreement to that effect is

to be found in such inferences as may be drawn from the face of the orders and from the custom of the company to issue them and the employees to receive them on other than the regular cash pay days and the fact that no employee has ever presented one of such orders for redemption in anything else than coal. There is no proof of any compulsion on the part of the defendant upon its operatives, except in so far as compulsion may be implied from the fact that unless defendant's operatives take their wages in coal orders they must always on each monthly pay day suffer the defendant to be in arrears about twenty days; that is, that on the regular pay day on that Saturday which is the nearest the 20th of the month, the defendant will not pay wages except up to the last day of the preceding month, but will pay in coal orders the whole wages due at the end of each week, and that such is the course of business between the defendant and its employees. The complainant purchased 614 of said accepted orders from defendant's employees, and within thirty days from the issuance of each of said orders he presented each of them to the Knoxville Iron Company, defendant hereto, and demanded that it redeem them in cash, which was refused by defendant. Complainant is a licensed dealer in securities, and sent his agents among the employees of the defendant to buy these coal orders. They had previously been selling at 75 cents on the dollar.—that is, before the passage of chapter

[17] 11, act of 1899,—but he instructed *his agents to give 85 cents on the dollar, and the orders now in suit were purchased at that price. They amount in dollars and cents to \$1,678. There is no evidence of bad faith on the part of the complainant in the purchase of said orders."

The orders sued on in this case were issued after the passage of the act of March 17, 1899.

From the decree of the chancery court of appeals an appeal was taken by the company to the supreme court of Tennessee, by which court the decrees of the courts below were affirmed. The case was then brought to this court by a writ of error allowed by the chief justice of the supreme court of Tennessee.

Mr. Edward T. Sanford argued the cause, and, with Messrs. Cornelius E. Lucky and James A. Fowler, filed a brief for plaintiff in error:

Among the rights of liberty and property protected by the provision of § 1 of the 14th Amendment to the Constitution of the United States, that no state shall "deprive any person of life, liberty, or property without due process of law," are the right to the acquisition and disposition of property, the right to labor in any lawful employment, and the right to enter into any lawful contract in reference to property or labor.

U. S. Const. 14th Amend. § 1; *Slaughter-House Cases*, 16 Wall. 127, 21 L. ed. 425; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 183 U. S.

28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Holden v. Hardy*, 169 U. S. 391, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; *Re Tiburcio Parrott*, 6 Sawy. 349, 1 Fed. 506; *Stockton Laundry Case*, 11 Sawy. 472, 26 Fed. 614; *Re Grice*, 79 Fed. 627; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

Every interference by the state with the rights of liberty and property, not coming within the legitimate exercise of the police power, is a deprivation of liberty and property without due process of law, and is unconstitutional and void.

Ibid.

Corporations are "persons" within the meaning of the 14th Amendment, and their property and liberties are protected by its provisions.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Minneapolis & St. L. R. Co. v. Beekwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

Whenever the police power of the state is sought to be exercised in matters affecting the public interest, outside of those primary police duties of safety, health, and morals, in which the public interest is intimately and inseparably connected with that of every individual, the impairment of individual rights of property and liberty can only be justified when it is shown to be demanded by the public welfare and the interest and well being of the community at large, as distinguished from the well-being of a particular class only.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Boston Beer Co. v. Massachusetts*, 97 U. S. 32, 24 L. ed. 992.

The rights of property and liberty of one class of the community can never be taken away by the legislature, in the exercise of its police power, merely to secure financial advantage to another class of the community, however large and deserving such other class may be.

The right of contract and other rights of liberty and property may be more freely infringed when necessary to protect the public safety, health, or morals than they can for the indefinite purpose of promoting the public welfare in general. This arises from the paramount duty of the state to protect the life, health, and morals of its citizens, their preservation constituting an overruling necessity which often justifies interference with individual rights that would be exempt from infringement upon general and indefinite considerations of public benefit.

Holden v. Hardy, 169 U. S. 397, 42 L. ed. 792, 18 Sup. Ct. Rep. 383.

The legislative justification for depriving any citizen of his life and property must be based upon a public benefit that is reasonably certain, and not merely upon conjectures and possibilities.

Re Morgan, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 295.

While there is a presumption in favor of the validity of state legislation, yet the legislative determination is subject to revision by the courts, and the attempted exercise of police powers will not be upheld if it bears no substantial relation to the welfare of the public at large, and arbitrarily interferes with the rights of individuals under the guise of protecting the public interest. The police power cannot be put forward as an excuse for oppression and unjust legislation.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *Guthrie*, 14th Amend. p. 76.

This legislation cannot be sustained, even though many contracts are embraced within it which are legitimately the subject of legislation, since, if it interferes with a single class of contracts which are proper in themselves and are protected by the Constitution, the act must fall as a whole.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Third Nat. Bank v. Divine Grocery Co.* 97 Tenn. 603, 34 L. R. A. 445, 37 S. W. 390.

Public policy requires the utmost liberty of contracting.

Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462.

Under the overwhelming weight of authority, statutes which attempt to enforce the payment of wages in money, and take away from the employer and laborer the right of contracting otherwise, are invalid and unconstitutional.

Godcharles v. Wigcman, 113 Pa. 431, 6 Atl. 354; *Showalter v. Ehlan*, 5 Pa. Super. Ct. 242; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 235; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253; *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340.

Similar attempts of state legislatures to arbitrarily interfere with the relationship of employer and employee in other matters, and to deprive them of the right of mutual contract, have also been held unconstitutional by a well-nigh unbroken line of authority.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braeeville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 455, 43 N. E. 624; *Bauer v. Reynolds*, 3 Pa. Dist. R. 502; *Com. v. Brown*, 6 Pa. Dist. R. 773; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *Shaffer v. Union Min. Co.* 55 Md.

74; *Opinion of the Justices*, 163 Mass. 587, sub nom. *Re House Bill, No. 1230*, 28 L. R. A. 344, 40 N. E. 713; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Re Kubaek*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *State v. Wilson*, 61 Kan. 32, 47 L. R. A. 71, 58 Pac. 981; *Re Eight Hour Bill*, 21 Colo. 29, 39 Pac. 328; *Re House Bill, No. 203*, 21 Colo. 27, 39 Pac. 431; *State v. Holden*, 14 Utah, 71, 37 L. R. A. 103, 46 Pac. 756, 14 Utah, 96, 37 L. R. A. 108, 46 Pac. 1105; *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *Re Considine*, 83 Fed. 157; *Cox v. Pittsburgh, C. C. & St. L. R. Co.* 1 Ohio N. P. 213; *Skinner v. Garnett Gold-Min. Co.* 96 Fed. 735; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304; *Whitebreast Fuel Co. v. People*, 175 Ill. 51, 51 N. E. 853; *Com. v. Brown*, 43 W. N. C. 69. See also *Tiedeman*, Pol. Power, § 178.

The attempts of the legislature in other analogous cases to deprive individuals of liberty and property under the guise of the police power have likewise been uniformly held unconstitutional by the courts.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Third Nat. Bank v. Divine Grocery Co.* 97 Tenn. 603, 34 L. R. A. 445, 37 S. W. 390; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006.

If the statute itself transcends the legitimate authority of the state, and attempts to interfere with the property or liberties of individuals beyond the proper police power of the state, it is, for this reason, not due process of law, and is repugnant to the 14th Amendment.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Holden v. Hardy*, 169 U. S. 367, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Insurance cases are distinguishable from the case at bar because of the peculiar nature of insurance contracts, and they are more nearly analogous to the *Granger Cases*, 94 U. S. 155, 24 L. ed. 94, and other cases in which it has been held that the state, in the exercise of its police power, may not only regulate the charges of common carriers, but may regulate the charge for storing grain in bulk in warehouses as a business "affected with a public interest."

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670.

Statutes regulating the contract rate of interest for the use of money furnish no real exception to the rule contended for, but are to be supported as a traditional policy of the race, rooted in abhorrence of usury from the earliest times.

Dunham v. Gould, 16 Johns. 367, 8 Am. Dec. 323; *Gray v. Bennett*, 3 Met. 522.

Mr. John W. Green submitted the cause for defendant in error. Mr. Samuel G. Shields was with him on the brief:

The presumption is always in favor of the validity of a statute if the contrary is not clearly demonstrated, and a statute is not to be pronounced void upon the ground of repugnancy to the Constitution, unless such repugnancy is clear, and the conclusion that it exists inevitable.

Cooper v. Telfair, 4 Dall. 14, 1 L. ed. 721; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Pine Grove Twp. v. Talcott*, 19 Wall. 666, 22 L. ed. 227.

The state may by statute lawfully limit the right of contract.

Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Dugger v. Mechanics' & F. Ins. Co.* 95 Tenn. 250, 28 L. R. A. 796, 32 S. W. 5; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

The statute complies with the due-process-of-law clause of the Constitution.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 230. See also *Slaughter-House Cases*, 16 Wall. 127, 21 L. ed. 425; *Davidson v. New Orleans*, 96 U. S. 104, 24 L. ed. 619.

The statute is a legitimate exercise of the police power.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 700, 40 L. ed. 859, 16 Sup. Ct. Rep. 714; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Davis v. Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; *Douglass v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693; *Mobile v. Yuille*, 3 Ala. 140, 36 Am. Dec. 441.

The foregoing citations apply solely to the rights of private citizens with respect to their private affairs. The principle is also illustrated by the large class of cases involving the police power of the state over quasi-public corporations, such as railroads, elevators, water companies, telegraph and telephone companies, etc.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 183 U. S.

1028; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

Wages due to the laborer are often and in many ways made the subject of legislative protection, and such statutes, so far from being considered paternal and as financial measures, are upheld by the courts as just means for the protection of the weak against the strong.

Seamen's wages are regulated by statutes of the United States.

U. S. Rev. Stat. § 4520.

Seamen are protected against new or unusual stipulations in the shipping articles, or against stipulations contravening the language and policy of the statute.

The Two Fannys, 25 Fed. 285; *The San Marcos*, 27 Fed. 567.

It is improper for plaintiff in error to assume that health, morals, and safety are alone concerned in the exercise of the police power.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Statutes like the one in question are founded upon reasons similar to those which justify the passage of usury laws, concerning which the supreme court of Illinois declares: They "proceed upon the theory that the lender and borrower of money do not occupy towards each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting, and place him at the mercy of the lender."

Frerer v. People use of School Fund, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395.

Similar legislation in other states is held constitutional.

Opinion of the Justices, 163 Mass. 587, sub nom. *Re House Bill, No. 1230*. 28 L. R. A. 344, 40 N. E. 713; *Hancock v. Yaden*, 121 Ind. 366, 6 J. R. A. 576, 23 N. E. 253; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000; *Avent Beattyville Coal Co. v. Com.* 96 Ky. 218, 28 L. R. A. 273, 28 S. W. 502; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *Shaffer v. Union Min. Co.* 55 Md. 74.

*Mr. Justice Shiras delivered the opinion [17] of the court:

This is a suit in equity brought to this court by a writ of error to the supreme court of the state of Tennessee, involving the validity, under the Federal Constitution, of an act of the legislature of Tennessee passed March 17, 1899, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employees.

The caption and material portions of this act are as follows:

"An Act Requiring All Persons, Firms, Corporations, and Companies Using Cou-

pons, Scrip, Punchouts, Store Orders or Other Evidences of Indebtedness to Pay Laborers and Employees for Labor, or Otherwise to Redeem the Same in Good and Lawful Money of the United States in the Hands of Their Employees, Laborers, or a Bona Fide Holder, and to Provide a Legal Remedy for Collection of Same in Favor of Said Laborers, Employees, and Such Bona Fide Holder.

- [18] *Sec. 1. Be it enacted by the general assembly of the state of Tennessee, That all persons, firms, corporations, and companies using coupons, scrip, punchouts, store orders, or other evidences of indebtedness to pay their or its laborers and employees, for labor or otherwise, shall, if demanded, redeem the same in the hands of such laborer, employee, or bona fide holder, in lawful money of the United States: *Provided*, The same is presented and redemption demanded of such person, firm, company, or corporation using same as aforesaid, at a regular pay day of such person, firm, company, or corporation to laborers or employees, or if presented and redemption demanded as aforesaid by such laborers, employees, or bona fide holders at any time not less than thirty days from the issuance or delivery of such coupon, scrip, punchout, store order, or other evidence of indebtedness to such employees, laborers, or bona fide holder. Such redemption to be at the face value of said scrip, punchout, coupon, store order, or other evidence of indebtedness: *Provided*, further, Said face value shall be in cash the same as its purchasing power in goods, wares, and merchandise at the commissary, company store, or other repository of such company, firm, person, or corporation aforesaid.

"Sec. 2. Be it further enacted, That any employee, laborer, or bona fide holder referred to in § 1 of this act, upon presentation and demand for redemption of such scrip, coupon, punchout, store order, or other evidence of indebtedness aforesaid, and upon refusal of such person, firm, corporation, or company to redeem the same in good and lawful money of the United States, may maintain in his, her, or their own name an action before any court of competent jurisdiction against such person, firm, corporation, or company, using same as aforesaid, for the recovery of the value of such coupon, scrip, punchout, store order, or other evidence of indebtedness, as defined in § 1 of this act."

The views of the supreme court of Tennessee, sustaining the validity of the enactment in question, sufficiently appear in the following extracts from its opinion, a copy of which is found in the record:

- [19] "Confessedly, the enactment now called in question is in all *respects a valid statute and free from objection as such, except that it is challenged as an arbitrary interference with the right of contract, on account of which it is said that it is unconstitutional, and not the 'law of the land' or 'due process of law.'

"The act does, undoubtedly, abridge or

qualify the right of contract, in that it requires that certain obligations payable in the first instance in merchandise shall in certain contingencies be paid in money; yet it is as certainly general in its terms, embracing equally every employer and employee who is or may be in like situation and circumstances, and it is enforceable in the usual modes established in the administration of government with respect to kindred matters. The exact and precise requirement is that all employers, whether natural or artificial persons, paying their employees in 'coupons, scrip, punchouts, store orders, or other evidences of indebtedness,' shall redeem the same at face value in money, if demanded by the employee or a bona fide holder on a regular pay day or at any time not less than thirty days from issuance (§ 1), and that, if payment be not so made upon such demand, the owner may maintain a suit on such evidence of indebtedness, and have a money recovery for the face value thereof, in any court of competent jurisdiction (§ 2).

"There is no prohibition against the issuance of any of the obligations referred to, nor against payment in merchandise or otherwise according to their terms, but only a provision that they shall be paid in money at the election and upon a prescribed demand of the owner. In other words, the effect of the act is to convert into cash obligations such unpaid merchandise orders, etc., as may be presented for money payment on a regular pay day or as much as thirty days after issuance.

"Under the act the present defendant may issue weekly orders for coal, as formerly, and may pay them in that commodity when desired by the holder, but instead of being able, as formerly, to compel the holder to accept payment of such orders in coal, the holder may, under the act, compel defendant to pay them in money. In this way and to this extent the defendant's right of contract is affected.

"Under the act, as formerly, every employee of the defendant *may receive the [20] whole or a part of his wages in coal orders, and may collect the orders in coal, or transfer them to someone else for other merchandise or for money. His condition is bettered by the act, in that it naturally enables him to get a better price for his coal orders than formerly, and thereby gives him more for his labor; and yet, although the defendant may not in that transaction realize the expected profit on the amount of coal called for in the orders, it in no event pays more in dollars and cents for the labor than the contract price.

"The scope and purpose of the act are thus indicated. The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him or his bona fide transferee, at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though

slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation. Being general in its operation and enforceable by ordinary suit, and being unimpeached and unimpeachable upon other constitutional grounds, the act is entitled to full recognition as the 'law of the land' and 'due process of law' as to the matters embraced, without reference to the state's police power, as was held of an act imposing far greater restrictions upon the right of contract, in the case of *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5, and as had been previously decided in respect of other limiting statutes therein mentioned. 95 Tenn. 253, 254, 28 L. R. A. 799, 32 S. W. 6, 7.

"Furthermore, the passage of this act was a legitimate exercise of police power, and upon that ground also the legislation is well sustained. The first right of a state, as of a man, is self-protection, and with the state that right involves the universally acknowledged power and duty to enact and enforce all such laws not in plain conflict with some provision of the state or Federal Constitution as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people.

[21] *The act before us is, perhaps, less stringent than any one considered in any of the cases mentioned. It is neither prohibitory nor penal; not special, but general; tending towards equality between employer and employee in the matter of wages; intended and well calculated to promote peace and good order, and to prevent strife, violence, and bloodshed. Such being the character, purpose, and tendency of the act, we have no hesitation in holding that it is valid, both as general legislation, without reference to the state's reserved police power, and also as a wholesome regulation adopted in the proper exercise of that power."

The supreme court of Tennessee justified its conclusions by so full and satisfactory a reference to the decisions of this court as to render it unnecessary for us to travel over the same ground. It will be sufficient to briefly notice two or three of the latest cases.

In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, the validity of an act of the state of Utah, regulating the employment of workmen in underground mines, and fixing the period of employment at eight hours per day, was in question. There, as here, it was contended that the legislation deprived the employers and employees of the right to make contracts in a lawful way and for lawful purposes; that it was class legislation, and not equal or uniform in its provisions; that it deprived the parties of the equal protection of the laws, abridged the privileges and immunities of the defendant as a citizen of the United States, and deprived him of his property and liberty without due process
183 U. S.

of law. But it was held, after full review of the previous cases, that the act in question was a valid exercise of the police power of the state, and the judgment of the supreme court of Utah, sustaining the legislation, was affirmed.

Where a contract of insurance provided that the insurance company should not be liable beyond the actual cash value of the property at the time of its loss, and where a statute of the state of Missouri provided that, in all suits brought upon policies of insurance against loss or damage by fire, the insurance company should not be permitted to deny that the property insured was worth at the time of issuing the policy the full amount of the insurance, this court held [22] that it was competent for the legislature of Missouri to pass such a law, even though it places a limitation upon the right of contract. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

In *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, a judgment of the supreme court of Arkansas sustaining the validity of an act of the legislature of that state, which provided that whenever any corporation or person engaged in operating a railroad should discharge, with or without cause, any employee or servant, the unpaid wages of any such servant then earned should become due and payable on the date of such discharge without abatement or deduction, was affirmed. It is true that stress was laid in the opinion in that case on the fact that, in the Constitution of the state, the power to amend corporation charters was reserved to the state, and it is asserted that no such power exists in the present case. But it is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

The judgment of the Supreme Court of Tennessee is affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissent.

*DAYTON COAL & IRON COMPANY (Limited), Plff. in Err.,
v.
T. A. BARTON.

(See S. C. Reporter's ed. 23-25.)

Foreign corporations—subject to state laws
—store orders redeemable in money.

The fact that a corporation is foreign, and not

NOTE.—On the validity and effect of statutes requiring wages to be paid in lawful money—see *Avent-Beattyville Coal Co. v. Com.* (Ky.) 28 L. R. A. 273, and note.

domestic, does not help it in contesting the constitutionality of the Tennessee act of March 17, 1899, requiring the redemption in money of store orders and scrip issued to employees in payment of wages, which act is held valid as to domestic corporations.

[No. 26.]

Argued March 7, 1901. Decided October 21, 1901.

IN ERROR to the Supreme Court of the State of Tennessee to review a decision affirming a judgment against a corporation in a suit to recover money on store orders issued to employees for labor. *Affirmed.*

See same case below, 103 Tenn. 604, 53 S. W. 970.

Statement by Mr. Justice **Shiras**:

[23] *This was an action tried in the circuit court of Rhea county, Tennessee, wherein T. A. Barton, a citizen of Tennessee, sought to recover from the Dayton Coal & Iron Company (Limited), a corporation organized under the laws of Great Britain, and doing business as a manufacturer of pig iron and coke in said county. The company owns a store, where it sells goods to its employees and other persons. The company also has a monthly pay day, and settles in cash with its employees on said pay day. In the meantime, and to such of its employees as see fit to request the same, it issues orders on its storekeeper for goods.

On March 17, 1899, the legislature of Tennessee passed an act requiring "all persons, firms, corporations, and companies using coupons, scrip, punchouts, store orders, or other evidences of indebtedness to pay laborers and employees for labor or otherwise, to redeem the same in good and lawful money of the United States in the hands of their employees, laborers, or a bona fide holder, and to provide a legal remedy for collection of same in favor of said laborers, employees, and such bona fide holders."

This was a suit brought by said Barton to recover as a bona fide holder of certain store orders that had been issued by the defendant company to some of its laborers in payment for labor. The defendant company denied the validity of the legislation, as well under the laws and Constitution of Tennessee as the 14th Amendment of the Constitution of the United States. The plaintiff recovered a judgment against the company in the circuit court of Rhea county, and this judgment was affirmed by the supreme court of Tennessee, whereupon a writ of error from this court was allowed by the chief justice of the state supreme court.

Mr. Frederick L. Mansfield argued the cause and filed a brief for plaintiff in error:

When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to persons or society or government, and the parties are capable of con-

tracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof.

State v. Loomis, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *San Antonio & A. P. R. Co. v. Wilson* (Tex. App.) 19 S. W. 910; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Godcharles v. Wigman*, 113 Pa. 431, 6 Atl. 354; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Shaver v. Pennsylvania Co.* 71 Fed. 931; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285.

Laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid, must be based upon some existing distinction or reason not applicable to others not included within their provisions.

Cooley, Const. Lim. 391; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285.

The vocation of the employer, as well as that of his employee, is his property. Depriving the owner of property, or one of its attributes, is depriving him of his property under the provisions of the Constitution.

People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 48.

Such legislation as the legislation in question partakes of the nature of despotism.

Re Jacobs, 98 N. Y. 114, 50 Am. Rep. 636; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Godcharles v. Wigman*, 113 Pa. 431, 6 Atl. 354; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Bauer v. Reynolds*, 3 Pa. Dist. R. 502; *Showalter v. Ehlan*, 5 Pa. Super. Ct. 242.

To take from property its chief element of value, and to deny to the citizen the right to use and transmit it in any proper and legitimate method, are as much depriving him of his property as if the property itself were taken.

Third Nat. Bank v. Divine Grocery Co. 97 Tenn. 609, 34 L. R. A. 445, 37 S. W. 390; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

The fact that appellant is an alien corporation does not alter the case, or make any different rule from what it would be if it were a domestic corporation.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

A statute prohibiting the manufacture or sale, for food, of any substitute for butter

or cheese produced from pure, unadulterated cream or milk, is unconstitutional.

People v. Marks, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

The right to pursue in a lawful manner a lawful vocation or trade, unmolested by laws in any way restrictive of that right, is a privilege that is protected and secured to the citizen by the Constitution of the United States.

Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408; *Ward v. Maryland*, 12 Wall. 430, 20 L. ed. 453; *Slaughter-House Cases*, 16 Wall. 97, 21 L. ed. 415; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; 1 Smith, *Wealth of Nations*, chap. 10; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Re Eight Hour Bill*, 21 Colo. 29, 39 Pac. 328; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Re House Bill, No. 203*, 21 Colo. 27, 39 Pac. 431; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395.

The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man, of which he cannot be deprived under the guise of law, or otherwise, except by usurpation or force.

Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481.

Everyone has the absolute right to the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land.

1 Bl. Com. 138; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Wynchamer v. People*, 13 N. Y. 378.

All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements, are infringements upon the fundamental rights of liberty, which are under constitutional protection.

People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 48; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *State ex rel. Randolph v. Wood*, 49 N. J. L. 88, 7 Atl. 286; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454.

The manner in which the law in question discriminates against one class of employers and employees and in favor of all others places it in opposition to the guaranties hereinbefore discussed, and renders it invalid.

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395.

The privilege of contracting is both a liberty and a property right; and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still

allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.

Frorer v. People use of School Fund, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Austin v. Murray*, 16 Pick. 121.

"The law of the land" does not mean the acts of legislatures which deprive the citizen of his rights, privileges, or property, but it means a valid act; and the spirit of the Constitution means that there must be some limitations on the part of the legislature. Magna Charta relieved the British subject from the tyranny of the King, and remitted him to the despotism of Parliament; the Constitution of the United States, under the 14th Amendment, relieves every person of the uncontrolled despotism of the legislature.

Wynchamer v. People, 13 N. Y. 378.

The right of personal security, the right of personal liberty, and the right to protect property are three fundamental rights of all persons in the United States.

Slaughter-House Cases, 16 Wall. 127, 21 L. ed. 425.

There are some rights, in every free government, beyond the Constitution of the state.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 661, 22 L. ed. 461.

Mr. Benj. Gordon McKenzie argued the cause and filed a brief for defendant in error:

"Due process of law" and "the law of the land" mean one and the same thing.

Davidson v. New Orleans, 96 U. S. 101, 24 L. ed. 618.

Then it necessarily follows, if this act is constitutional, that it is the law of the land, and by it, within proper and reasonable limits, business and property rights can be regulated.

Holden v. Hardy, 169 U. S. 392, 42 L. ed. 791, 18 Sup. Ct. Rep. 383.

This court has held that the statute of Utah making eight hours' labor constitute a day's work is a proper exercise of the police power of the state.

Ibid. See also *Com. v. Alger*, 7 Cush. 53.

The act in question is general in its application, and hence no objection can be brought on the ground of class legislation, as it applies to every person, natural or artificial. Such laws have been repeatedly upheld as a proper exercise of the police power of the state. In Tennessee an act regulating fire insurance contracts, and making the three-fourths value clause void, was upheld as proper and constitutional.

Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5.

And the same court has held that an ordinance prohibiting the erection of wooden buildings within certain fire limits was not, in a constitutional sense, an impairment of a contract for erection of the same, although

the contract was made before the passage of the ordinance.

Knoxville v. Bird, 12 Lea, 121, 47 Am. Rep. 326.

And that a law prohibiting the sale of cotton within certain hours was constitutional, and a proper exercise of the police power of the state.

Truss v. State, 13 Lea, 311.

A West Virginia statute similar to the statute in question in many particulars was sustained and upheld by the supreme court of that state.

State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000.

An act of the state of Indiana requiring biweekly payments of wages was upheld as proper by the supreme court of that state.

Hancock v. Yaden, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253.

The supreme courts of Massachusetts, Rhode Island, Kentucky, and many other states have sustained similar, and even more drastic, laws for the regulation of business and contracts growing out of same.

State ex rel. Curtis v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *Shaffer v. Union Min. Co.* 55 Md. 74; *Opinion of the Justices*, 163 Mass. 589, sub nom. *Re House Bill, No. 1230*, 28 L. R. A. 344, 40 N. E. 713.

Every intendment is in favor of the constitutionality of the act, and the presumption is that the legislature acted properly.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

All contracts and property rights are subject to the police power of the state.

Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5; *Marr v. Bank of West Tennessee*, 4 Lea, 585; *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 326; *New York v. Miln*, 11 Pet. 139, 9 L. ed. 662; *Passenger Cases*, 7 How. 457, 12 L. ed. 775; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Lawton v. Steele*, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 172, 34 L. R. A. 725, 36 S. W. 1041; *Smith v. State*, 100 Tenn. 494, 41 L. R. A. 432, 46 S. W. 566; *Austin v. State*, 101 Tenn. 567, 50 L. R. A. 478, 48 S. W. 305; *Cooley*, Const. Lim. 5th ed. 706; *Black*, Stat. Constr. & Interpretation of Laws, § 154.

The very language of § 1, 14th Amend. U. S. Const. implies that by "due process of law, or the law of the land," property rights may be regulated, and even taken.

Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955.

[24] *Mr. Justice Shiras delivered the opinion of the court:

The only question presented for our consideration in this record is the validity, under the 14th Amendment of the Constitution of the United States, of the act of the leg-

islature of the state of Tennessee prescribing that corporations and other persons issuing store orders in payment for labor shall redeem them in cash, and providing a legal remedy for bona fide holders of such orders.

In the case of *Knoxville Iron Co. v. Harbison*, in error to the supreme court of Tennessee, decided at the present term, 183 U. S. 13, ante, 55, 22 Sup. Ct. Rep. 1, we affirmed the judgment of that court sustaining the constitutional validity of the state legislation in question, and the cause now before us is sufficiently disposed of by a reference to that case.

The only difference in the cases is that in the former the plaintiff in error was a domestic corporation of the state of Tennessee, while in the present the plaintiff in error is a foreign corporation. If that fact can be considered as a ground for a different conclusion, it would not help the present plaintiff in error, whose right, as a foreign corporation, to carry on business in the state of Tennessee, might be deemed subject to the condition of obeying the regulations prescribed in the legislation of the state. As was said in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, that "which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. . . . The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207."

We do not care, however, to put our present decision upon the fact that the plaintiff in error is a foreign corporation, nor *to be[25] understood to intimate that state legislation, invalid as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the state. *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Blake v. McClung*, 172 U. S. 239, 254, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

The judgment of the Supreme Court of Tennessee is affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissent.

FRED. A. McMASTER, Administrator of the Estate of F. E. McMaster, Deceased, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 25-42.)

Life insurance — forfeiture — unauthorized insertion changing time for premium — failure of insured to read policy.

1. Evidence of the unauthorized insertion in

NOTE.—As to the effect of agent's filling in answers in application for insurance without

an insurance policy, on request of the insurance agent, of a provision contrary to that which had been agreed upon between him and the insured, and evidence of the agent's assurance, in response to an inquiry by the insured, to the effect that the policy conformed to their agreement, is admissible on the question whether the insured was or was not bound by the inserted provision, either on the ground that he had requested it or that he was negligent in not reading the policy.

2. The omission of the insured to read a life insurance policy when delivered to him and payment of premiums made, and when in answer to his inquiry the insurance agent told him that the policy conformed to their agreement, does not constitute such negligence as to estop the insured from denying that by accepting the policy he agreed to a provision therein contained, but of which he was ignorant and to which he had not agreed, to the effect that the annual premium should be paid in subsequent years on a date earlier than that on which the policy was issued.
3. On the question of forfeiture of an insurance policy which contains provisions that are inconsistent, or which is so framed as to be fairly open to construction, the view should be adopted, if possible, which will sustain rather than forfeit the contract.

[No. 29.]

Argued March 18, 1901. Decided October 28, 1901.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision affirming a judgment in favor of defendant in an action on policies of life insurance. *Reversed*, and remanded with direction of judgment for plaintiff.

See same case below, 40 C. C. A. 119, 99 Fed. 856.

Statement by Mr. Chief Justice **Fuller**:
[26] *This was an action brought by Fred. A. McMaster, administrator of the estate of Frank E. McMaster, deceased, against the New York Life Insurance Company on five policies of insurance of \$1,000 each upon the life of Frank E. McMaster.

The applications were dated December 12, and the policies December 18, 1893. The premiums for a year in advance were paid and the policies delivered December 26, 1893.

McMaster died January 18, 1895, and the defense was that the insurance had been forfeited by failure in payment of the second annual premiums on or before January 12, 1895, that is to say, within thirty days after December 12, 1894, when the company contended they became due.

The company alleged in a substituted and amended answer that the policies were exe-

cuted and delivered December 12, 1893, and set forth:

"2. This defendant, for further answer, says that said application is dated the 12th day of December, 1893, and asked the issuing of five policies of \$1,000 each upon the life of the said *Frank E. McMaster, de- [27] ceased. Said application also contained a request that said five policies each should be issued, dated, and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued. "This defendant grants to the insured in said defendant company a grace of one month on the payment of premiums, which extended the day of payment of premiums from December 12th, 1894, as in the policies issued to said Frank E. McMaster, deceased, late as the 12th day of January, 1895, but not later.

"3. This defendant, for further answer, says that payment of the premiums due upon said policies were not paid within the time prescribed as aforesaid, and that said Frank E. McMaster died on the 18th day of January, 1895, six days after said policies had lapsed and were forfeited for nonpayment of premiums as required.

"6. This defendant, further answering said petition, says that said application is a part of said policies, in each case, that said assured received and accepted said policies during his lifetime, and had them all in his possession for a long time, and was aware and knew, or could have known, the contents in each policy.

"That said assured had paid the premiums when said policies were delivered to him; that by reason of said assured's acceptance of said policies, his representative, the plaintiff herein, is estopped from denying the date of said policies or claiming that said policies should have a different date from the application, and is estopped for the reasons above stated from claiming that said words, to wit, 'Please date policy same as application,' were not in said application when insured signed same, for by accepting said policies the assured waived said right to object, if said words were inserted, as alleged in petition, after the signing of the application, which this defendant denies."

The case was tried by the circuit court without a jury; special findings of fact made; and judgment rendered in favor of defendant. 90 Fed. 40.

Plaintiff prosecuted a writ of error from the circuit court of *appeals, and the judg- [28] ment was affirmed. 40 C. C. A. 119, 99 Fed. 856. The writ of certiorari was then allowed.

Knowledge of assured—see note to Union Mut. L. Ins. Co. v. Wilkinson, 20 L. ed. U. S. 617.

On the effect of knowledge by insurer's agent of the falsity of statements in application—see Clemans v. Supreme Assembly R. S. of G. F. (N. Y.) 16 L. R. A. 33, and note.

As to the effect of riders or slips attached to insurance policies—see Jackson v. British America Assur. Co. (Mich.) 30 L. R. A. 636, and note.

183 U. S. U. S., Book 46.

Upon the question when an insurance agent is the agent of the insured—see Michigan Pipe Co. v. Michigan F. & M. Ins. Co. (Mich.) 20 L. R. A. 277, and note.

That forfeiture of an insurance policy is not favored in law—see Gunther v. New Orleans Cotton Exch. Mut. Aid Asso. (La.) 2 L. R. A. 118, and note. And see note to Dennis v. Massachusetts Ben. Asso. (N. Y.) 9 L. R. A. 189.

Pending the trial below, plaintiff filed a bill in equity for the reformation of the policies, and the circuit court granted the relief prayed. 78 Fed. 33. On appeal this decree was reversed (30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63), and an application to this court for certiorari was denied. 171 U. S. 687, 18 Sup. Ct. Rep. 944. The circuit court of appeals expressed the opinion in that case that no recovery could be had at law or in equity, and accordingly the circuit court in this case, although of opinion that plaintiff was entitled to recover, gave judgment for defendant.

Separate opinions were given by the judges of the court of appeals, Sanborn and Thayer, J.J., concurring in affirming, and Caldwell, J., dissenting.

The findings of fact by the circuit court were as follows:

"1st. The plaintiff, Fred A. McMaster, was when the suit was brought and is now the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the probate court of Woodbury county, Iowa; and furthermore said plaintiff was when this suit was brought and is now a citizen of the state of Iowa, and a resident of Woodbury county, Iowa.

"2d. That the defendant, the New York Life Insurance Company, was when this suit was brought and is now a corporation created under the laws of the state of New York, having its principal office and place of business in the city of New York, in the state of New York, but being also engaged in carrying on its business of life insurance in the state of Iowa and other states.

"3d. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and, as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company, and set forth in the circular issued by the company, and printed on the back of the policies issued by the company, under the heading, 'Benefits and Provisions referred to in this Policy,' in the following words: 'After this policy shall have been in force three

[29] *months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during said month, this indebtedness will be deducted from the amount of the insurance.'

"4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated

December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

"5th. In the application when signed by Frank E. McMaster it was provided that the amount of insurance applied for was the sum of \$5,000, to be evidenced by five policies for \$1,000 each, on the ordinary life table, the premium to be payable annually.

"6th. There now appears on the face of the application, interlined in ink, the words, 'Please date policy same as application.' These words were not in the application when it was signed by McMaster, but after the signing thereof they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893; and it does not appear that Frank E. McMaster ever knew that these words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

"7th. By the express understanding had between F. W. Smith, *the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered. [30]

"8th. The defendant company, at its home office in New York City, upon receipt of the application, determined to grant the insurance applied for, and issued five policies each for the sum of \$1,000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was \$21.00, and forwarded the same to its agent F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made a part of this finding of fact, and each policy contains the recital: 'This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and — cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.'

"9th. The five policies inclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid

the agent the full first annual premium, or the sum of \$21 on each policy, and, without reading the policies, he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company, as hereinabove set forth.

[31] "10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums *on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York.

"11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster in the defendant company were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like thirty days of grace and loans, and, in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as she understood it, the grace on the second premiums would expire January 11, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

"12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take \$1,000 or \$2,000 insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

"13th. That on or about January 15th, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received, and in reply McMaster said: 'All right. Just hold them. There is no hurry about them.' And in the same conversation he stated that he had other insurance,—referring to the policies in the defendant company.

[32] "14th. That the action of Frank E. McMaster shows, and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would *continue in force for the period of thirteen months from the date of the policies, and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

183 U. S.

"15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

"16th. That up to the time of his death the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

"17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premiums coming due on said policies.

"18th. That the defendant company has not paid said policies or any part thereof, and, assuming the same to be valid, there is due thereon November 1, 1898, the sum of (\$5,965) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums, with interest thereon to March 14, 1895."

The policies were dated December 18, 1893, and provided:

This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ——— cents, to be paid in advance, and of the payment of a like sum on the 12th day of December in every year thereafter during the continuance of this policy.

*After this policy shall have[33] been in force one full year, if it shall become a claim by death the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed.

The benefits and provisions placed by the company on the next page are a part of this contract as fully as if recited over the signatures hereto affixed. Benefits and provisions referred to in this policy.

If the insured is living on the 12th day of December in the year nineteen hundred and thirteen, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following: [cash value; annuity;

paid-up policy, etc., etc.] If the insured made no selection dividends were to be apportioned as provided.

(Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder.)

No agent has power in behalf of the company to make Powers not Delegated. or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice president, second vice president, actuary, or secretary of the company, and will not be delegated.

All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice president, second vice president, actuary or secretary, and countersigned by such agent. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

[34] *After this policy shall have Grace. been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid. During the said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month this indebtedness will be deducted from the amount of the insurance.

The applications were dated December 12, 1893, and contained, among other things, the following:

Sum to be insured, \$5,000.

Five policies of \$1,000 each.

Please date policy same as application.

[It was averred in the complaint and found by the circuit court that these words in italics were inserted by the agent after the applications were signed and without applicant's knowledge.]

Premium payable { Annually.
Semi-annually.
Quarterly.

Note: Strike out the rates not desired.

On what table { Ordinary Life.
Life premium.
Endowment payable in...years
Limited endowment payable in...years.

I do hereby agree as follows: . . . 2. That inasmuch as only the officers at the home office of said company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written

statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises, or information be reduced to writing and presented to the officers of said company, at the home office in this application. . . . 4. That any policy which may be *issued under this ap-[35] plication shall not be in force until the actual payment to and acceptance of the premium by said company or an authorized agent, during my lifetime and good health.

Mr. Henry J. Taylor argued the cause, and, with Messrs. Frank E. Gill and Eric A. Burgess, filed a brief for petitioner:

The statements of the agent in reference to existing terms of the policies were known to him to be false, and were relied on by the assured to his damage. That the guilty party may not render his fraud effectual, the parol-evidence rule must yield to the rule of equitable estoppel.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 556; *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. ed. 398.

The party responsible for the fraud or other vice inherent in a contract estops himself from setting it up, and parol evidence is admissible to establish and furnish the basis for the estoppel. Under the rule of estoppel the statement, "Please date policy same as application," is not the direction of the assured, but of the company itself, and the company must bear all the consequences naturally, reasonably, or actually flowing from its conduct.

Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; *American L. Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. ed. 593; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610, 24 L. ed. 268; *North American F. Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; *Patten v. Merchants' & F. Mut. F. Ins. Co.* 40 N. H. 375; *McMaster v. New York L. Ins. Co.* 78 Fed. 36; *Marston v. Kennebec Mut. L. Ins. Co.* 89 Me. 266, 36 Atl. 389.

Above the rule of parol evidence against varying or contradicting the terms of the written contract is the doctrine that one cannot use provisions procured through mistake, fraud, or deceit to perpetuate the same.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; *American L. Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. ed. 593; *Etna Live Stock, Fire, & Tornado Ins. Co. v. Olmstead*, 21 Mich. 251, 4 Am. Rep. 483; *Kausal v. Minnesota Farmers' Mut. F. Ins. Asso.* 31 Minn. 21, 47 Am. Rep. 776, 16 N. W. 430; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610, 24 L. ed. 268; *North American F. Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638.

The case in controversy would have been the same, in substance, if the agent had wrongfully, and without the knowledge or consent of the assured, inserted in the application, instead of the words, "Please date policy same as application," the words "The contract of insurance issued hereunder shall be in force for the first annual premium not to exceed twelve months and seventeen days," and the company had copied into the policy this exact provision.

Phenix Ins. Co. v. Allen, 109 Ind. 272, 10 N. E. 85; *Hove v. Provident Fund Soc.* 7 Ind. App. 586, 34 N. E. 830; *Plumb v. Catawagus County Mut. Ins. Co.* 18 N. Y. 392, 72 Am. Dec. 52; *Michigan Mut. L. Ins. Co. v. Leon*, 138 Ind. 636, 37 N. E. 584; *Sullivan v. Phenix Ins. Co.* 34 Kan. 170, 8 Pac. 112; *Kausal v. Minnesota Farmers' Mut. F. Ins. Asso.* 31 Minn. 21, 47 Am. Rep. 776, 16 N. W. 430.

Even if it should be granted that it was McMaster's duty to read the policies, still, his neglect to do so can bind him only to what the company had a right to insert therein.

Equitable Safety Ins. Co. v. Hearne, 20 Wall. 494, 22 L. ed. 398; *Supreme Lodge K. of P. v. Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611; *Kister v. Lebanon Mut. Ins. Co.* 128 Pa. 553, 5 L. R. A. 646, 18 Atl. 447; *Fitchner v. Fidelity Mut. Fire Asso.* 103 Iowa, 276, 72 N. W. 530; *Dryer v. Security F. Ins. Co. (Iowa)* 82 N. W. 494; *Hartford Steam Boiler Inspection & Ins. Co. v. Cartier*, 89 Mich. 41, 50 N. W. 747.

The respondent ought not to be allowed to plead its own wrong to forfeit and defeat the policies.

Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617; *American L. Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. ed. 593; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610, 24 L. ed. 268.

Forfeitures are odious in law, and are enforced only where there is clear evidence that that was what was meant by the stipulation of the parties. There must be no cast of management or trickery to entrap the party into a forfeiture.

Supreme Lodge K. of P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611; *Kister v. Lebanon Mut. Ins. Co.* 128 Pa. 553, 5 L. R. A. 646, 18 Atl. 447.

Whatever may be the effect of the date, December 12, upon renewals for insurance in subsequent years, having accepted and retained the first full annual premium under the written and oral agreement that the insurance should not begin until the delivery of the policies and the payment of the premium, the assured should not now be subjected to a forfeiture which in effect forfeits insurance already paid for.

Methvin v. Fidelity Mut. Life Asso. (Cal.) 58 Pac. 387.

If the second annual premium had been made payable on the date corresponding to the date of the policy, to wit, on December 18, then this controversy could never have arisen.

183 U. S.

Parkhill v. Brighton, 61 Iowa, 103, 15 N. W. 853; Iowa Code 1897, § 23, p. 125; N. Y. Laws 1892, chap. 677, § 26.

The Iowa statute providing that the company shall be forever precluded from the benefit of any application unless it attaches a true copy thereof to the policy, and that the insured is entitled to the full benefit thereof whether annexed or not, does not require that the insured examine the copy of the application indorsed on the policy.

Donnelly v. Cedar Rapids Ins. Co. 70 Iowa, 396, 28 N. W. 607; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507, 20 N. W. 782; *Wallace v. Council Bluffs Ins. Co.* 66 Iowa, 139, 23 N. W. 302; *Cook v. Federal Life Asso.* 74 Iowa, 746, 35 N. W. 500; Iowa Code 1897, §§ 1749, 1815, 1819.

The provision of the policy, "if any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company," contravenes the New York statute, and is void.

Hurst Home Ins. Co. v. Muir, 21 Ky. L. Rep. 828, 53 S. W. 3; *Mutual L. Ins. Co. v. Hill*, 49 L. R. A. 127, 38 C. C. A. 159, 97 Fed. 263; *Mutual L. Ins. Co. v. Dingley*, 49 L. R. A. 132, 40 C. C. A. 459, 100 Fed. 408; *Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. 796; *Equitable Life Assur. Soc. v. Trimble*, 27 C. C. A. 404, 48 U. S. App. 565, 83 Fed. 85; *Osborne v. Home L. Ins. Co.* 123 Cal. 610, 56 Pac. 616; May, Ins. 4th ed. § 356 A, note (a); *Johnson v. New York L. Ins. Co.* 109 Iowa, 711, 50 L. R. A. 99, 78 N. W. 905.

The "due date" is not fixed by the nominal date of premium payment on the face of the policy, but by the expiration of thirty days after giving the statutory notice.

Baxter v. Brooklyn L. Ins. Co. 119 N. Y. 454, 7 L. R. A. 293, 23 N. E. 1048; *Johnson v. New York L. Ins. Co.* 109 Iowa, 711, 50 L. R. A. 99, 78 N. W. 905; May, Ins. 4th ed. § 356 A, note.

Inasmuch as this construction had been given to the identical language of these policies prior to their issue, and the company permitted the language of its policies to remain unchanged, it must be held to have acquiesced in that construction; for otherwise it would have changed the language of its policies in respect thereto.

Fidelity & C. Co. v. Loewenstein, 46 L. R. A. 450, 38 C. C. A. 29, 97 Fed. 17.

When policies of insurance contain ambiguous, contradictory, conflicting, or inconsistent provisions, effect will be given to the provisions most favorable to the assured, and that construction will be adopted which is most favorable to the assured.

First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 673, 24 L. ed. 563; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Moulou v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Thompson v. Phenix Ins. Co.*

136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Manufacturers' Indemnity Co. v. Dorgan*, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; *Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 305, 47 U. S. App. 260, 78 Fed. 754; *Kister v. Lebanon Mut. Ins. Co.* 128 Pa. 553, 5 L. R. A. 646, 18 Atl. 447.

The forfeiting provisions should be construed as affecting the right to renewals,—that is, as affecting a continuation of the policies in force in subsequent years, and not as a limitation upon the time for which the premium had already been paid. Having paid for thirteen months of insurance, the assured should not be subjected to a forfeiture which in effect “would result in the forfeiture of a portion of the premium already paid.”

Methvin v. Fidelity Mut. Life Asso. (Cal.) 58 Pac. 387; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765; *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671.

The controverted provisions of the policies are difficult of interpretation, uncertain, and ambiguous.

New York L. Ins. Co. v. Dingley, 35 C. C. A. 245, 93 Fed. 153; *Rosenplanter v. Providence Sav. Life Assur. Soc.* 46 L. R. A. 473, 37 C. C. A. 566, 96 Fed. 721; *Fidelity & C. Co. v. Loewenstein*, 46 L. R. A. 450, 38 C. C. A. 29, 97 Fed. 20.

Neither a fraudulent purpose, nor an intent to deceive or mislead, is essential to the application of the doctrine of estoppel.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. ed. 619; 2 Pom. Eq. Jur. § 805; *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491; *Ewart, Estoppel*, p. 97.

It is always enough if the conduct or representations naturally result in accomplishing a legal fraud.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657.

The doctrine of equitable estoppel may be applied in a law action.

Barnard v. German American Seminary, 49 Mich. 444, 13 N. W. 811; *Kirk v. Hamilton*, 102 U. S. 77, 26 L. ed. 82; *John Skillito Co. v. McClung*, 45 Fed. 778; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617.

Smith was the agent of the company.

Jamison v. State Ins. Co. 85 Iowa, 229, 52 N. W. 185; *Cook v. Federal Life Asso.* 74 Iowa, 746, 35 N. W. 500; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Knights Templar & M. Life Indemnity Co. v. Berry*, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. 511; *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; *New York L. Ins. Co. v. Russell*, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94; *Central*

Nat. Bank v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Joyce, Ins.* § 194.

The burden of proof to show that a legal and sufficient notice was properly given rests upon the insurance company. It must show a strict compliance with the terms of the statute before it can assert a forfeiture.

Baxter v. Brooklyn L. Ins. Co. 119 N. Y. 454, 7 L. R. A. 293, 23 N. E. 1048; *De Frece v. National L. Ins. Co.* 136 N. Y. 151, 32 N. E. 556; *Phelan v. Northwestern Mut. L. Ins. Co.* 113 N. Y. 147, 20 N. E. 827; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113; *Johnson v. New York L. Ins. Co.* 109 Iowa, 711, 50 L. R. A. 99, 78 N. W. 905; *New York L. Ins. Co. v. Dingley*, 35 C. C. A. 245, 93 Fed. 153; *Rosenplanter v. Provident Sav. Life Assur. Soc.* 46 L. R. A. 473, 37 C. C. A. 566, 96 Fed. 721; *Mutual L. Ins. Co. v. Hill*, 49 L. R. A. 127, 38 C. C. A. 159, 97 Fed. 263; *Mutual L. Ins. Co. v. Dingley*, 49 L. R. A. 132, 40 C. C. A. 459, 100 Fed. 408.

Inasmuch as none of the essential contents of the notice are found or anywhere given, the last clause of the 10th finding is without force or effect to sustain the judgment, because it states a mere conclusion of law, and not the finding of an ultimate fact. The general statement that a notice was sent “of the coming due of the premiums” at some unstated time does not sufficiently state the ultimate fact.

United States v. Harris, 23 C. C. A. 483, 46 U. S. App. 653, 77 Fed. 825; *Cooper v. French*, 52 Iowa, 531, 3 N. W. 538; 12 Enc. Pl. & Pr. pp. 1038–1046; *Daube v. Philadelphia & R. Coal & I. Co.* 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 715; *Keene Mach. Co. v. Barratt*, 40 C. C. A. 571, 100 Fed. 590.

Findings of fact which merely announce certain legal conclusions deducible from facts not stated are not sufficient to support a judgment.

8 Enc. Pl. & Pr. p. 943; *Kane v. Rippey*, 22 Or. 299, 29 Pac. 1005.

The burden of proving a strict compliance with all the essential requirements of the statute being upon the company, and the special findings being silent as to every essential fact of notice, the court is bound to infer an insufficient notice, for nothing can be supplied to such findings by intendment. Every fact essential to support the judgment must affirmatively appear in the findings.

United States v. Harris, 23 C. C. A. 483, 46 U. S. App. 653, 77 Fed. 821.

An insufficient finding upon any material issue or fact has the same legal effect as no finding at all, and therefore is equivalent to an express finding against the party on whom the burden of proof rests, which in this case was the company.

Keene Mach. Co. v. Barratt, 40 C. C. A. 571, 100 Fed. 590.

The special findings of the circuit court are such that this court should reverse both the circuit court of appeals and the circuit court, and remand the case, with suitable instructions to enter judgment in favor of the petitioner and against the respondent for the sum of \$5,965, together with interest thereon from November 1, 1898, and for costs in all the courts.

Ft. Scott v. Hickman, 112 U. S. 150, 28 L. ed. 636, 5 Sup. Ct. Rep. 56; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; *Evans v. Kister*, 35 C. A. 28, 92 Fed. 828.

Messrs. **W. E. Odell** and **Frederic D. McKenney** argued the cause, and, with Mr. *George W. Hubbell*, filed a brief for respondent:

The retention of the policy was an approval of the terms of the applications as submitted to the company, and of the terms of the policies as issued thereon. The consequence of that approval, after his death, cannot be avoided.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.

All previous arrangements were merged in the written agreement.

Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674.

As parol evidence is not admissible to show that a written contract varies from the previous agreement of the parties, parol evidence of a contemporaneous representation as to the legal effect of its contents is likewise to be excluded.

LaFarge v. Rickert, 5 Wend. 187, 21 Am. Dec. 209.

It must be presumed that McMaster read the applications and the policies, and was fully cognizant of the limitations on the authority of the agent therein expressed.

Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 329, 24 L. ed. 388; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 240, 24 L. ed. 689.

The failure to read the policies, if in fact such failure continued after the date of their receipt, was gross negligence. It was the duty of the insured to read and acquaint himself with their contents, in order that any error or mistake or divergence from the terms of the application, appearing in them, might promptly be brought to the attention of the company and corrected. By failing to report any such, the insured must be presumed to have accepted the policies in accordance with their terms, and to have agreed that they should remain as the basis of the contract of insurance.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.

The payment of the first premium made upon delivery of the policy, being but a part of a fixed and definitely ascertained whole, viz., one twentieth of the entire amount of premiums required by the policy to be paid, carried the insurance to the next pay day and one month beyond. The fact that the next pay day occurred less than twelve months after such payment does not alter the case, for the payment made was not a payment for such period, but merely one of twenty similar payments which by the terms of the policy were required to be made on a designated day in each and every year of the accumulation period.

Methvin v. Fidelity Mut. Life Asso. 129 Cal. 251, 61 Pac. 1112; *Bryan v. National Life Ins. Asso.* 21 R. I. 149, 42 Atl. 513; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

183 U. S.

*Mr. Chief Justice **Fuller** delivered the [35] opinion of the court:

By the payment of the annual premiums in advance and the delivery of the policies, McMaster's life became insured in the sum of \$5,000.

The contracts were not assurances for a single year, with the privilege of renewal from year to year on payment of stipulated premiums, but were entire contracts for life, subject to forfeiture by failure to perform the condition subsequent of payment as provided, or to conversion in 1913 at the election of the assured. *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765; *New York L. Ins. Co. v. Statham*, 93 U. S. 30, 23 L. ed. 791.

The contention of the company presented by its answer was that McMaster requested that the policies "should be issued, dated, and take effect the same date as the application, namely, the 12th day of December, 1893;" that the policies were accordingly so issued; and that McMaster's acceptance of them estopped his representative from denying that date, or claiming that the request that the policies should be so dated was not made by him.

But the policies were not dated December 12, and were dated December 18, the day on which they were actually issued. The applications were in terms parts of the policies, and by them it was agreed that the policies, though issued, should not be in *force until [36] the actual payment and acceptance of the premiums. This was a provision intended to cover any time which might elapse between issue and delivery and payment. So that, notwithstanding the premiums in this instance were not actually paid and received and the policies delivered until December 26, it may be conceded that, and in accordance with the practice in such matters, the contracts of insurance commenced to run from December 18 rather than from December 26. They were certainly not in force on December 12, 1893. No controversy was raised as to fractions of a day, or the exclusion or inclusion of the first day, and it was conceded that payment on January 12, in one view, or on January 18, in the other, would have averted a forfeiture.

Assuming, however, that the alleged request was not made by McMaster, that it was not, at least literally, complied with, or that it was immaterial, the company insists that the policies expressly required payment of the annual premiums, subsequent to the first (payable and paid on delivery), on December 12 in each year, commencing with December 12, 1894; that McMaster in accepting them without objection became bound by this requirement, and could not plead ignorance thereof resulting from not reading them when tendered; and that, therefore, these policies were properly forfeited January 12, 1895, being twelve months from December 12, 1893, with a month of grace added.

The applications were part of the policies, and from them it appeared, and was found by the circuit court, that McMaster applied

for insurance "on the ordinary life table, the premium to be payable annually." He was solicited to insure by the company's agent, and might, according to the company's form which was used, have asked that the premiums be payable annually, semiannually, or quarterly, but he chose that they should be payable annually, and that the rate of premium should be calculated on that basis by the ordinary life table. The company assented to this, and fixed the annual premium on each policy at \$21, on payment of which—that is, payment in advance—the policy was to go into effect. The payments were made, and the insurance

[37] was put in force for McMaster's life, "subject, it is true, to forfeiture for nonpayment of subsequent premiums, but forfeiture when? If within the first year then the payment for that year did not secure the immunity from forfeiture during the year, which had been contracted and paid for.

But the company says that McMaster requested that the policies should go into effect on December 12, 1893, and that his representative is estopped from denying that that is the operation of the policies as framed and accepted, or that the second premiums matured December 12, 1894.

It was found from the evidence that after McMaster had signed the applications, and without his knowledge or assent, the agent of the company inserted therein: "Please date policy same as application;" and it was further found that when the policies were returned to Sioux City, and were taken by the company's agent to McMaster, he "asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium or the sum of \$21 on each policy, and without reading the policies he received them and placed them away."

We think the evidence of this unauthorized insertion, and of what passed between the agent and McMaster when the policies were delivered, taken together, was admissible on the question whether McMaster was bound by the provision that subsequent payments should be made on December 12, commencing with December 12, 1894, because requested by him, or because of negligence on his part in not reading the policies.

The applicable statutes of Iowa declared that "any person who shall hereafter solicit insurance or procure applications therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

Each policy provided that after it had been in force for three months "a grace of one month will be allowed in payment of subsequent premiums, subject to an interest

[38] charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid. During the said month of grace the unpaid premium, with interest as above, remains an indebtedness

due the company. and, in the event of death during said month, this indebtedness will be deducted from the amount of the insurance." This was a month in addition to the period covered by premiums already paid.

McMaster was justified in assuming, and on the findings must be held to have assumed, that if he paid the first annual premium in full he would be entitled to one year's protection, and to one month of grace in addition, that is, to thirteen months' immunity from forfeiture. And the findings show that the company, by its agent, gave that meaning to the clause, and that McMaster was induced to apply for the insurance by reason of the protection he supposed would be thus obtained.

In *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87, it was decided that a person procuring an application for life insurance in Iowa became by force of the statute the agent of the company in so doing, and could not be converted into the agent of the assured by any provision in the application.

In that case the applicant was required to state whether he had any other insurance on his life. He was in fact a member of several co-operative associations, and therefore did have other insurance; but the soliciting agent of the company, to whom he stated the facts, believing that insurance of that kind was not insurance within the meaning of the question, wrote "No other" as the proper answer, at the same time assuring the applicant that it was such. And this court held that the company was bound by the interpretation put upon the question by its soliciting agent.

When, then, McMaster signed these applications he understood, and the company by its agent understood, that if the risks were accepted at the home office he would, by paying one year's premium in full, obtain contracts of insurance which could not be forfeited until after the expiration of thirteen months.

The company accepted the risks and issued the policies December 18, and they were delivered and the premiums paid December 26.

*Bearing in mind that McMaster had made [39] no request of the company in respect of antedating the policies, and was ignorant of the interpolation of the agent, and ignorant in fact, and not informed or notified in any way, of the insertion of December 12 as the date for subsequent payments, he had the right to suppose that the policies accorded with the applications as they had left his hands, and that they secured to him, on payment of the first annual premiums in advance, immunity from forfeiture for thirteen months. And the agent assured him that this was so.

The situation being thus, we are unable to concur in the view that McMaster's omission to read the policies when delivered to him and payment of the premiums made constituted such negligence as to estop plaintiff from denying that McMaster by accepting the policies agreed that the insurance might be forfeited within thirteen months from December 12, 1893. *Supreme Lodge K. of*

P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611, and cases cited; *Fitchner v. Fidelity Mut. F. Asso.* 103 Iowa, 279, 72 N. W. 530; *Hartford Steam Boiler Inspection & Ins. Co. v. Cartier*, 89 Mich. 41, 50 N. W. 747.

On the other hand, can the company deny that McMaster obtained insurance which was not forfeitable for nonpayment of premiums within thirteen months after the first payment?

If it can, by reason of its own act, without McMaster's knowledge, actual or legally imputable, then the company's conduct would have worked a fraud on McMaster in disappointing, without fault on his part, the object for which his money was paid. The motive of the agent to get a bonus for himself rather than to deceive McMaster is not material, as the result of his action would be the same. To permit the company to deny the acts and statements on which the transaction rested would produce the same injury to McMaster, no matter what the agent's motives.

But what is the proper construction of these contracts in respect of the asserted forfeiture? The company, although retaining the premiums paid, and not offering to return them, contends that, if McMaster was not bound by an agreement that the subsequent premiums should be paid on December 12, then that the minds of the parties [40] had not met because it had not *contracted except on the basis of payments so to be made; but the question still remains whether the right of recovery in this case is dependent on such payment on the 12th day of December, 1894, or within thirty days thereafter.

We are dealing purely with the question of forfeiture, and the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract. *Thompson v. Phoenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563.

Each of these policies recited that it was made in consideration of the written application therefor, which was made part thereof, and of the payment in advance of an annual premium of \$21, "and of the payment of a like sum on the 12th day of December in every year thereafter during the continuance of this policy."

Does this latter provision require payment of an annual premium during the year already secured from forfeiture by payment made in advance?

May not the words "in every year thereafter" mean in every year after the year the premiums for which have been paid? Or in every year after the current year from the date of the policy?

At all events, if the payment in advance was a payment which put in force a contract good for life, determinable by nonpayment of subsequent premiums, and this first payment was payment of the premiums for a year, could the requirement of payment of a second

annual premium within that year be given greater effect than the right to cancel the policies from January 18, 1895, if such payment were not tendered until after the lapse of thirteen months from December 12, 1893?

To hold the insurance forfeitable for nonpayment of another premium within the year for which payment had already been fully made would be to contradict the legal effect under the applications and policies of the first annual payment. Clearly, such a construction is uncalled for, if the words "the 12th day of December in every year thereafter" could be assumed *to mean in every [41] year after the year for which the premiums had been paid. But if not, taking all the provisions together, and granting that the words included December 12, 1894, nevertheless it would not follow that forfeiture could be availed of to cut short the thirteen months' immunity from December 18, 1893, as the premiums had already been paid up to December 18, 1894. And the company could not be allowed, on this record, by making the second premiums payable within the period covered by the payment of the first premium, to defeat the right to the month of grace which had been proffered as the inducement to the applications, and had been relied on as secured by the payment. If death had occurred on December 18, 1894, or between the 12th and 18th, it is quite clear that recovery could have been had, and as the contracts were for life, and were not determinable (at least for twenty years) at a fixed date, but only by forfeiture, it appears to us that the applicable rules of construction forbid the denial of the month of grace in whole or in part.

It is worthy of remark that it was specifically provided that after the policies had been in force one full year they should become incontestable on any other ground than nonpayment of premiums, and we suppose it will not be contended that if any other ground of contest had existed and death had occurred between December 12 and December 18, 1894, the company would have been cut off from making its defense, because the policies had been in force "one full year" from December 12.

And if not in force until December 18, the date of actual issue, how can it be said that liability to forfeiture accrued before the twelve months had elapsed?

The truth is the policies were not in force until December 18, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th. And as the policies could not be forfeited for nonpayment during that time the month of grace could not be shortened by deducting the six days which belonged to McMaster of right.

In our opinion the payment of the first year's premiums made *the policies nonforfeitable for the period of thirteen months, and inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defense to the action. [42]

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause is remanded to the latter court, with a direction to enter judgment for plaintiff in accordance with the eighteenth finding, with interest and costs.

Mr. Justice **Brewer** did not hear the argument and took no part in the decision.

MILTON C. MITCHELL, *Plff. in Err.*,
v.
POTOMAC INSURANCE COMPANY OF
GEORGETOWN, D. C.

(See S. C. Reporter's ed. 42-53.)

Trial — insurance — explosion — lighted match.

1. An instruction submitting to the jury a question which is not based on any evidence is properly denied.
2. An explosion caused by gasoline kept in a retail stove and tin store is not covered by a policy insuring the stock of goods by a written clause including the grant of a privilege to keep a limited quantity of gasoline, where the printed clauses of the policy exclude liability for explosions of any kind unless fire ensues, and then cover loss or damage by fire only.
3. A lighted match is not a fire within the meaning of an insurance policy excluding liability for damages caused by explosions, so as to cover damages from an explosion caused by the match.

[No. 51.]

Argued October 23, 24, 1901. Decided November 11, 1901.

IN ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a judgment in favor of the defendant in an action on a policy of insurance. *Affirmed.*

See same case below, 16 App. D. C. 241.
The facts are stated in the opinion.

Mr. **Samuel Maddox** argued the cause and filed a brief for plaintiff in error:

Whenever there is a question of fact before the court, and there is any testimony, no matter how slight, tending to prove the existence of such fact, the question is one within the peculiar province of the jury, and it is reversible error in the court to withdraw it from them.

Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748.

If the jury found that there was fire, however slight, in the back cellar, just before the explosion and causing it, their verdict must have been for the plaintiff.

Hamburg Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70; *Washburn v. Farmers' Ins.*

NOTE.—On the liability of an insurer for loss caused by explosion—see *Heuer v. Northwestern National Ins. Co.* (Ill.) 19 L. R. A. 594, and note.

Co. 2 Fed. 304; Washburn v. Miami Valley Ins. Co. 2 Flipp. 664, 2 Fed. 633; La Force v. Williams City F. Ins. Co. 43 Mo. App. 518.

Gasoline was part and parcel of the goods kept for sale by the assured, and was, and was intended to be, protected by the insurance.

If any of the printed conditions in a policy of fire insurance are repugnant to the main purpose of insurance against perils by fire, they must yield; otherwise the policy becomes a mere deception, instead of the protection which the parties to it designed.

Hoffman v. Aetna F. Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; *Viele v. Germania Ins. Co.* 26 Iowa, 66, 96 Am. Dec. 83; *Barnard v. National F. Ins. Co.* 27 Mo. App. 26; *Fraim v. National F. Ins. Co.* 170 Pa. 151, 32 Atl. 613; *Faust v. American F. Ins. Co.* 91 Wis. 158, 30 L. R. A. 783, 64 N. W. 883; *Yoch v. Home Mut. Ins. Co.* 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189.

The insurance company ought not to be heard to say that it insured an explosive only in the event it did not explode,—practically the only thing gasoline or its vapor can do when brought into contact with fire.

Harper v. New York City Ins. Co. 22 N. Y. 441; *Lynn Gas & Electric Co. v. Mcriden F. Ins. Co.* 158 Mass. 570, 20 L. R. A. 297, 33 N. E. 690.

The instruction of the court below restricting the meaning of the word "explosion" to what the ordinary man would understand to be meant by that word is at variance with the well-settled rule that where a contract of insurance is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the assured.

Imperial F. Ins. Co. v. Coos County, 151 U. S. 462, 38 L. ed. 235, 14 Sup. Ct. Rep. 379.

It is also at variance with that other well-established rule which holds that conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.

Hoffman v. Aetna F. Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337.

Mr. **J. Holdsworth Gordon** argued the cause and filed a brief for defendant in error:

Where a lighted match is applied to the escaped gases, and an explosion thereby occurs, which causes damage, but is not followed by combustion, the explosion is the proximate cause of the injury, and the lighted match is only the remote cause. In such case, fire does not reach the property injured, but the concussion resulting from the explosion does the damage, and is the proximate cause.

Hamburg Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70; *Heuer v. North-Western National Ins. Co.* 144 Ill. 393, 19 L. R. A. 594, 33 N. E. 411.

The contact of vapor in a room with a burning lamp has been held not to be a fire within the meaning of the risk assumed; and, although the insurance company is liable for the damages done by the fire which followed the explosion, it is not liable for the loss occasioned by the explosion itself.

Briggs v. North American & Mercantile Ins. Co. 53 N. Y. 446.

A lamp causing explosion of vapors is not a "fire" within the meaning of the policy sued on.

United Life, F. & M. Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735.

The jury were properly told that the word "explosion" is to be understood in its ordinary and proper sense.

Hamburg Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 82; *United Life, F. & M. Ins. Co. v. Foote*, 22 Ohio St. 348, 10 Am. Rep. 735.

[43] *Mr. Justice **Peckham** delivered the opinion of the court:

This is an action brought by the plaintiff in error upon a policy of insurance issued by the defendant. On the trial the insurance company had a verdict upon which judgment was entered, and, the court of appeals of the District of Columbia having affirmed it (16 App. D. C. 241), the plaintiff has brought the case here. The policy was

[44] for \$5,000 on the plaintiff's *stock in trade, which was destroyed on September 27, 1896. The property insured was described in the written part of the policy as follows:

"On his stock of stoves and their findings, tins, and tinware, tools of trade, and such other goods kept for sale in a first-class retail stove and tin store, situate No. 3,108 M street, Georgetown, D. C.

"Privilege granted to keep not more (than) five (5) barrels of gasoline or other oil or vapor."

The policy also contained the following printed indemnity clause:

"Against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided. . . ."

In finer print are the following conditions and exceptions, among others:

"It being covenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only.

"Or, if gunpowder, phosphorus, naphtha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored, or used on the premises, in quantities exceeding one barrel at any one time without written consent, . . . this policy shall be void."

The damage to the insured stock amounted to \$4,568.50, and was due to the falling of the building and the crushing of the stock as hereafter detailed. The defendant denied liability on the ground that the falling of the building and injury to the stock had

been caused solely by explosion, no fire ensuing, and was therefore excepted from the policy.

An extra premium was charged for the gasoline privilege.

The plaintiff in error conducted a business at 3,108 M street, Georgetown, D. C., in a two-story-and-attic brick structure, his stock consisting of stoves and tinware, and he did besides a general repairing business. There was a cellar under the building *di- [45] vided into two compartments by a division, with room for a doorway, but there was no door between the divisions. The gasoline which the insurance policy permitted the plaintiff to keep was stored in the cellar in a tank underneath the back cellar floor. Customers were supplied with gasoline from a pump which was operated in the back of the store above the cellar where the gasoline tank was. There were no gas jets in the cellar, and no artificial lighting of any kind. When near the door one could see without the use of a match, or candle, or any other light, but when 7 or 8 feet away it was necessary to have artificial light of some kind. In the front cellar, stove castings and brick, surplus stoves and ranges, were kept. Along the sides shelving was arranged upon which brick and castings were put. No trouble had been experienced with gasoline vapor on account of the furnace which was in the cellar, or from matches or candles which were used to light persons about. There was no fire in the furnace at the time of the loss. Frequently half a dozen candles were around on the floor when work was to be done. The back cellar was used for the same purpose as the front cellar, except that stoves were not put in there; it was lighted only by a small window looking out into the alley. Matches and candles were used in the back cellar as in the front. When the workmen found what they were looking for, it was customary to drop these charred matches upon the floor, or put them on the stoves or castings.

The clerk who went into the cellar on the occasion testified in regard to the disaster as follows:

"It was about 1 o'clock in the day. When I went down there was no odor of gasoline in the cellar. I know the odor, which is pungent, unmistakable, and easily detected. The particular piece of casting that was wanted was in a tier of bins in the shelving on the east side of the main cellar and about 15 feet from the back cellar. It was so far from the door that I could not see it without the use of a light. On reaching the tier I struck a match and looked in the particular place where we were accustomed to keep this kind of casting; but it was not there. As I had been away from the store for three weeks previous, and did not know to what bin in the shelves they had been *moved, I [46] started looking from one to the other, beginning near the top. The first match burned my fingers, and I dropped it and lit another, with which I continued my search down, when all of a sudden the place was enveloped or filled with this blue flame. It

was a bluish color, and I knew at once that it was gasoline vapor that had ignited. I knew it at once because I remembered the appearance of it,—had seen it before. Where it started I do not know; but the first I knew of it, it was all over the place and I was in the midst of it. I don't know distinctly whether the blaze started at my hand or not. When I became conscious of the fact that there were flames there, it was all over the place; not only where I was, but all over the cellar. I noticed it first all over the cellar. There was no noise connected with it, except the sh-sh-sh like the swish of a whip or anything of that kind. I could see it play around. I became unconscious, either from the burns or the walls falling on me, I don't know which. The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. I crawled towards the front, where I was pulled through the front wall. I had been protected from the *débris* by the way in which the joists fell. They broke in the middle, one end remaining in the east wall and the other resting on the floor, thus leaving a little angle at the side. This condition existed all the way to the front of the building. It was very dark,—like the darkness of Egypt. The brick work was shattered in front and the house had fallen down."

The plaintiff in error claimed on the trial that there was evidence of a fire in the back cellar preceding the explosion and causing it, and that the explosion was therefore but an incident in the progress of the fire, and the company was therefore liable on the policy. He made the following request to charge the jury:

"If the jury find from the evidence that on the 28th day of September, 1896, at or before the time the witness Oliver went into the cellar of the plaintiff's premises, as described by him, a fire originating in accidental or other causes was in progress in the back cellar of said premises, and that afterward and *whilesuch fire was in progress the gas or vapor generated by the evaporation of liquid gasoline came in contact with the flames of such fire and exploded and prostrated portions of the building in which the insured commodities were stored, then the damage done to such commodities by reason of such prostration was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

The court refused the request, and the exception to such refusal brings up the first question argued by the plaintiff in error.

In the course of the charge it was stated as follows:

"The court has granted an instruction to this effect, that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire,

but if the explosion were not an incident to a precedent fire, but was the origin and the direct cause of the loss, then there was no destruction by fire, and the plaintiff is not entitled to recover anything from the defendant."

It is not important to inquire whether there was in truth any evidence tending to prove the existence of a fire in the front cellar preceding the lighting of the match therein, because the submission of the question to the jury was all that the plaintiff could ask, and the verdict negatives its existence. But the court drew a distinction between the front and rear cellar, and refused the foregoing request by the plaintiff's counsel, for the reason given, as follows:

"The court was asked to instruct you with reference to the theory that there was a precedent fire in the back room. The court felt obliged to refuse such an instruction, because there is no testimony in the case that would justify the jury in reaching the conclusion that before Mr. Oliver struck that match there existed a fire in the rear portion of that cellar. There is no testimony and no evidence of the fact."

The court also charged as follows:

"It is not contended that any fire followed the explosion, and that any portion of this stock in trade was injured by a subsequent fire, but it is claimed by the plaintiff that there existed *a precedent fire, and that the explosion was an incident of that precedent fire. The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to fire."

The court also charged:

"Now the question for you to determine in the light of all this testimony and your own knowledge and experience is this: Was the falling of this building and the injury to the stock in trade contained within it due to an explosion or not? If it was, and there was no antecedent fire, the verdict should be for the defendant. If you find in the case evidence that there was an antecedent fire, which did not amount to an explosion, but which was simply rapid combustion, which resulted in a collapse of the building, and not in an explosion, then it is conceded that the plaintiff is entitled to recover such damages as you shall find that he sustained. If you find a verdict for the plaintiff, you ought to give him interest on the amount to which he is entitled from the 19th day of January, 1897. You may take the ease, gentlemen."

With relation to the denial of the request of plaintiff's counsel, the court of appeals, in the opinion delivered by Mr. Justice Shepard, said:

"The instruction undertook to direct the special attention of the jury, first, to the probable existence of an accidental fire in the rear cellar before the entry of the witness Oliver into the front one, and, second,

to the probable ignition of the vapor in the front cellar by that fire instead of by the match lighted by Oliver immediately before the explosion took place in the front cellar. Neither of these inferences seems to have any reasonable foundation in the evidence, and the second is directly opposed to the testimony of Oliver, upon which the plaintiff's case rests. Had this been the only issue in the case the court might, without error, have directed a verdict for the defendant. *Gunther v. Liverpool & L. & G. Ins. Co.* 134 U. S. 110, 116, 33 L. ed. 857, 860, 10 Sup. Ct. Rep. 448." And also *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840.

[49] *A careful perusal of the evidence in the case brings us to the same conclusion. There was no evidence of any fire in the back cellar preceding the lighting of the match in the front cellar, and it would have been error to submit such a question to the jury for that reason. The request was therefore properly denied.

It is also contended that gasoline being kept for sale by the insured in his store, was covered by the written language of the policy, which included not only his stock of stoves, etc., but also "such other goods kept for sale in a first-class retail stove and tin store, situate No. 3,108 M street, Georgetown, D. C." It is then argued that, as gasoline is in its nature explosive, the risk arising therefrom was covered by the policy, and the loss occasioned thereby was one for which the company was liable; and if the printed provisions of the policy provided otherwise they are inconsistent with the written part of the policy, and the latter must prevail. This construction would render unnecessary the privilege to keep not more than five barrels of gasoline, which is also written in the policy. We think the construction contended for is inadmissible.

The language of the policy did not insure the plaintiff upon any property which he might choose to keep and sell in his store. The language means, not only the particular property specifically described, but such other goods as are kept for sale in a first-class retail stove and tin store, which in this case was situated as stated in the policy. Identifying the store by naming its situation does not alter the significance of the language, in effect, prescribing that the goods are such as are kept for sale in a first-class retail stove and tin store. The "other goods" must be such as are ordinarily, usually, customarily kept for sale in a first-class retail stove and tin store, and not such other classes of property as the insured may then or at any time choose to keep for sale in his particular store. This we think is the plain meaning of the language. The cases cited in the opinion delivered in the court of appeals make this plain, if anything more than the language itself were wanted for that purpose. Unless gasoline is such a commodity as is usually kept for sale in a first-class retail stove and tin store, [50] it would not be included *in that language. There is no evidence showing that gasoline is thus usually kept, and without evidence

to that effect it cannot be presumed that such is the fact. The language which immediately follows, "privilege granted to keep not more than five barrels of gasoline or other oil or vapor," also tends to show quite conclusively that the parties did not consider the description already given of the property insured, as permitting the keeping and selling of gasoline, for otherwise the privilege would not have been necessary to be inserted in the policy.

Taking the written and the printed language of the policy together, and there is no inconsistency therein. The extent and limits of the insurance are, as stated in the printed provision, "against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured;" and there is the further condition, "it being covenanted as conditions of this contract that this company . . . shall not be liable . . . for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only."

The written part insured the plaintiff on property therein described, which does not cover gasoline in the description of "other goods." What the insurance is and its limits are stated in the printed portions. Taking all the language together, the written and the printed, the contract is plain and unambiguous, without inconsistency or contradiction between the written and printed portions thereof, and therefore there is no room for the application of the principle that where such inconsistency or ambiguity exists the written portion prevails.

In regard to the keeping of gasoline for sale, and the reason for writing the privilege to so keep it in the policy, and the effect thereof, the court charged as follows:

"You hardly need be told, I think, as ordinary business men, that a privilege to keep something does not bring the privileged article within the articles insured by the policy. Suppose that clause read 'privilege to keep not more than 50 pounds of gunpowder,' on the premises, and the party insured was keeping a dry goods store or a drug store, would it be contended by any sensible man that the gunpowder was an article insured *by the policy? Clearly this [51] privilege to keep was inserted to offset the forfeiture of the policy if the provision contained in this policy were violated without this privilege, and that provision is this:

"If gunpowder, phosphorus, naphtha, benzine, or crude earth or coal oil are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time, without written consent of the company, the policy should be void.

"So that if these five barrels of gasoline were kept upon those premises without the written consent of the company, the policy would have been absolutely forfeited and the plaintiff would not have been entitled to recover damages for loss if the whole stock had been destroyed by fire. (1) So it must

be believed that the plaintiff, when he took his policy, fully understood what its terms and provisions were. That is the reason that he asked for, received, and paid for this privilege of keeping not more than five barrels of gasoline on the premises. I suppose that, inasmuch as keeping such inflammable material upon the premises would naturally increase the risk of loss, the insurance company would require the payment of a larger premium than it would have required if such inflammable material were not kept on the premises."

We regard this part of the charge as unexceptionable.

The plaintiff also claims that error was committed by the court in charging the jury, at the request of the defendant, in substance:

(1) If the loss was caused solely by an explosion or ignition of explosive matter, not caused by a precedent fire, the plaintiff cannot recover.

(2) If an explosion occurred from contact of escaping vapor with a match lighted and held by an employee of the plaintiff, and the loss resulted solely from such explosion, the verdict must be for the defendant.

(3) A match lighted and held by an employee of the plaintiff coming in contact with the vapor and causing an explosion is not to be considered as "fire" within the meaning of the policy.

[52] *We think each instruction was correct. A loss occurring solely from an explosion not resulting from a preceding fire is covered by the exception in the policy. And an explosion which occurred from contact of escaping vapor with a lighted match, under the facts stated, would also plainly come within the exception of the policy. Also a lighted match is not a "fire" when used as stated in the above third clause of the charge. *United Life, F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70; *Briggs v. North American & Mercantile Ins. Co.* 53 N. Y. 446, 449.

Exception was also taken to the charge of the judge explaining the meaning of the word "explosion" as used in the policy. Upon that the court charged:

"Now, gentlemen of the jury, when the word 'explosion' was used in the policy, the company as ordinary men,—at least its officers were ordinary men, and not, as I assume, scientific men,—and the party insured an ordinary man, are presumed to have understood the word 'explosion' in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word. And, after all, the question here being explosion or non-explosion, is, What do you, as ordinary men, understand occurred at that time in the light of all the testimony? Was it an explosion in the ordinary and popular sense of that word, or was it a fire with a subsequent explosion or a subsequent collapse of the building as a sequence to the fire?"

The plaintiff claimed there was some evidence that the collapse of the building was the result, not of explosion, but of rapid combustion of the gasoline vapor, which first expanded the atmosphere of the cellar, and then, through cooling, produced a vacuum that caused the crushing in of the floor by the unresisted pressure of the external atmosphere.

With reference to that contention the court charged:

"If the jury believe from the evidence that on the 28th day of September, 1896, the commodities of the plaintiff mentioned in the policy of insurance, offered in evidence, were destroyed *or injured or lost in [53] the manner testified to by the plaintiff's witnesses; and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any nonexplosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured was the immediate result thereof,—then the loss was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

We think these two extracts from the charge of the judge fairly presented the question to the jury, and the exception to the charge is not available.

We find no error in the case, and the judgment of the Court of Appeals is affirmed.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plff. in Err.,

v.

H. W. HICKMAN, James Cowgil, and Joseph Flory, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri.†

(See S. C. Reporter's ed. 53-62.)

Removal of causes—state as real party.

The state is not the real party plaintiff, so as to preclude a removal of the cause to a Federal court for diverse citizenship, in a suit insti-

†This case appears in the Official Report under the title of *Missouri, K. & T. R. Co. v. Missouri Railroad & Warehouse Comrs.*

NOTE.—On removal of causes generally—see notes to *Whelan v. New York, L. E. & W. R. Co.* (C. C. N. D. Ohio) 1 L. R. A. 65; *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 346; and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

On removal of causes from state to Federal courts, where the Constitution of the United States, or an act of Congress, or a treaty comes in question—see note to *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656. See also *Ferguson v. Ross* (C. C. E. D. N. Y.) 3 L. R. A. 322, and note; *Austin v. Gagan* (C. C. N. D. Cal.) 5 L. R. A. 476, and note.

tuted by railroad commissioners under Mo. Rev. Stat. 1899, § 1150, to restrain a railroad company from violating the law and the order of the commissioners with respect to rates, although the state is contingently liable for the costs of the litigation, and might have some indirect and remote pecuniary interest by reason of the fact that forfeitures and penalties for disobedience of the orders of the court would go to a county school fund.

[No. 11.]

*Argued and Submitted October 16, 1901.
Decided November 11, 1901.*

IN ERROR to the Supreme Court of the State of Missouri to review a decision affirming a decree in a suit in which the state court had refused to order a removal to a Federal court. *Reversed.*

See same case below, 151 Mo. 644, 52 S. W. 351.

Statement by Mr. Justice **Brewer**:

[54] *This case involves the question of removal from a state to a Federal court.

The state of Missouri has a body of statutes for the regulation of railroads. By one section a board of railroad commissioners is created. To this board is committed the duty of supervising the conduct and charges of railroads, of hearing and deciding complaints against them, and making such orders as the circumstances require. Section 1143, Rev. Stat. Mo. (1899), identical with § 2646, Rev. Stat. Mo. (1889), contains this provision:

"Sec. 1143. Commissioners to See to Enforcement of Article—Investigate Complaints.—It shall be the duty of the railroad commissioners of this state to see that the provisions of this article are enforced. When complaint is made in writing by any person having an interest in the matter about which complaint is made, that any rate or rates established by any common carrier are unreasonable, unjust, or extortionate, or that any of the provisions of this article have been or are being violated, it shall be the duty of said railroad commissioners to proceed at once to investigate such complaint and determine the truth of the same."

The section also authorizes the commissioners to summon witnesses, to punish for failure or refusal to attend or testify, declares that any common carrier wilfully or knowingly obstructing or preventing the commissioners from making such investigations shall be deemed guilty of a misdemeanor and punished by a fine. Other sections provide for penalties and forfeitures. In § 1144, the same as § 2647, Rev. Stat. 1889, is this clause:

"Sec. 1144. Forfeitures, How Recovered and Disposed of.—The forfeitures and penalties herein provided for shall go to the county school fund of the county where sued for, and may be recovered in a civil action in the name of the state of Missouri, at the relation of the board of railroad commissioners to the use of said fund."

183 U. S.

Section 1150 (§ 2653, Rev. Stat. 1889) reads as follows:

"Sec. 1150. Proceedings when Order of Commissioners is Disobeyed—Circuit Court—Enforce or Renew Order—Proceedings.—*Where the complaint involves either a private or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent, or employee thereof, shall violate, refuse, or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any circuit court at any county in this state into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable. And such notice may be served on such common carrier, its officers, agents, or servants, in such manner as the court may direct; and said court shall proceed to hear and determine the matter speedily in such manner as to do justice in the premises; and to this end said court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as may seem needful to enable it to form a just judgment in the matter of such petition. On such hearing the report of said commissioners shall be prima facie evidence of the matter therein stated; and if it be made to appear to the court on such hearing, or on report of such persons appointed as aforesaid, that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. If such court shall hold and decide that any order of said board of railroad commissioners involved in such proceeding was not a lawful order, said court shall, without any reference to the regularity or legality of the proceedings of said board or of the order thereof, proceed to make such order as the said board should have made, and to enforce said order by the process of said court, and to enforce and collect *the forfeitures and penalties herein provided in all respects according to the provisions of this act. And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other per-

son failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of \$100 per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. When the subject in dispute shall be of the value of \$100 or more, either party to such proceeding before such court may appeal to the proper appellate court in the state, in the same manner that appeals are taken from such courts in this state in other proceedings involving like sums of money; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless stay of proceedings be ordered by the court from which the appeal is taken, or by the appellate court to which the appeal is taken, upon the application of the appealing party. Whenever any such petition shall be filed by the commissioners as aforesaid it shall be the duty of the attorney general, when requested by said commissioners, to prosecute the same. All proceedings commenced upon such petition shall, [57] upon application of the *petitioner, be advanced upon the docket and take precedence of any other case upon the docket except criminal cases. The costs of such proceedings may be, with the approval of the attorney general and governor of the state, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case."

Under the authority of these statutes, upon a hearing after complaint and notice, the railroad commissioners found that the railway company was charging excessive and illegal rates for travel over what is known as the Boonville bridge across the Missouri river, and made and entered of record an order directing it to discontinue such charges. This order was dated July 22, 1895. The railway company not complying with the order, a suit was instituted on August 17, 1895, in the circuit court of Cooper county, Missouri, by such commissioners, setting forth the facts and praying process, mandatory or otherwise, to restrain the defendant from further continuing to violate the law

and the order of the commissioners. The company in due time filed a petition for removal to the circuit court of the United States, alleging that it was a corporation created and existing under the laws of the state of Kansas and a citizen of that state, and that the plaintiffs were citizens of the state of Missouri. No question was made as to the sufficiency of the petition and bond in respect to any formal matter. The state court refused to order the removal, notwithstanding which the railway company took a transcript of the record and filed it in the Federal court, where a motion to remand was made and overruled. 97 Fed. 113. The state court, after refusing to order the removal, proceeded with the hearing of the case, the railway company declining to take any part therein. On such hearing a decree was entered in accordance with the petition of the railroad commissioners. This decree was appealed *to the supreme court of the [58] state, and by that court on June 30, 1899, affirmed. 151 Mo. 644, 52 S. W. 351.

Mr. George P. B. Jackson argued the cause and filed a brief for plaintiff in error:

The circuit court of Cooper county was without jurisdiction to try and determine this case. Therefore the judgment of the supreme court of Missouri affirming the judgment of the circuit court should be reversed. When the petition and bond for removal were filed the state court had nothing to do except to make an order transferring the case to the Federal court. The making of such order was not essential to the jurisdiction of the Federal court.

Shepherd v. Bradstreet Co. 65 Fed. 142.

When the proper application for removal is made, the jurisdiction of the state court ceases, whether that court grants or refuses an order of removal. After that the further proceedings in the state court are "*coram non iudice*, and absolutely void."

Virginia v. Rives, 100 U. S. 313, *sub nom. Ex parte Virginia*, 25 L. ed. 667; *Stanley v. Chicago, R. I. & P. R. Co.* 62 Mo. 508; *Bcery v. Chicago, R. I. & P. R. Co.* 64 Mo. 533; *Black's Dillon. Removal of Causes*, § 192.

If the state court still assumes to exercise jurisdiction, the party seeking the removal may still continue in the state court and make defense, and does not thereby prejudice his right to insist on removal and on the jurisdiction of the Federal court.

Black's Dillon, Removal of Causes, § 193.

If under such circumstances judgment is rendered against him in the state court, and on appeal the same is affirmed in the state supreme court, then this court will, on writ of error, reverse the judgment of the state court, because there was no jurisdiction in that court to render any judgment.

Oakley v. Goodnow, 118 U. S. 43, 30 L. ed. 61, 6 Sup. Ct. Rep. 944; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

The state courts were without jurisdiction to pass upon the question of removability of the case, because it is conceded that it does

not appear upon the face of the papers that the state has any interest; but that is to be ascertained, if it can be, by an investigation, and by going beyond the nominal parties. The Federal court alone has power to make that investigation of what exists outside the record.

Black's Dillon, Removal of Causes, §§ 191, 192; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; *Carson v. Hyatt*, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306.

The state is not a party to this suit, and has no pecuniary interest in it. It has no more interest in this controversy than it has in having the law enforced in any case. The case was therefore removable to the Federal court, and the state courts had no jurisdiction over the case after the filing of the petition and bond for removal.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Hickman v. Missouri, K. & T. R. Co.* 97 Fed. 113.

Regardless of the name in which the suit was commenced, regardless of who may be designated as plaintiff, the question that is to determine the jurisdiction of the Federal court is simply, Will the judgment or decree sought operate upon the pecuniary and material interests of the state of Missouri, or upon the interests of one or more of her citizens?

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *McWhorter v. Pensacola & A. R. Co.* 24 Fla. 417, 2 L. R. A. 504, 5 So. 129; *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. 883; *Mercantile Trust Co. v. Texas & P. R. Co.* 51 Fed. 529; *Richmond & D. R. Co. v. Trammel*, 53 Fed. 196.

The statute of Missouri under which this suit was commenced negatives the contention that the state is a party to the proceeding.

Mo. Rev. Stat. 1889, § 2653; *Hickman v. Missouri, K. & T. R. Co.* 97 Fed. 113.

The defendants in error were to be regarded in the nature of trustees of an express trust, and could maintain the suit in their own names without joining or naming the persons for whose benefit they sued.

Mo. Rev. Stat. 1889, § 1991.

The jurisdiction of the Federal court, and consequently the right to remove a case, depends on the citizenship of administrators, executors, trustees, receivers, and others similarly situated.

New Orleans v. Gaines, 138 U. S. 595, sub nom. *New Orleans v. Whitney*, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. ed. 183 U. S. U. S., Book 46.

380, 7 Sup. Ct. Rep. 193; *Knapp v. Troy & B. R. Co.* 20 Wall. 117, 22 L. ed. 328; *Gardner v. Brown*, 21 Wall. 36, 22 L. ed. 527; *Dore v. Tulleys*, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; Black's Dillon, Removal of Causes, §§ 91-94.

There is no merit in the contention of defendants in error that this court is concluded by the construction of the statute of Missouri by the supreme court of that state in this case. The statute was not before the court for construction. There was no dispute as to the meaning of the statute. The court did not assume to construe it, but only referred to it by way of argument, making certain deductions from its undisputed meaning. Not only was there no clear case of construction, but there was no such established construction as to assimilate it to the rule of *stare decisis*, which this court had held necessary.

Carroll v. Carroll, 16 How. 275, 14 L. ed. 936. See also *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382; *Venic v. Murdock*, 92 U. S. 494, 23 L. ed. 583.

Especially are the above tests applied and insisted upon in cases involving the jurisdiction of Federal courts.

See *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539.

Messrs. **Edward C. Crow** and **Samuel B. Jeffries** submitted the cause for defendants in error:

The state court committed no error in retaining cognizance of the case and proceeding to final judgment.

Hickman v. Missouri, K. & T. R. Co. 151 Mo. 648, 52 S. W. 351; 25 Stat. at L. 434, chap. 866; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Yulee v. Vose*, 99 U. S. 539, 25 L. ed. 355; *Removal Cases*, 100 U. S. 474, sub nom. *Meyer v. Delaware R. Constr. Co.* 25 L. ed. 599.

The United States district court, as shown by the record, pleadings, and motion to remove, had no jurisdiction of the cause.

24 Stat. at L. 552, chap. 373; 25 Stat. at L. 433, chap. 866; *Stone v. South Carolina*, 117 U. S. 431, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Ames v. Kansas ex rel. Johnston*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Alabama v. Wolfe*, 18 Fed. 836; *Indiana use of Delaware County v. Alleghany Oil Co.* 85 Fed. 870; *State ex rel. Muncie v. Lake Erie & W. R. Co.* 85 Fed. 1; *Ferguson v. Ross*, 3 L. R. A. 322, 38 Fed. 161; *Sundry African Slaves v. Madrazo*, 1 Pet. 110, 7 L. ed. 73; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Browne v. Strode*, 5 Cranch, 303, 3 L. ed. 108; *Maryland use of Markley v. Baldwin*, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; *McNutt v. Bland*, 2 How. 15, 11 L. ed. 161.

When the record, together with the petition for removal, fails to present a removable cause, the state court will properly deny the application, and proceed with the trial.

Black's Dillon, Removal of Causes, § 191:

Home Ins. Co. v. Curtis, 32 Mich. 402; *Armory v. Armory*, 95 U. S. 186, 24 L. ed. 428; *Kanouse v. Martin*, 14 How. 23, 14 L. ed. 310; *Mahone v. Manchester & L. R. Corp.* 111 Mass. 72, 15 Am. Rep. 9; *National Union Bank v. Dodge*, 42 N. J. L. 316; *Carswell v. Schley*, 59 Ga. 17; *Dahlonaga Co. v. Frank W. Hull Merchandise Co.* 88 Ga. 339, 14 S. E. 473; *Indianapolis, B. & W. R. Co. v. Risley*, 50 Ind. 60; *Blair v. West Point Mfg. Co.* 7 Neb. 146.

Having once acquired jurisdiction, the state court should proceed until it is judicially informed that its power over the cause has been suspended.

Carswell v. Schley, 59 Ga. 17; *Armory v. Armory*, 95 U. S. 186, 24 L. ed. 428; Black's Dillon, Removal of Causes, § 191; *Gregory v. Hartley*, 113 U. S. 742, 28 L. ed. 1150, 5 Sup. Ct. Rep. 743; *National Docks & N. J. Junction Connecting R. Co. v. Pennsylvania R. Co.* 52 N. J. Eq. 58, 28 Atl. 71; *Removal Cases*, 100 U. S. 457, sub nom. *Meyer v. Delaware R. Constr. Co.* 25 L. ed. 593.

A state is not a citizen within the meaning of the removal act of Congress.

Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Ames v. Kansas ex rel. Johnston*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Ferguson v. Ross*, 3 L. R. A. 322, 38 Fed. 161; Black's Dillon, Removal of Causes, § 81; *Postal Teleg. Cable Co. v. United States*, 155 U. S. 432, sub nom. *Postal Teleg. Cable Co. v. Alabama*, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *Indiana v. Tolleston Club*, 53 Fed. 18; *Minnesota v. Guaranty Trust & S. D. Co.* 73 Fed. 914; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260.

Courts will look behind the nominal parties, and examine the entire record to determine the real parties in interest. This is always true in passing upon the question of jurisdiction.

Ferguson v. Ross, 3 L. R. A. 322, 38 Fed. 161; Black's Dillon, Removal of Causes, § 86; *Maryland use of Markley v. Baldwin*, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278.

The state of Missouri is the real party plaintiff, the commissioners being the nominal parties.

Ferguson v. Ross, 3 L. R. A. 322, 38 Fed. 161; *Hickman v. Missouri, K. & T. R. Co.* 151 Mo. 648, 52 S. W. 351.

The state court is at liberty to determine for itself whether on the face of the record a removal has been effected.

Chesapeake & O. R. Co. v. White, 111 U. S. 134, 28 L. ed. 378, 4 Sup. Ct. Rep. 353; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *New Orleans, M. & F. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799.

The state of Missouri is not undertaking to invoke the protection of the 11th Amendment to the Constitution of the United States; it is not being sued, but is itself the suitor. Therefore the ease of *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38

L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, is not in point.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

Even though it is held that the same construction should be given the statute in relation to the removal of causes from a state court to the district court as has been placed upon the 11th Amendment to the Constitution of the United States, we submit that the state of Missouri has such a pecuniary interest in the result of this litigation as to constitute it a real and substantial party hereto.

Mo. Rev. Stat. 1899, §§ 1150, 1151, 1155.

When it appears that the state court has construed its own Constitution and statutes applicable to the case, the Federal court is bound by the decision of the state court in regard to the meaning of the Constitution and laws of its own state, and its decision upon such a state of facts will be followed by the Federal courts. This is true in all cases where the writ of error is to a state court.

Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

It having been determined by the state court that under the statutes of Missouri the state has a pecuniary interest in the subject-matter of the controversy, the Federal courts will adopt the same as conclusive, and not undertake to overturn it.

Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Powell v. Brunswick County*, 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 166; *Turner v. Wilkes County*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Lawler v. Walker*, 14 How. 149, 14 L. ed. 364.

Under the removal act of Congress it is not necessary that the state should have a pecuniary interest in the result of the ease in order to constitute it a party to the proceeding and prevent a removal from the state court. A "governmental interest" is sufficient.

The state, in the exercise of its sovereign power, has certain duties to perform toward its people, which duties are solely governmental. In the enforcement of the rights of the people the state alone, in many cases, can act. The rights of citizens, being merged one with another, constitute the sovereign power of the people or state, and as such can only proceed in the name of the state.

Easton & A. R. Co. v. Greenwiche, 25 N. J. Eq. 566; *Allen v. Freeholders of Monmouth County*, 13 N. J. Eq. 68; *Higbee v. Camden & A. R. Co.* 19 N. J. Eq. 276; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332.

The supervisory or visitatorial power over corporations in this country is lodged in the state, and may be exercised in such manner as may be designated by legislative authority. Generally, it is exercised through the medium of the courts and public officers or persons authorized or appointed by legislative sanction.

2 Kent, Com. 300; *Lewis v. Whittle*, 77

Va. 415; 1 Elliott, Railroads, § 12; 4 Thomp. Corp. §§ 5473, 5474; 2 Beach, Corp. §§ 831, 832; 1 Thomp. Corp. § 908.

The visitatorial or superintending power of the state over corporations will always be exercised through the medium of courts, by writs of mandamus, quo warranto, or prohibition, as the exigencies of the case may require.

State ex rel. Cuppel v. Milwaukee Chamber of Commerce, 47 Wis. 680, 3 N. W. 760; 2 Beach, Corp. §§ 831, 832; 4 Thomp. Corp. § 5474.

Railroad companies are given certain prerogative franchises and privileges for public purposes, in return for which the state retains a right of supervision and control in excess of that exercised over purely private corporations. In the very grant of the franchise there is, in effect, an implied condition that it shall be held as a public or quasi-public trust.

Messenger v. Pennsylvania R. Co. 36 N. J. L. 407, 13 Am. Rep. 457; 1 Elliott, Railroads, §§ 1, 2.

In this matter the state has a legal entity separate and apart from the persons composing it, very much like private corporations, which, on account of their legal entity, act under their corporate names independent of the persons composing them. The legal entity alone controls as to whether a corporation is a proper party. This is also true in determining the question of jurisdiction when a corporation is a party.

Tipppecanoe County v. Lafayette, M. & B. R. Co. 50 Ind. 85; *Fictsam v. Hay*, 122 Ill. 293, 13 N. E. 501; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Gelpcke v. Blake*, 19 Iowa, 263.

Railroads, like telegraph, telephone, and turnpike companies, are quasi-public servants. The nature of their business makes them so, and they are therefore bound to serve the public on reasonable terms, with impartiality. They are endowed with the right to appropriate private property, upon the sole ground that they are quasi-public servants, their business being that in which the public has a direct and positive interest.

Com. v. Lowell Gas Co. 12 Allen, 75; *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382; *Charles River Bridge v. Worcester Bridge*, 11 Pet. 420, 9 L. ed. 773; *Worcester v. Western R. Corp.* 4 Met. 564; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Gibson v. Mason*, 5 Nev. 283; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755.

While the ownership of a railroad may be in private individuals, yet the use is public, in which the public have an easement similar to that possessed in public highways.

Worcester v. Western R. Corp. 4 Met. 564; *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Gibson v. Mason*, 5 Nev. 283.

Under the Constitution of Missouri all railways constructed or to be constructed are denominated as and declared to be "public highways," thereby bringing them clearly within the control and supervision of the state in the exercise of its sovereign power.

Mo. Const. art. 12, § 14.

183 U. S.

Nothing but the right to remove the case to the district court will be considered.

Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

*Mr. Justice **Brewer** delivered the opinion[58] of the court:

The single question presented for our consideration is whether the railway company was entitled to remove this suit from the state to the Federal court. The state court refused the removal, and the Federal court, on the other hand, denied a motion to remand. Under these circumstances this court has jurisdiction to determine whether there was error on the part of the state court in retaining the case. *Removal Cases*, 100 U. S. 457, *sub nom. Meyer v. Delaware R. Constr. Co.* 25 L. ed. 593; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 582, 40 L. ed. 536, 542, 16 Sup. Ct. Rep. 389.

On the face of the record the railway company was entitled to a removal. The plaintiffs were citizens of Missouri, the state in which the suit was brought. The railway company was a citizen of the state of Kansas. There was, therefore, diverse citizenship, the defendant a citizen of another state than that in which the suit was brought petitioning for removal, and the removal appears perfect in form.

But it was held by the supreme court of the state of Missouri that it was proper to go behind the face of the record and inquire who was the real party plaintiff, and, making such examination, that court decided that the real party plaintiff was the state of Missouri. If that conclusion be correct then no removal in this case was justifiable, because a state is not a citizen within the meaning of the removal acts. *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; *Postal Teleg. Cable Co. v. United States*, 155 U. S. 482, *sub nom. Postal Teleg. Cable Co. v. Alabama*, 39 L. ed. 231, 15 Sup. Ct. Rep. 192.

Was the state the real party plaintiff? It was at an early *day held by this court,[59] construing the 11th Amendment, that in all cases where jurisdiction depends on the party it is the party named in the record. *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. But that technical construction has yielded to one more in consonance with the spirit of the amendment, and in *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164, it was ruled upon full consideration that the amendment covers, not only suits against a state by name, but those also against its officers, agents, and representatives where the state, though not named as such, is nevertheless the only real party against which in fact the relief is asked, and against which the judgment or decree effectively operates. And that construction of the amendment has since been followed.

That amendment refers only to suits brought against a state. But applying the same principles of construction to the removal acts and to cases in which it is claimed that the state, though not the nominal, is in fact the real, party plaintiff, it may fairly be held that the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. Such a case was *Ferguson v. Ross*, 3 L. R. A. 322, 38 Fed. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the state, and it was held by the circuit court for the eastern district of New York that the action was one in which the real party plaintiff was the state. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery.

But this case is not like *Ferguson v. Ross*, and does not come within the rule above stated. It is not an action to recover any money for the state. Its results will not inure to the benefit of the state as a state in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They [60] are the real *parties in interest, and in respect to whom the decree will effectively operate.

It is true that the state has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation, for if that were so the state would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common. The interest must be one in the state as an artificial person. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362-390, 38 L. ed. 1014-1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

While not controverting these general propositions, the supreme court of the state was of the opinion that the state had a direct, pecuniary interest in the result of the litigation, by virtue, first, of its possible liability for costs, and, secondly, because were the litigation pushed to the extreme there might be penalties imposed which would, when collected, pass into the school fund of the state. We quote its language:

"This section of the statute makes provision for a civil action to enforce the re-

quirement in behalf of two classes of persons: First, 'the board of railroad commissioners;' second, 'any person or company interested in such order or requirement.' Now, while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the state has no pecuniary interest, it is not so in actions under this statute by persons of the first class, its board of railroad commissioners. In such actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid under the express provision of the statute out of any money in the treasury not otherwise appropriated, and is, moreover, pecuniarily interested not only by reason of the liabilities it incurs in the action, but because of its pecuniary interest in the judgments which may be obtained and which when pushed to the final extremity of execution may result in the payment of penalties, not directly into the state treasury, it is true, but into the treasury of one of its political subdivisions for the benefit *of the public schools, to the [61] establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the state, in addition to its governmental, has a real pecuniary, interest in the subject-matter of this controversy, and that the suit is being prosecuted for its benefit in every sense, and is not subject to removal to the United States court, and we so hold."

We are unable to concur in these views. Whatever may be the result of any subsequent or ancillary proceeding, the direct object of this suit is to obtain a decree of the court commanding the railway company to comply with the order of the commissioners. Such a decree is similar to the ordinary decrees of a court of equity, and it is familiar that a court of equity may enforce compliance with its orders and decrees by penalties upon the delinquents. So that if this possible pecuniary result is sufficient to make the state the real party plaintiff it would follow that in Missouri the state is the real party plaintiff in every equity suit, because in every equity suit such penalties may be imposed.

Neither can it be held that the state's voluntary assumption of the costs of the litigation when the decree is adverse to the railroad commissioners makes it the real party plaintiff. That is simply an incidental matter, and does not determine its relations to the suit any more than its payment of the salary of the judge, fees of jurors, or any other expenses of the litigation. We are of opinion, therefore, that the party named in the record as plaintiff is the real party plaintiff, and that the voluntary assumption by the state of the costs in some contingencies of the litigation, or the indirect and remote pecuniary results which may follow from a disobedience of the orders of the court, do not make it the party to whom alone the relief sought inures, and in whose

favor a decree for the plaintiff will effectively operate.

The judgment of the Supreme Court of the State of Missouri is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice **Gray** was not present at the argument, and took no part in the decision of this case.

[62] *DISTRICT OF COLUMBIA, *Appt.*,
v.

COLUMBUS J. ESLIN, Administrator of
Daniel A. Connolly, Deceased, *et al.*

(See S. C. Reporter's ed. 62-66.)

Appeal—statutes.

The repeal, by the act of Congress of March 3, 1897, chap. 387 (29 Stat. at L. 665, 669), of the act of February 13, 1895, chap. 87 (28 Stat. at L. 664), and the enactment that all proceedings pending under the act so repealed shall be vacated, and that no judgment heretofore rendered in pursuance of said act shall be paid, precludes the Supreme Court of the United States from taking jurisdiction of an appeal by the District of Columbia from a judgment allowing certain claims, although the application for the appeal had been made and notice given before the repeal of the statute.

[No. 36.]

Argued October 23, 1901. Decided November 4, 1901.

A PPEAL from a judgment of the Court of Claims against the District of Columbia. *Dismissed* for want of jurisdiction.

The facts are stated in the opinion.

Mr. **Robert A. Howard** argued the cause, and, with *Assistant Attorney General Pratt*, filed a brief for appellant.

Messrs. George A. King and J. W. Douglass argued the cause and filed separate briefs for appellees.

Mr. **William B. King** also filed a brief for appellees.

[62] *Mr. Justice **Harlan** delivered the opinion of the court:

By an act of Congress approved June 16th, 1880, chap. 243, the jurisdiction of the court of claims was extended to all claims then existing against the District of Columbia, arising out of contracts by the late board of public works and extensions thereof made by the commissioners of the District, as well as to such claims as had arisen out of contracts by the district commissioners after the passage of the act of June 20th, 1874 (18 Stat. at L. 116, chap. 337), and all claims for work done by the order

or direction of the commissioners and accepted by them for the use, purposes, or benefit of the District prior to March 14th, *1876. It was provided that all such claims [63] against the District should in the first instance be prosecuted before the court of claims by the contractor, his personal representatives, or his assignee, in the same manner and subject to the same rules in the hearing and adjudication of the claims as the court then had in the adjudication of claims against the United States. 21 Stat. at L. 284, 285, §§ 1, 2.

By the same act it was provided that if no appeal was taken from the judgment of the court of claims in the cases therein provided for, within the term limited by law for appealing from the judgments of that court, "and in all cases of final judgments by the court of claims, or, on appeal, by the supreme court where the same are affirmed in favor of the claimant, the sum due thereby shall be paid, as hereinafter provided, by the Secretary of the Treasury." § 5.

These consolidated suits were brought under the above act, and within the time limited by its provisions.

In the progress of the cause a judgment was rendered in one of the cases in favor of the District for \$658.05, and in the others the petitions were severally dismissed. New trials were granted in each case, and time was given for further proof.

By an act of Congress approved February 13th, 1895, chap. 87, amendatory of the above act of June 16th, 1880, it was provided that in the adjudication of claims brought under the act of 1880 "the court of claims shall allow the rates established and paid by the board of public works; and whenever said rates have not been allowed, the claimant or his personal representative shall be entitled, on motion made within sixty days after the passage of this act, to a new trial of such cause." 28 Stat. at L. 664.

The cases were heard on the exceptions of the defendant to a referee's report, and the aggregate amount found due from the District was \$13,458.33. And the record states that upon the facts set forth in the referee's report "the court, under the act of February 13, 1895 (28 Stat. at L. 664, chap. 87), and in accordance with the agreement of the parties, decides, as conclusions of law as to the said sum of \$13,458.33, so found due from the District of Columbia, that the several claimants named below each recover judgment against the United States in the amounts stated, *viz.*" *Here follows. [64] in the record, a statement of the amount found due each claimant, the aggregate being the above sum.

The order referring the cause for a statement of the several accounts was made after the passage of the act of February 13th, 1895, and the referee's report was made pursuant to the provisions of that act.

In accordance with the findings of fact and of law the court, on the 22d of June, 1896, entered final judgment in favor of the

NOTE.—On the effect of statutes to defeat or preserve pending civil actions—see *Pritchard v. Savannah Street & Rural Resort R. Co. (Ga.)* 14 L. R. A. 721, and note. And see note to *United States v. Tynen*, 20 L. ed. U. S. 153.
183 U. S.

respective claimants for the amounts found due them respectively, the judgment upon its face purporting to be "within the intent and meaning of the act of February 13th, 1895."

On the 3d of September, 1896, the District of Columbia, by the Attorney General of the United States, made application for and gave notice of an appeal to this court. Subsequently, February 25th, 1897, the District moved to set aside the judgment of June 22d, 1896, and to grant a new trial.

While the motion for new trial was pending Congress passed the act of March 3d, 1897, chap. 387, making appropriations for the expenses of the government of the District for the fiscal year ending June 30th, 1898. That act, among other things, provided that the above act of February 13th, 1895, "be, and the same is hereby, repealed, and all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid." 29 Stat. at L. 665, 669.

Our attention was called by counsel to the case of *Re Hall*, 167 U. S. 38, 41, 42 L. ed. 69, 70, 17 Sup. Ct. Rep. 723, 724. in which it is stated that the court of claims made the following general order: "The act of 13th February, 1895, 28 Stat. at L. 664, chap. 87, having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments, and all other papers in such suits be restored to and retained upon the files of the court without further proceedings being had." This order is not found in the present record.

What was the effect of the act of 1897 upon the power of this court to re-examine the final judgment of the court of claims in these cases? In our opinion, there can be only one solution of this question.

[65] The present cases were brought under the act of 1895, and *were determined with reference to its provisions. In view of the repeal of that act by Congress, the requirement that pending proceedings be vacated, and the express prohibition of the payment of judgments theretofore rendered, any declaration by this court as to the correctness of the final judgment entered by the court of claims under the act of 1895 would be useless for every practical or legal purpose, and would not be in the exercise of judicial power within the meaning of the Constitution. It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897. A proceeding against the Secretary having that object in view would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the
86

government. It seems, therefore, clear that a declaration by this court in relation to the matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties. What was said by Chief Justice Taney in *Gordon v. United States*, 117 U. S. 697, 702, may be here repeated. After stating that this court should not express an opinion where its judgment would not be final and conclusive upon the rights of the parties, and that it was an essential part of every judgment passed by a court exercising judicial power that it should have authority to enforce it or to give effect to it, the Chief Justice said: "It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; *yet it is the whole power that the court [66] is allowed to exercise under this act of Congress." See also *Hayburn's Case*, 2 Dall. 409, 1 L. ed. 436; *United States v. Ferreira*, 13 How. 40, 46, 14 L. ed. 42, 44; *Re Sanborn*, 148 U. S. 222, 37 L. ed. 429, 13 Sup. Ct. Rep. 577; and *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 483, 486, 38 L. ed. 1047, 1059, 1060, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

It results that, as no judgment now rendered by this court would have the sanction that attends the exercise of judicial power, in its legal or constitutional sense, *the present appeal must be dismissed* for want of jurisdiction and without any determination of the rights of the parties.

It is so ordered.

GULF & SHIP ISLAND RAILROAD COMPANY *et al.*, Plffs. in Err.,
v.

GEORGE P. HEWES, Tax Collector, etc.

(See S. C. Reporter's ed. 66-78.)

Corporations — charters — exemptions from taxation — impairment of obligation of contract — repeal of exemption.

1. A bill averring that a railroad charter, and an exemption from taxation for a term of twenty years contained therein, constitute a

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On the power of state legislature to exempt
183 U. S.

contract with the state, which is violated by subsequent legislation repealing the exemption, raises a Federal question for which there is sufficient color to sustain the jurisdiction of the Supreme Court of the United States on writ of error to a state court which has decided against the exemption.

2. A certificate of the chief justice of a state court, stating that the validity of state legislation subsequent to the charter of a corporation was drawn in question upon the ground that it impaired the obligation of a contract, and that the decision was in favor of the validity of such legislation, may be resorted to, in the absence of an opinion, to show that a Federal question which was otherwise raised in the record was actually passed upon by the court.
3. The charter of the Gulf & Ship Island Railroad Company granted by Miss. act February 23, 1882, even if it be considered as a revival of the rights and privileges which had formerly belonged to a company chartered in 1850, is taken subject to the provision of Miss. Const. 1869, which requires the property of such corporations to be taxed, like that of individuals, in proportion to its value.
4. A subrogation by statute of one corporation to the rights and privileges of a former corporation does not include an immunity from taxation.
5. The exemption from taxation for a term of twenty years, which Miss. act February 23, 1882, § 18, assumes to give to the railroad company thereby incorporated, must, in the light of the state Constitution, providing for the taxation of the property of corporations in proportion to its value, and of the prior decisions of the state courts, be deemed to be subject to the power of the legislature to alter, amend, or repeal it.
6. The question whether or not a repealable exemption from taxation, given by state law, has been in fact repealed by a subsequent statute, is one which turns upon the construction of a state law, and is not reviewable on writ of error from the Supreme Court of the United States to a state court, although it would be otherwise if the exemption were irrevocable and thus constituted a contract.
7. Taxes upon the privileges of corporations, being taxes upon their property, are subject to the limitations of Miss. Const. 1869, art. 12, §§ 13, 20, requiring the property of corporations to be taxed, like that of individuals, in proportion to its value.

[No. 5.]

Argued October 15, 16, 1901. Decided November 18, 1901.

N ERROR to the Supreme Court of the State of Mississippi to review a decision affirming a decree sustaining a demurrer to

from taxation—see Hogg v. Mackay (Or.) 19 L. R. A. 77, and note.

On the effect of decisions of state courts in Federal courts—see notes to United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490, and Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

That the United States Supreme Court will not review decisions of state courts construing state statutes, unless specially authorized—see note to Commercial Bank v. Buckingham, 12 L. ed. U. S. 169.

As to construction and effect of state laws and Constitutions and state decisions in regard

183 U. S.

a bill for an injunction against the collection of taxes assessed against a railroad company. *Affirmed.*

Statement by Mr. Justice **Brown**:

*This was a bill in equity filed in the court [67] of chancery of Harrison county, Mississippi, by the railroad company, against the tax collector of that county, to enjoin the collection of certain property and privilege taxes assessed against the railroad company for the fiscal year 1896.

The bill averred in substance the incorporation of the railroad company by an act of the legislature of the state of Mississippi, approved February 23, 1882, the 18th section of which act declared "that said company, its stock, its railroads and appurtenances, and all its property in this state, necessary or incident to the full exercise of all powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act;" that immediately thereafter the corporation entered upon the construction of its road, and at the time of the filing of the bill had about 75 miles in operation; that, notwithstanding this charter exemption, the state railroad commission has returned its property for taxation, and that defendant has demanded, not only a privilege tax, but a property tax levied for state and county purposes, and threatens seizure of its property. Wherefore an injunction was prayed.

To this bill defendant interposed a demurrer for want of equity, and because the exemption was a mere bounty, repealable at the pleasure of the legislature, and void of any element of contract. The demurrer was sustained, and leave granted the plaintiff to amend its bill. Thereupon it filed an amendment alleging that the exemption in the charter constituted a contract between the plaintiff and the state, that the railroad was constructed upon the faith of such contract, and that it was not within the power of the state to repeal the exemption; and invoking in that connection the contract clause of the Constitution. Defendant again demurred. The demurrer was sustained, *and an appeal granted to the supreme court of the state, which affirmed the decree of the court below. Whereupon plaintiff sued out a writ of error from this court, which defendant moved to dismiss. [68]

Messrs. Eaton J. Bowers and Edward Mayes argued the cause and filed a brief for plaintiffs in error.

to same—see note to Elmendorf v. Taylor, 6 L. ed. U. S. 290.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey (Vt.) 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; Montana Gre-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. 35 C. C. A. 12.

On change of decision of state courts as impairing obligation of contract—see note to Los Angeles v. Los Angeles City Water Co. 44 L. ed. U. S. 886.

Mr. R. C. Beckett argued the cause, and, with *Mr. Frank A. Critz*, filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[68] **Mr. Justice Brown* delivered the opinion of the court:

1. The motion to dismiss must be overruled. Counsel for the railroad company appears to have invoked the contract clause of the Constitution upon the original argument; but whether this be so or not the bill was subsequently amended under leave of the court, by averring that the charter and the exemption from taxation contained in the 18th section constituted a contract between the plaintiff corporation and the state of Mississippi that the state would not demand any taxes upon its capital, property, or stock for the term of twenty years from the enactment of the charter; and that, if said exemption from taxation had been repealed, which the company denied, it was not within the power of the state to repeal such exemption, for the reason that the same constituted a contract upon which the company had acted, and upon the faith of which it had constructed the road; and that such repeal was a violation of the contract clause of the Constitution. The Federal question was properly raised, and there is at least sufficient color for it to sustain our jurisdiction. No opinion was delivered by the supreme court, but the chief justice certifies that the validity of the state legislation subsequent to the charter of 1882 was drawn in question upon the ground of its impairment of the contract contained in such charter, and that the decision was in favor of the validity of such legislation. While such a certificate is insufficient to give

[69] us jurisdiction, where such jurisdiction does not appear in the record it may be resorted to, in the absence of an opinion, to show that a Federal question which was otherwise raised in the record was actually passed upon by the court. *Armstrong v. Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 41, 48, 45 L. ed. 415, 418, 21 Sup. Ct. Rep. 256; *Mississippi & M. R. Co. v. Rock*, 4 Wall. 177, 18 L. ed. 381; *Parmelee v. Lawrence*, 11 Wall. 36, 20 L. ed. 48; *Cross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940.

2. The bill set out, and, until the argument in this court, the plaintiff company relied solely upon, a charter granted February 23, 1882, by the legislature of Mississippi, to incorporate the Gulf & Ship Island Railroad Company, the 18th section of which declared "that in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this state will and will not impose thereon, it is hereby declared that said company, its stock, its railroad and appurtenances, and all its property in the state necessary or incident to

the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act."

To strengthen its position, and to enable the company to rally to its support an exemption antedating the Constitution of 1869, upon which the defendant relies, the plaintiff calls to our attention an act passed in 1850 to incorporate the Gulf & Ship Island Railroad Company, and a further act approved March 1, 1854, amendatory of that act, the 11th section of which declares "that the property and investments of the company connected with this enterprise, within this state, shall not be subject to taxation until the road shall be in full operation and completed."

The position of the plaintiff in this connection is that prior to the Code of 1857 there was no general law and no constitutional provision in any way restraining the legislature from granting irrevocable exemptions, and that the charter of 1882 was a mere continuance of the original charter of 1850-1854; that the construction of the road authorized by that charter *had never [70] been abandoned; and that so late as 1872 the legislature had adopted a memorial to Congress praying that a land grant made by Congress in 1858 for the benefit of the Gulf & Ship Island Railroad Company, and which had lapsed to the United States by the intervention of the Civil War, might be revived in favor of that railroad.

But we are of opinion that the charter of 1882 cannot be considered as a revival or continuation of the charter of 1854, since the names of the incorporators are entirely different, the routes of the two railroads are also different, and no reference is made in the charter of 1882 to the prior charters, although the names of the two corporations are identical. There is nothing in the act of 1882 to indicate even the existence of a prior act incorporating a road under the same name. It is true that at the same session of the legislature (1882) another memorial to Congress was adopted by the legislature for a revival of the grant of public lands made by the United States in 1856 to aid in the construction of the Gulf & Ship Island Railroad, but in this very memorial it was stated that "at its present session our legislature has granted a new act of incorporation with liberal provisions, thus again attesting the abiding and earnest interest felt by our people in this important work."

It is also true that on March 13, 1884, the legislature passed another act to facilitate the construction of the Gulf & Ship Island Railroad, and for other purposes, the 8th section of which declared "that said Gulf & Ship Island Railroad Company are hereby subrogated to all the rights and privileges heretofore granted by the state of Mississippi to the Gulf & Ship Island Railroad Company, and shall have the right to use and enjoy such field notes, maps, and surveys as have been heretofore made in the interest of said road as were authorized

and granted by the state under the acts approved March 2, 1854, and December 3, 1858." This is an effort to subrogate the new railroad to the rights and privileges of the former one, but its language contains an implied admission that, without such subrogation, the rights and privileges of the former company had lapsed, and that a new act was necessary to revive them. But if the [71] act be considered as a "revival of the rights and privileges which had formerly belonged to the old company, such rights and privileges would be subordinated to the provisions of the new Constitution of 1869, which in the meantime had been adopted. *Planters' F. & M. Ins. Co. v. Tennessee use of Memphis*, 161 U. S. 193, 198, 40 L. ed. 667, 668, 16 Sup. Ct. Rep. 466. In addition to all this, however, the better opinion is that a subrogation to the "rights and privileges" of a former corporation does not include an immunity from taxation. *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

We are unable to see that there is anything in this legislation to indicate that the plaintiff company stands in a position to escape the application of the Constitution of 1869. Indeed, it seems to us entirely clear that the injection of the charter of 1850-1854 into this case was a mere afterthought; and that the charter upon which the plaintiff must rely is that of 1882, set forth in this bill; and that such charter must be construed in subordination to the Constitution of 1869, which we now proceed to consider.

3. The only provisions of the Constitution pertinent to this case are the following sections of article 12:

"Sec. 13. The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals.

"Sec. 20. Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

As it is not altogether clear from the language of these sections whether it was competent for the legislature to grant to a railroad company an exemption from taxation, it is conceded by both sides to this controversy that we are bound to look to the decisions of the supreme court of Mississippi at the time this charter was granted, for their proper interpretation. *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968. While the question of contract or no contract in a particular case is one which must be determined by ourselves, every such alleged contract is presumed to have been entered into upon the basis and in contemplation of the existing Constitution and statutes, and upon the established construction theretofore put upon them by the highest judicial *authority of the state. *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008; *Wade v. Travis County*, 174 U. S. 499, 509, 43 L. ed. 1060, 1064, 19 Sup. Ct. Rep. 715, and cases cited.

[72] We are referred to the case of *Mississippi Mills v. Cook*, 56 Miss. 40, decided in 1878, 183 U. S.

four years prior to this charter, as settling the proper construction of these sections of the Constitution. Indeed, counsel stipulate that the stockholders invested their money in reliance upon this adjudication. The Mississippi Mills were chartered in 1871 for the purpose of manufacturing cotton and woolen fabrics, and in 1872 an act was passed, of which the Mississippi Mills were subsequently given the benefit, providing that all taxes upon the property of said company should be applied to the payment of debts which the company had incurred in the construction of their factory. In 1877 this act was so far amended as to be substantially repealed; and in 1878 the company filed a bill in chancery against the tax collector, setting up the acts of 1872 and 1873 as constituting a contract with the company, and alleging that the act of 1877 impaired the obligation of such contract, and was in violation of the Constitution of the United States.

The bill was held not to be maintainable, the court deciding:

(1) That it was not intended by § 13 of article 12 of the Constitution to confer power on the legislature to tax the property of corporations, because that existed without this section as an inherent legislative power.

(2) That the property of the corporations mentioned was declared to be *subject* to taxation, that is, liable to taxation, the same as that of individuals, but it was not necessarily to be *subjected* to taxation. Since overruled in *Adams v. Yazoo & M. Valley R. Co.* 77 Miss. 194, 28 So. 956.

(3) That any legislative act, "whether it be a charter or other form of law, which says it shall be exempt, and not subject to taxation, is in conflict with the Constitution." But that the legislature might exempt property of a certain class, whether the owners were corporations or natural persons, but corporate property could never be placed beyond the reach of the taxing power. "It may not be taxed, but it must be ever liable. It need not be *subjected*, but it must always be *subject*, to taxation, *the [73] same as that of individuals, for the Constitution so declares. The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper, in common with the property of individuals, which may be taxed or not for the time being." See also *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219; *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33.

(4) That it followed from this that it was competent for the legislature to modify or repeal the act of 1872, and that the repealing act of 1877 was constitutional, and operated as a repeal of the exemption. This was reaffirmed in *Attala County Supers. v. Kelly*, 68 Miss. 40, 8 So. 376; *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33.

(5) In a concurring opinion, delivered by the chief justice, he held that, if the exemp-

tion were granted in the form of a contract in the charter, it was prohibited.

Although the decision of the case was put upon the ground that the exemption from taxation contained in the acts of 1872 and 1873 was a mere bounty and subject to repeal by the legislature, the report would seem to indicate the opinion of the court to have been that no exemption was valid which was contained in the charter of a particular corporation (a question not necessarily involved); but whether this be so or not, it is entirely clear that the court intended to decide that, under the Constitution of 1869, any exemption granted by the legislature was a mere bounty and subject to repeal.

Under this construction of the Constitution it becomes unnecessary to decide whether the exemption contained in the charter of 1882 be void or not, since, as it appears by the certificate of the chief justice, the decision of the court below was put upon the ground that the subsequent legislation, and particularly the Annotated Code of 1892, which was construed by the court as repealing the exemption in the charter, was constitutional and valid. Indeed, counsel for the collector, in their brief, expressly disclaim any reliance upon the position that the exemption in this case was originally unconstitutional and void, putting their case expressly upon the ruling of the supreme court that such exemption had been repealed.

[74] *Holding, then, as we do, that the exemption was subject to repeal, it only remains to consider whether the Code of 1892 did in fact repeal and abrogate it. In this connection the state relies upon § 3744 of the Annotated Code of 1892, which declares that "following property, and no other, shall be exempt from taxation, to wit." Here follows a list of some twenty classes of property, among which, however, railroads are *not* included. If an exemption under a special act be repealed by the words "and no other," contained in a general act declaring what property shall be exempt from taxation, it would follow that this exemption was repealed by the Code of 1892, and the principle applied in *Louisville Water Co. v. Clark*, 143 U. S. 1, 11, 36 L. ed. 55, 57, 12 Sup. Ct. Rep. 346, would also be applicable here. The railroad company, however, insists that its rights are saved by § 8 of the same Code, which declares that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption, unless it be expressly so provided herein." There being no such express provision in the Code respecting the act of 1882, it is insisted that the exemption contained in that act is saved. The supreme court, however, seems to have held, as it had already done with respect to a similar section in the Code of 1880 (*Adams v. Yazoo & M. Valley R. Co.* 77 Miss. 317, 28 So. 956), that the exemption was not saved.

We do not find it necessary to pass upon the soundness of this conclusion, as we are of opinion that the question whether the ruling of the supreme court, that a *repealable* exemption has been in fact repealed by a sub-

sequent statute, is one which turns upon the construction of a state law, and is not reviewable here, although if the exemption were *irrepealable*, and thus constituted a contract, it would be our duty to decide for ourselves whether the subsequent act had repealed it or impaired its obligation. The only contract relied upon is one exempting the property of a particular corporation from taxation for a certain number of years; a contract which, in the light of the state Constitution and the prior decisions of the state courts, must be read as if it contained a proviso that the legislature might in the meantime alter, amend, or repeal the act. Hence, as the legislature is left entirely free to act upon the subject,*no subsequent legis-[75]lation could possibly impair the obligation of the contract, if such exemption can be called a contract at all. If no statute *could* impair it, it goes without saying that none *did* impair it. If, then, the decision of the supreme court, that the legislature had in fact repealed the exemption, was right, the railroad company cannot complain, since the legislature had done no more than it had a right to do. If, upon the other hand, we should be of opinion that the supreme court was wrong in holding the exemption repealed, such exemption would be abrogated, not by the act of 1892, but by an erroneous construction of that act. Our only authority to review the action of the state courts in this class of cases under Rev. Stat. § 709, arises when the validity of a state *statute* is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. Now, if the statute adjudged to be valid does not impair the obligation of any contract, it is not repugnant to the Constitution. It is the fact that the act, as construed by the supreme court, impairs the obligation of a contract that gives us jurisdiction, and if there be in the act of 1882 no contract that can be impaired by subsequent legislation, it is of no consequence that the supreme court may have given it a wrong construction. "Before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired." *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 88, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142. Indeed the whole foundation of our jurisdiction in this class of cases must rest upon a *contract* which cannot be legally impaired.

This court has repeatedly held that we cannot revise the judgment of the highest court of a state unless, by its terms or necessary operation, it gives effect to some provision of a state Constitution or law which, as thus construed, impairs the obligation of a precedent contract. In *Mississippi & M. R. Co. v. Rock*, 4 Wall. 177, 181, 18 L. ed. 381, 382, this court pronounced it a "fundamental error that this court can, as an appellate tribunal, reverse the decision of a state court, because that court may hold a contract *to be void which this court might hold to be valid." So, too, in *Knox v. Ex-*

change Bank, 12 Wall. 379, 383, 20 L. ed. 414, 415, it was said by Mr. Justice Miller: "But we are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which we held." To the same effect are *Lehigh Water Co. v. Boston*, 121 U. S. 388, 392, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916, and *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 30, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741. In the latter case it is said by Mr. Justice Gray: "In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." See also *Central Land Co. v. Laidley*, 159 U. S. 103, 109, 40 L. ed. 91, 93, 16 Sup. Ct. Rep. 80.

We are therefore of opinion that we cannot review the action of the state court in holding this exemption to have been repealed.

4. A single point with regard to the *privilege* taxes included in the assessment sought to be enjoined remains to be considered.

By § 18 of the company's charter of 1882 it was declared "that such company, its stock, its railroad and appurtenances, and all its *property* in this state necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act." This undoubtedly implies an exemption from privilege as well as ad valorem taxes, and such has been the construction given to it by the supreme court of Mississippi. *Grand Gulf & P. G. R. Co. v. Buck*, 53 Miss. 246.

But, as we have already held, this section must be construed as subservient to § 13, article 12 of the Constitution of 1869, providing that "the *property* of all corporations for pecuniary profit shall be subject to taxation."

Now, if privilege taxes are taxes upon the *property* of corporations, an exemption from such taxes was subject to repeal as much as we have already held an exemption of ad valorem taxes to be.

Whatever may have been the fluctuations of opinion upon this subject,—and it is not to be denied that there are many cases in the state courts holding that a privilege tax is not a tax upon property,—the law in this court, so far as concerns railway franchises, must be deemed to have been settled by the case of *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568, in which an exemp-

tion in the charter of the Wilmington & Raleigh Railway Company, of "the property of said company and the shares therein," from taxation, was decided to extend to a tax upon the franchise and rolling stock. In delivering the opinion of this court, Mr. Justice Davis observed: "It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature, therefore, was not inhibited from taxing it. This position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed, and depot grounds, but it is equally with them covered by the general term 'the property of the company,' and therefore equally within the protection of the charter." To the same effect are *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 195, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, and *Veazie Bank v. Fenno*, 8 Wall. 533, 547, 19 L. ed. 482, 487.

This also appears to be the law in Mississippi. *Coulson v. Harris*, 43 Miss. 728; *Drysdale v. Pradat*, 45 Miss. 445.

In *West River Bridge Co. v. Dix*, 6 How. 507, 534, 12 L. ed. 535, 546, the franchise of a bridge company was held to be property subject to condemnation under the law of eminent domain. See also *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Spring Valley Waterworks v. Schottler*, 62 Cal. [78] 110; *Nichols v. New Haven & N. Co.* 42 Conn. 103, 125; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561, 574; *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 561, 63 N. W. 746; *Richmond & D. R. Co. N. C. Div. v. Brogden*, 74 N. C. 707.

It follows, then, that privilege taxes, being taxes upon property, are subject to the constitutional limitations of 1869, and their exemption was equally repealable as that of ad valorem taxes.

The railroad company also calls attention to § 181 of the Constitution of 1890, by virtue of which "exemptions from taxation to which corporations are legally entitled at the adoption of this Constitution shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature." The words "sooner repealed" in this section apparently refer to a repeal before the expiration of the exemption under their respective charters, and as the supreme court has held that the exemption in this case was repealed by the Annotated Code of 1892 the company can gain no additional advantage by this section. *Adams v. Tombigbee Mills*, 78 Miss. 676, 29 So. 470.

Inasmuch as the statute in question could not, and in the opinion of supreme court did

not, impair the obligation of any prior contract, its judgment must be affirmed.

Mr. Justice **Gray** was not present at the argument, and took no part in the decision of this case.

[79] *CARLES U. COTTING and Francis Lee Higginson, Appts.,
v.

A. A. GODARD, as Attorney General of the State of Kansas, Kansas City Stock-Yards Company, et al.†

(See S. C. Reporter's ed. 79-115.)

Constitutional law — equal protection of laws — statute limiting charges of stock-yards company — collusive action.

1. A stock-yards company is denied the equal protection of the laws by Kan. act March 3, 1897, which limits the amount of the charges to be made by that corporation, without limiting the charges to be made by other similar corporations doing a smaller amount of business, and without any reference to the character or value of the services rendered, although the statute is general in its terms and is made applicable to any corporation doing business of a certain amount, and notwithstanding the fact that by virtue of the great amount of business done by the corporation affected by the statute it may make a reasonable income, since the statute makes a positive and direct discrimination between persons engaged in the same class of business, and bases it simply upon the quantity of business which each may do.
2. A suit will not be dismissed as collusive when brought by stockholders against the cor-

†This case appears in the Official Report under the title of *Cotting v. Kansas City Stock Yards Company and the State of Kansas*.

NOTE.—On the legislative power to fix tolls, rates, or prices—see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177.

As to constitutionality of statutes restricting contracts and business—see note to *State v. Loomis* (Mo.) 21 L. R. A. 789.

On the constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579.

As to injunction against criminal proceedings—see *Crichto v. Dahmer* (Miss.) 21 L. R. A. 84, and note.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

On Federal jurisdiction of suits against a state—see notes to *Tindall v. Wesley*, 13 C. C. A. 165, and *Hans v. Louisiana*, 33 L. ed. U. S. 842.

Unconstitutional inequality or discrimination in state regulation of tolls or rates.

A legislative classification of railroads for

poration and its officers and the attorney general to restrain the enforcement of a statute, merely because the officers of the corporation agree with the stockholders as to the unconstitutionality of the statute.

[No. 1.]

Argued November 14, 15, 1899. Ordered for reargument March 26, 1900. Reargued January 23, 24, 1901. Decided November 25, 1901.

APPPEAL from a decree of the Circuit Court of the United States for the District of Kansas dismissing a complaint in a suit to restrain the enforcement of a statute. *Reversed.*

See same case below, 82 Fed. 850.

Statement by Mr. Justice **Brewer**:

*In March, 1897, Charles U. Cotting, a citizen of the state of Massachusetts, filed in the circuit court of the United States for the district of Kansas a bill of complaint against the Kansas City Stock-Yards Company, a corporation of the state of Kansas, and certain officers of that company, and Louis C. Boyle, attorney general of the state of Kansas. A few days later Francis Lee Higginson, a citizen of the state of Massachusetts, filed a bill of complaint in the same court and against the same parties. [79]

These suits were subsequently ordered by the court to be consolidated, and were thereafter proceeded in as one.

The plaintiffs respectively alleged that they were stockholders of the Kansas City Stock-Yards Company, and that the suits were brought in their own behalf and that

the purpose of fixing their rates was sustained in *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94, against the claim that it denied equal privileges or immunities to some of the railroad companies.

Power of the legislature to classify railroads in the regulation of fares and freights according to the length of their lines is also sustained in *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028. And it is held that there is no violation of the equal protection of the laws if the same rule is applied to all railroads of the same class.

To divide railroads into two classes according to the length of time they have been organized is not beyond the power of the legislature in prescribing rates. *Ames v. Union P. R. Co.* 4 Inters. Com. Rep. 835, 64 Fed. 165.

If the classification of railroads for the regulation of rates operates uniformly, the court cannot decide whether it is the best that could have been done or not. The court can decide only the question whether it could be done at all and under any circumstances. If it could, the legislature must decide for itself whether the common good requires that it should be done. *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 163, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 95.

But the fact that a statute gives a railroad commission, in addition to the authority to revise tariffs, the power, for undisclosed reasons

of other stockholders having a like interest, who might thereafter join in the prosecution thereof. The main purpose of the suits was to have declared invalid a certain act of the legislature of the state of Kansas approved March 3, 1897, entitled "An Act Defining What shall Constitute Public Stock

[80]Yards, Defining the Duties of *the Person or Persons Operating the Same, and Regulating All Charges thereof, and Removing Restrictions in the Trade of Dead Animals, and Providing Penalties for Violations of This Act."

A temporary restraining order was granted, and subsequently a motion for a preliminary injunction was made. Pending that motion the court appointed a special master, with power to take testimony and report the same, with his findings, as to all matters and things in issue upon the hearing of the preliminary injunction prayed for. 79 Fed. 679. On August 24, 1897, the special master filed his report. On October 4, 1897, the motion for a preliminary injunction was heard on affidavits, the master's report, exceptions thereto on behalf of both parties, and arguments of counsel. The motion was refused and the restraining order, which had remained in force in the meantime, was set aside. 82 Fed. 839.

A stipulation was thereupon entered into that the defendants should forthwith file their answers to the bills; that replications thereto should be immediately filed; and that the cases thus put at issue should be heard on final hearing, upon the pleadings, proofs, master's report, and exhibits, without further testimony from either party.

On October 28, 1897, after argument, the court dismissed the bills of complaint. 82 Fed. 850. In the opinion of Circuit Judge

Thayer there was the following order, which was also embodied in the final decree:

"The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock-yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance by the Supreme Court in *Hovey v. McDonald*, 109 U. S. 161, 27 L. ed. 891, 3 Sup. Ct. Rep. 136, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt, and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are *of such moment and the [81] questions at issue so balanced with doubt as to justify and require an exercise of the power in question. Therefore, although the bills will be dismissed, yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted for the term of ten days, and if in the meantime an appeal shall be taken such injunction will be continued in force until the appeal is heard and determined in the Supreme Court of the United States; provided that, in addition to the ordinary appeal bond, the Kansas City Stock-Yards Company shall make and file in this court its bond in the penal sum of \$200,000, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that in the event the decree dismissing the bills is affirmed it will, on demand, pay to the party or parties entitled thereto all overcharges

and without accountability to anyone, to give better rates to one corporation than to another, is held to make the statute unconstitutional. *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679.

A somewhat similar objection to the Kentucky act of March 10, 1900, to prevent railroad companies from charging extortionate rates, was relied upon in *Louisville & N. R. Co. v. McChord*, 103 Fed. 216 (Reversed on other grounds in *McChord v. Cincinnati, N. O. & T. P. R. Co.* 183 U. S. 483, *post*, ---), as a reason for enjoining, *pendente lite*, its threatened enforcement. This act, *inter alia*, provided that when complaint should be made to the railroad commission that a railroad had charged extortionate rates, or the commission had reason to believe such rates were being charged, it should hear and determine the matter, and if it found that the company had been guilty of extortion it should fix a just and reasonable rate, which the company should not exceed under a heavy penalty. The court said: "If one railroad should be convicted by the commission of having been 'guilty of extortion,' and if a lower rate should consequently be fixed by it, such rate is prescribed for the guilty railroad alone, and for none of the others. The effect of the determination that the railroad has been guilty of extortion is individual. This being so, the others are still at liberty to charge, as proper, a rate which, if charged by the one thus convicted, would be deemed extortion; thus not

183 U. S.

merely inflicting a single penalty for a single offense, but placing the guilty railroad at the disadvantage of having a lower rate than its rivals, and depriving it of the equal protection of the laws. It cannot be just, it cannot be an equality of right or of protection, for an act to be unlawful if done by one railroad in Kentucky, and perfectly lawful if done by another railroad in the same state."

So, the fact that a statute regulating railroad rates burdens railroad corporations with pains and penalties not imposed on other persons operating railroads in competition with the corporations is held to make an unconstitutional discrimination against the corporations. *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679.

Elevator owners are not deprived of the equal protection of the laws by a statute regulating elevator charges in places having a population of 130,000 or more. *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

A turnpike company is not deprived of the equal protection of the laws by a statute fixing the rates which it may charge much lower than those imposed upon other turnpike companies differently located, as it can only demand the right to receive such compensation as will be just both to itself and to the public under all the circumstances of the case. *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

for yarding and feeding live stock at its stock yards in Kansas City, Kansas, and Kansas City, Missouri, which it may have enacted in violation of §§ 4 and 5 of the Kansas statute relative to stock yards, approved March 3, 1897, since an injunction was first awarded herein, to wit, on April—, 1897; and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal; said obligation to become void if the statute in question shall be pronounced invalid by the Supreme Court.” 82 Fed. 857.

On November 4, 1897, an appeal was duly taken and allowed to this court.

Subsequently, Louis C. Boyle's term of office as attorney general having expired, his successor, A. A. Godard, was substituted as a party defendant.

The act of the legislature of the state of Kansas is in the following terms:

[82] “Sec. 1. Any stock yards within this state, into which live stock is received for the purpose of exposing or having the same exposed for sale or feeding, and doing business for a compensation, and which for the preceding twelve months shall have had an average daily receipt of not less than 100 head *of cattle, or 300 head of hogs, or 300 head of sheep, are hereby declared to be public stock-yards.

“Sec. 2. Any person, company, or corporation owning or operating any public stock-yard or stock-yards in this state is hereby declared to be a public stock-yards operator, whether living or being within this state or not.

“Sec. 3. Every such public stock-yards operator or operators shall annually, on the 31st day of December of each year, file with the secretary of state an itemized statement certified and sworn to, setting forth the number of head of cattle, calves, sheep, hogs, horses, and mules received in his or their public stock-yards during the year next preceding.

“Sec. 4. It shall be unlawful for the owners, proprietors, or the employees of the owners or proprietors of any such public stock-yards within this state to charge for driving, yarding, watering, and weighing of stock greater prices than the following: For driving, yarding, watering, and weighing of cattle, 15 cents per head; calves, 8 cents per head; hogs, 6 cents per head; sheep, 4 cents per head; and there shall be but one yardage charged.

“Sec. 5. It shall be unlawful for the owner, owners, or proprietors, or their employees, of any such stock yards within this state, to sell and deliver at the rate of less than 2,000 pounds for a ton of hay, or any part thereof, the same to be of good quality, or to charge for or to sell the same at more than 100 per cent above the average market price or value of such hay upon the markets of the towns or cities wherein such stock yards are located, upon the day preceding such sale and delivery; and it shall also be unlawful for any such owners or proprietors or employees to sell and deliver less

than 70 pounds of corn in the ear for a bushel, or less than 56 pounds of shelled corn for a bushel, or to charge for or to sell the same at more than 100 per cent above the average market price or value of such ear corn or shelled corn on the markets of the towns or cities wherein said stock yards are located, on the day next preceding such sale and delivery. All feed not above named shall be sold for no greater per cent of profit than hereinbefore provided.

*“Sec. 6. It shall be unlawful for the own-[83] ers or proprietors of any stock yards to prohibit the owner or owners, or the representatives of any owner or owners, of any dead stock in such yard or yards from selling such dead stock to any person or persons.

“Sec. 7. That any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for the first offense not more than \$100; for the second offense not less than \$100 nor more than \$200; and for the third offense not less than \$200 nor more than \$500 and by imprisonment in the county jail not exceeding six months for each offense; and for each subsequent offense he or they shall be fined in any sum not less than \$1,000 and by imprisonment in the county jail not less than six months.

“Sec. 8. It is hereby made the duty of the attorney general to prosecute all violations of the provisions of this act.

“Sec. 9. All acts or parts of acts in conflict with this act are hereby repealed.

“Sec. 10. This act shall take effect and be in force from and after its publication in the official state paper.” Laws of Kansas 1897, chap. 240, p. 448.

Mr. Albert H. Horton argued the cause, and, with Mr. B. P. Waggener, filed a brief for appellants:

If we concede the power of the legislature under some circumstances to classify stock-yard companies, and prescribe one rate for one class and other rates for other classes, the classification cannot be arbitrarily made.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The evasion of the constitutional provisions forbidding unlawful discriminations by the framing of the act so that it was not likely, and hardly possible, that any other stock yards than those of Kansas City would come within its provisions, should not be connived at by the courts.

Central Trust Co. v. Citizens' Street R. Co. 80 Fed. 218.

Even though a division of cities of the state into certain classes, based exclusively on population, has been sustained by the Kansas supreme court, that court has held that when an act of the legislature is so special in its provisions that it can only apply to three certain cities it is unconstitutional and void.

Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800; see also *State ex rel. Helfer v. Simon*, 53 N. J. L. 550, 22 Atl. 120; *State ex rel. Richards v. Hammer*, 42 N. J. L. 435; *State ex rel.*

Reemelin v. Smith, 48 Ohio St. 211, 26 N. E. 1069; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Adams v. Nemeyer*, 54 Ohio St. 614, 46 N. E. 1154.

So, the supreme court of Ohio has rebuked the favorite evasion of the legislature of that state, of seeming to adopt a general law, and yet making it local or special in its character.

Pittsburgh, Ft. W. & C. R. Co. v. Martin, 53 Ohio St. 386, 41 N. E. 690.

A statute is not constitutional which selects particular individuals from a class or locality and subjects them to peculiar rules, or imposes upon them special obligations or burdens, from which others in the same locality or class are exempt.

Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800; *Cooley*, Const. Lim. 6th ed. 479, 482, 483, and notes. See also *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *State ex rel. McCue v. Ramsey County Sheriff*, 48 Minn. 236, 51 N. W. 112; *Darcy v. San José*, 104 Cal. 642, 38 Pac. 500; *Cincinnati v. Steinkamp*, 54 Ohio St. 284, 43 N. E. 490; *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553.

As the statute was clearly intended for a particular case, and practically looks to no broader application, it is vicious class legislation, and therefore unconstitutional. When an act is found to fit a special case only, it is deemed to have been intended solely for it.

Sutherland, Stat. Constr. § 129.

It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our Constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that anyone should be subjected to losses, damages, suits, or actions from which all others, under like circumstances, are exempted.

Holden v. James, 11 Mass. 396, 6 Am. Rep. 174.

No state shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no state, even with due process of law, shall deny to anyone within its jurisdiction the equal protection of the laws.

Santa Clara Railroad Tax Case, 9 Sawy. 165, 18 Fed. 385, 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

The Kansas City Stock-Yards Company, although a corporation, is a person within the 14th Amendment.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The finding of the master and the court below, of the value of the property of the Kansas City Stock-Yards Company, owned and operated by it for stock-yards purposes, was founded upon incompetent and insufficient testimony. The property was valued

as a dead structure,—not as a unit or system, or as a living and going concern.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Little Rock & Ft. S. R. Co. v. McGehee*, 41 Ark. 202; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *King v. Minneapolis Union R. Co.* 32 Minn. 224, 20 N. W. 135; *Sanford v. Poe*, 16 C. C. A. 305, 37 U. S. App. 378, 59 Fed. 546; *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945.

If it would be unreasonable to reduce the total net income of the stock-yards company 75 per cent, prima facie it is unreasonable to reduce any part of such net income 75 per cent.

Ames v. Union P. R. Co. 4 Inters. Com. Rep. 835, 64 Fed. 165.

Considering the current rate of interest in Kansas and the character of the investment of the stockholders, the act of March 3d, 1897, would, by its necessary operation, deprive the Kansas City Stock-Yards Company of the right to obtain just compensation for the services rendered by it, and would also deny to such company and its stockholders the equal protection of the laws.

Ibid.; *Milwaukee Electric R. & Light Co. v. Milwaukee*, 87 Fed. 577; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Mr. William D. Guthrie also argued the cause, and, with Messrs. Albert H. Horton and B. P. Waggener, filed a brief for appellants:

So far as the question of the jurisdiction of a Federal court to enjoin the state officers from enforcing an unconstitutional statute when such enforcement would obviously interfere with and destroy the property rights of the citizen is involved, this case is within the settled doctrine of this court.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The attorney general by a full investigation and adversary contest upon the merits, conducted by him below, has waived the question of jurisdiction under the 11th Amendment.

Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878.

In equity it is always the practice to plead jurisdiction at the proper time and before a defendant enters into his defense at large. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant.

Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604.

There is a broad difference in the matter

of state regulation, between the public or quasi-public use of highways, waters, etc., and the use of private property by the public for its convenience and profit.

The true rule is not so stringent as to deny a citizen relief unless the legislation is confiscation; but upon this question of reasonableness the court should "apply justice as it is understood of men, and, in its clear light," determine the controversy.

Southern P. Co. v. Railroad Comrs. 78 Fed. 236.

In estimating the profits of operation an allowance must be made for depreciation, and improvements may be properly charged against income.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *San Diego Land & Town Co. v. National City*, 74 Fed. 83, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Little Miami & C. & X. R. Co. v. United States*, 108 U. S. 277, 27 L. ed. 724, 2 Sup. Ct. Rep. 627; *Union P. R. Co. v. United States*, 99 U. S. 402, 25 L. ed. 274; *United States v. Central P. R. Co.* 138 U. S. 84, 34 L. ed. 895, 11 Sup. Ct. Rep. 285; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236; *Metropolitan Trust Co. v. Houston & T. C. R. Co.* 90 Fed. 683; *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203; *Glacier v. Rolls*, L. R. 42 Ch. Div. 436; *Dent v. London Tramways Co.* L. R. 16 Ch. Div. 344; *Davison v. Gillies*, L. R. 16 Ch. Div. 347, note; *Queen v. Grand Junction R. Co.* 4 Q. B. 18; *Queen v. London, B. & S. C. R. Co.* 15 Q. B. 313; *Reg. v. Great Western R. Co.* 15 Q. B. 1085; *Corry v. Londonderry & E. R. Co.* 29 Beav. 263.

The provision of the Kansas statute that the rate of interest shall be 6 per cent in the absence of an agreement fixing a different rate, and that the maximum shall be 10 per cent, is the expression of the thought and estimate of the state itself as to the value of money, and as to what justice requires for the use of it.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

It is the legal measure of the value of the use, not only of money, but of property generally, and is a fair and just basis in almost all cases.

Louden v. Shelby County Taxing Dist. 104 U. S. 771, 26 L. ed. 923; *Spalding v. Mason*, 161 U. S. 375, 40 L. ed. 738, 16 Sup. Ct. Rep. 592.

As the legislative rates do not afford, in any reasonable aspect of the proof contained in the record, anything like 6 per cent, the statute violates the property rights of the owner of these stock yards.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The property of the company should be valued in its present condition as a stock yard, to which special purpose the company's lands, by reason of their location and surroundings, were especially adapted.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; *National*

Waterworks Co. v. Kansas City, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853. See also *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Grant v. East & West R. Co.* 4 C. C. A. 511, 13 U. S. App. 1, 54 Fed. 569; *Dupuis v. Chicago & N. W. R. Co.* 115 Ill. 97, 3 N. E. 720; *Chicago, P. & St. L. R. Co. v. Eaton*, 136 Ill. 9, 26 N. E. 575; *Snouffer v. Chicago & N. W. R. Co.* 105 Iowa, 681, 75 N. W. 501; *Drury v. Midland R. Co.* 127 Mass. 571; *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39; *Miller v. Windsor Water Co.* 148 Pa. 429, 23 Atl. 1132; *Mifflin Bridge Co. v. Juniata County*, 144 Pa. 365, 13 L. R. A. 431, 22 Atl. 896; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *Rippe v. Chicago, D. & M. R. Co.* 23 Minn. 18.

The fair value in themselves of the services rendered to the public must be taken into consideration in determining judicially the reasonableness of the charges made.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Canada Southern R. Co. v. International Bridge Co.* L. R. 8 App. Cas. 723.

The proof that the charge exacted by a private carrier, or warehouseman, or inn-keeper, or stock yards is the customary rate during many years for similar services under like conditions should establish the reasonableness of such charge, as matter of law, in the absence of all evidence to the contrary.

Koek v. Emmerling, 22 How. 69, 16 L. ed. 292; *Erben v. Lorillard*, 2 Keyes, 567; *Louisville, E. & St. L. R. Co. v. Wilson*, 119 Ind. 352, 4 L. R. A. 244, 21 N. E. 341; *Hopper v. Chicago, M. & St. P. R. Co.* 91 Iowa, 639, 60 N. W. 487; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731; *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470.

Although legislative rates are to be treated as prima facie reasonable, they have no more force; enactment does not change or shift the burden of proof.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Messrs. A. A. Godard and B. H. Tracy argued the cause, and filed a brief for appellees:

There is no ambiguity apparent in the law and consequently no reason or excuse for the introduction of legislative journals as aids to its construction. Such journals are only secondary modes of ascertaining legislative intention, and they may be resorted to only when the meaning of the language of an act is itself doubtful.

23 Am. & Eng. Enc. Law, p. 336; *South-*
183 U. S.

work Bank v. Com. 26 Pa. 446; *Bank of Pennsylvania v. Com.* 19 Pa. 156.

The clause of the 14th Amendment which prohibits states from denying to any citizen the equal protection of the laws only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.

Kentucky Railroad Tax Cases, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

It does not prohibit legislation which is limited, either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and liabilities imposed.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

It may be safely said that the rule prescribes no rigid equality, and permits to the discretion and wisdom of the state a wide latitude, as far as interference by this court is concerned.

Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281. See also *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Cotting v. Kansas City Stock-Yards Co.* 79 Fed. 681.

The law forbidding the use of stoves for heating cars upon railroads more than 50 miles long has been held to be a valid exercise of the power of the legislature to classify the railroads doing business in the state.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

The business done at the Kansas City Stock Yards is public in its nature, and is impressed with a public use.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

In determining whether or not the rates permitted by the act of 1897 are reasonable, reference must be had to the actual value of the property affected thereby.

Anes v. Union P. R. Co. 4 Inters. Com. 183 U. S. U. S., Book 46.

Rep. 835, 64 Fed. 177; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Milwaukee Electric R. & Light Co. v. Milwaukee*, 87 Fed. 583.

This action cannot be maintained because it is a suit against the state of Kansas, and because the only relief sought herein is to enjoin the prosecution of criminal actions which would have to be brought in the name of the state of Kansas.

Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

The allegations of the bills, and the contention of the appellants, are that the injunctions should be allowed in order that a multiplicity of criminal suits may be avoided. This is not within the province of a court of equity; an injunction may in some cases be granted to restrain the prosecution of civil actions, but not to restrain the institution of criminal proceedings.

Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

Neither does the fact that many criminal suits are threatened, instead of one or few, change the rule.

Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

To enjoin the attorney general from proceeding in court against violators of law is equivalent to enjoining the actions of the courts themselves. Where a party is enjoined from prosecuting his case the effect is the same as if the court were enjoined from acting thereon.

Rensselaer & S. R. Co. v. Bennington & R. Co. 18 Fed. 617; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

Courts will not interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just, both to the owner and the public.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

Messrs. William D. Guthrie and B. P. Waggener argued the cause on reargument, and, with *Mr. Albert H. Horton*, filed a brief for appellant:

The objection to the jurisdiction was waived.

Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; *Coburn v. Cedar Valley Land & Cattle Co.* 138 U. S. 196, 34 L. ed. 876, 11 Sup. Ct. Rep. 258.

When an officer of a state is sued and intends to avail himself of the point that the judicial power of the courts of the United States does not extend to the suit, because virtually a suit against the state, he should at once challenge the power of the court to proceed further by a plea or demurrer to

the jurisdiction, and cannot be permitted to play fast and loose with the situation, and proceed with the reservation that, if he is defeated on the merits, he may still insist upon want of jurisdiction.

Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

On its face this act exempts, and was intended to exempt, small yards and small dealers in feed. And "it is a pure, bald, and unmixed power of discrimination in favor of" those persons who are engaged in a similar business of yarding and feeding cattle to a smaller extent than at the Kansas City yards.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The statute is obnoxious to the constitutional guaranties of liberty, property, and equal rights.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The value of services or property is always established in court by proof of customary charges.

Kock v. Emmerling, 22 How. 69, 16 L. ed. 292; *Erben v. Lorillard*, 2 Keyes, 567; *Gunning*, Tolls, pp. 61, 62; *Bedford v. Emmett*, 3 Barn. & A. 366; *Wright v. Bruister*, 4 Barn. & Ad. 116; *Heddy v. Wheelhouse*, Part 2, Cro. Eliz. 559; *Vinkensterne v. Edden*, 1 Ld. Raym. 384, 1 Salk. 248, 5 Mod. 356, Carthew, 357; *Shephard v. Payne*, 12 C. B. N. S. 414; *Louisville, E. & St. L. R. Co. v. Wilson*, 119 Ind. 352, 4 L. R. A. 244, 21 N. E. 341; *Hopper v. Chicago, M. & St. P. R. Co.* 91 Iowa, 639, 60 N. W. 487; *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470; 2 Kent, Com. 599.

The true test should be the value of the service in itself.

Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Canada Southern R. Co. v. International Bridge Co.* L. R. 8 App. Cas. 723.

Neither the owner of cattle nor the proprietor of a stockyard or cattle exchange or stable can be concluded, or his rights materially affected or impaired, by a mere legislative enactment.

Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679. See also *Vanhorne v. Dorrance*, 2 Dall. 304, Fed. Cas. No. 16,857; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 98

622; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759.

In estimating the profits of operation an allowance must necessarily be made for wear and tear and depreciation and renewal. This view as to depreciation and that improvements may be properly charged against income is fully supported by the authorities.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *San Diego Land & Town Co. v. National City*, 74 Fed. 79, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Little Miami & C. & X. R. Co. v. United States*, 108 U. S. 277, 27 L. ed. 724, 2 Sup. Ct. Rep. 627; *Union P. R. Co. v. United States*, 99 U. S. 402, 25 L. ed. 274; *United States v. Central P. R. Co.* 138 U. S. 84, 34 L. ed. 895, 11 Sup. Ct. Rep. 285; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236; *Metropolitan Trust Co. v. Houston & T. C. R. Co.* 90 Fed. 683; *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203; *Glazier v. Rolls*, L. R. 42 Ch. Div. 436; *Dent v. London Tramways Co.* L. R. 16 Ch. Div. 344; *Davison v. Gillies*, L. R. 16 Ch. Div. 347, note; *Queen v. Grand Junction R. Co.* 4 Q. B. 18; *Queen v. London, B. & S. C. R. Co.* 15 Q. B. 313; *Reg. v. Great Western R. Co.* 15 Q. B. 1085; *Corry v. Londonderry & E. R. Co.* 29 Beav. 263.

The market value of the capital stock would be a just basis of valuation for taxation.

Ryan v. Leavenworth County, 30 Kan. 185, 2 Pac. 156. See also *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561.

Mr. A. A. Godard argued the cause and filed a brief for appellees on reargument:

Federal courts will not grant an injunction against a state officer when it is conceded that he is proceeding under a valid state statute.

Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

This court will look at the nature of the case, as well as the nominal parties, to determine whether a suit is within the prohibition of the 11th Amendment.

Virginia Coupon Cases, 114 U. S. 270, sub nom. *Poindexter v. Greenhow*, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962.

This suit ought not to be maintained, because its sole purpose is to enjoin, in a court of equity, the prosecution of criminal actions.

Re Sawyer, 124 U. S. 210, 31 L. ed. 405, 8 Sup. Ct. Rep. 482; *Harkrader v. Wadley*, 172 U. S. 170, 43 L. ed. 406, 19 Sup. Ct. Rep. 119; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

**Mr. Justice Brewer*, after making the [83] above statement, delivered the following opinion, and announced the conclusion and judgment of the court:

The learned circuit judge, in deciding the case, appreciated the importance of the questions involved, and, although denying the relief sought by the plaintiffs, exercised his power of continuing the restraining order

[84] until such time as these questions *could be determined. Twice has this case been argued before us. We have had the benefit of able arguments and elaborate briefs of distinguished counsel. That the questions are difficult of solution no one reading the following statement will, we think, doubt.

It has been wisely and aptly said that this is a government of laws, and not of men; that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them.

We shall not attempt to determine all the questions presented, and yet it is fitting that we should state them, and some of the reasons urged in support of their decision one way or the other.

The first we notice is the principal matter in respect to which testimony was offered, which has been most largely discussed by counsel on both sides, and that is the validity of the reduction in the charges of the stock-yards company made by the act in question. Has the state the power to legislate on this matter, and, if so, can its legislation be upheld?

In *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, it was held that the state had power to fix the maximum charges for the storing of grain in warehouses in Chicago, the court saying (p. 126, L. ed. p. 84):

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

While there was a division of opinion in the court, yet the doctrine thus stated received the assent of a majority of its members, and has been reaffirmed since, although accompanied by a constant dissent. *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota ex rel. Stoescer*, 153 U. S. 391, 38 L. ed. 758, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857. See also the following cases in state courts: *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E.

[85] 670; *Lake Shore & *M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *Girard Point Storage Co. v. Southwark Foundry Co.* 105 Pa. 248; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; *Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co.* 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146.

50, 6 L. R. A. 855, 17 Atl. 146.

These decisions go beyond, but are in line with, those in which was recognized the power of the state to regulate charges for services connected with any strictly public employment, as, for instance, in the matter of common carriage, supply of water, gas, etc. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Railroad Commission Cases*, 116 U. S. 307, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

Tested by the rule laid down in *Munn v. Illinois*, it may be conceded that the state has the power to make reasonable regulation of the charges for services rendered by the stock-yards company. Its stock yards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and therefore must be considered as subject to governmental regulation.

But to what extent may this regulation go? Is there no limit beyond which the state may not interfere with the charges for services, either of those who are engaged in performing some public service or of those who, while not engaged in such service, have yet devoted their property to a use in which the public *has an interest? And is the ex-[86]tent of governmental regulation the same in both of these classes of cases?

In *Munn v. Illinois*, one of the latter class, in which the power of governmental regulation was affirmed, it was said (p. 125, L. ed. p. 84):

"From this it is apparent that down to the time of the adoption of the 14th Amendment it was not supposed that statutes regulating the use, or even the price of the use, of private property, necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all."

In *Budd v. New York* it was not charged or shown that the rates prescribed by the legislature were unreasonable, and the only question was the power of the legislature to interfere at all in the matter. The same is true of *Brass v. North Dakota ex rel. Stoesser* in which nothing was presented calling for any consideration of the test of reasonableness or of a limit to the legislative power.

As to those cases in which governmental regulation of charges was in respect to parties doing some public service the following is a *résumé* of the decisions. In *Spring Valley Waterworks v. Schottler* it was said (p. 354, L. ed. p. 176, Sup. Ct. Rep. p. 51):

"What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all."

In *Railroad Commission Cases* (p. 331, L. ed. p. 644, Sup. Ct. Rep. p. 345):

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

In *Wabash, St. L. & P. R. Co. v. Illinois* [87] nothing was said affecting *the question of the extent of the power of the legislature. In *Dow v. Beidelman* the quotation heretofore made from the *Railroad Commission Cases* was quoted with approval. In *Chicago, M. & St. P. R. Co. v. Minnesota* the same passage was quoted, and it was added (p. 458, L. ed. p. 981, Inters. Com. Rep. p. 220, Sup. Ct. Rep. p. 467):

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In *Chicago & G. T. R. Co. v. Wellman* it was said (p. 344, L. ed. p. 179, Sup. Ct. Rep. p. 402):

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

In *Reagan v. Farmers' Loan & T. Co.* (p. 100

399, L. ed. p. 1024, Inters. Com. Rep. p. 570, Sup. Ct. Rep. p. 1055):

"The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

And again (p. 412, L. ed. p. 1028, Inters. Com. Rep. p. 514, Sup. Ct. Rep. p. 1059):

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that everyone should receive some compensation for the use of his money *or [88] property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road."

In *St. Louis & S. F. R. Co. v. Gill* is this language (p. 657, L. ed. p. 570, Sup. Ct. Rep. p. 487):

"This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business."

In *Covington & L. Turnp. Road Co. v. Sandford* (p. 597, L. ed. p. 567, Sup. Ct. Rep. p. 205):

"The legislature has the authority in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not re-

quire to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In

[89] short, each *case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling the public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law."

In *Smyth v. Ames*, after an elaborate discussion of the question of rates and the power of the legislature in respect thereto, it was said (pp. 546, 547, L. ed. p. 849, Sup. Ct. Rep. p. 434):

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

In *San Diego Land & Town Co. v. National City* (p. 757, L. ed. p. 1161, Sup. Ct. Rep. p. 811):

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per

[90] annum of operating *the plant, including in-

183 U. S.

terest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, under all the circumstances considered, just both to the company and to the public."

And also affirming the limits of judicial interference with legislative action (p. 754, L. ed. p. 1160, Sup. Ct. Rep. p. 810):

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily *have the effect to deny just compensation [91] for private property taken for the public use."

Nothing was said in *Chicago, M. & St. P. R. Co. v. Tompkins* throwing any light upon the questions heretofore referred to.

In the light of these quotations, this may be affirmed to be the present scope of the decisions of this court in respect to the power of the legislature in regulating rates: As to those individuals and corporations who have devoted their property to a use in which the public has an interest, although not engaged in a work of a confessedly public character, there has been no further ruling than that the state may prescribe and enforce reasonable charges. What shall be the test of reasonableness in those charges is absolutely undisclosed.

As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which if enforced would amount to a confiscation of property. But it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation, and leave the property in the hands and under the care of the owners without any remuneration for its use. It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates.

In this case, as heretofore indicated, a volume of testimony has been taken, mainly upon the question of the cost and value of the stock yards, and the effect upon the income of the company by reason of the proposed reduction. This testimony was taken before a master, with instructions to report the cost of the stock yards, the present value of the property, the receipts and expenditures thereof, the manner of operation, and such other matters as might be pertinent for a determination of the case. Stated in general terms, his findings were that the value of the property used for stock-
[92]yard purposes, including the value *of certain supplies of feed and materials which were on hand December 31, 1896, is \$5,388,003.25; that the gross income realized by the stock-yards company during the year 1896, which was taken as representing its average gross income, was \$1,012,271.22. The total expenditures of the company for all purposes during the same period amounted to \$535,297.14,—thus indicating a net income for the year of \$476,974.08. The court, however, increased the estimate of the net income by adding to the expenditures the sum of \$113,584.65, expended in repairs and construction, thus placing the net income at the amount of \$590,558.73. If the rates prescribed by the Kansas statute for yarding and feeding stock had been in force during the year 1896 the income of the stock-yards company would have been reduced that year \$300,651.77, leaving a net income of \$289,916.96. This would have yielded a return of 5.3 per cent on the value of property used for stock-yard purposes, as fixed by the master. Or if the capital stock be taken after deducting therefrom such portion thereof which represents property not used for stock-yard purposes, the return would be 4.6 per cent.

Counsel for appellants challenge the correctness of these findings, and seek to show by a review of the testimony that no such per cent of return on the real value of the investment would be received by the company in case the proposed reduction is put into effect. But, without stopping to enter into

the inquiry suggested by their contention, it is enough for our present purpose to state in general the conclusions of the master and the court.

On the other hand, it is shown by the findings, approved by the court, that the prices charged in these stock yards are no higher, and in some respects lower, than those charged in any other stock yards in the country, and finding 37 is—

“The other stock yards heretofore enumerated are operated generally in the same manner as those at Kansas City, and there is and was for a long time prior to March 12, 1897, active and growing competition among their owners to attract and secure to each the shipment of live stock from competitive territories. Kansas City is the greatest stocker and feeder market in the world, and while Chicago exceeds it as a general market, *yet, because of the expense[93] of transportation from Kansas City there, and the loss in weight by shrinkage during such transportation, the live stock shipped to and sold at Kansas City in 1896 realized for its owners more than \$1,500,000 in excess of the amount which would have been realized if forwarded from Kansas City to and sold on the Chicago market.”

Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the state. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself. In the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the state, aware that the state in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the state, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which

expresses the judgment of the state believes that the particular services should be rendered without profit he is not at liberty to [94] complain? While we have said *again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state he must submit to a like determination as to the paramount interests of the public?

Again, wherever a purely public use is contemplated, the state may and generally does bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain, by which property can be taken, and taken, not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the state, and, exercising those powers and doing the work of the state, is it wholly unfair to rule that he must submit to the same conditions which the state may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public has an interest in.

In reference to this latter class of cases, which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of the state. He is not using his property in the discharge of a purely public service. He acquires from the state none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He can force no one to sell to him, he cannot prescribe the price which he shall pay. He must deal in the market as others deal, buying only when he can buy and at the price at which the owner is willing to sell, and selling only when he can find a purchaser and at the price which the latter is willing to pay. If under such circumstances he is [95] bound by all the conditions *of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all state regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile business.

Pursuing this thought, we add that the state's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular

charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law, even in respect to those engaged in a quasi-public service, independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered? As said by Mr. Justice Bradley in *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732:

"It is also obvious that, since a wharf is property and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition *he makes of such revenue, can in no [96] way concern those who make use of the wharf, and are required to pay the regular charges therefor; provided, always, that the charges are reasonable, and not exorbitant."

In *Canada Southern R. Co. v. International Bridge Co.* (L. R. 8 App. Cas. 723, 731) Lord Chancellor Selborne thus expressed the decision of the House of Lords:

"It certainly appears to their lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of

fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable according to any standard of reasonableness which can be suggested. That being so, it seems to their lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of **the Tay Bridge*, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their lordships can hardly characterize that argument as anything less than preposterous."

The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness. In other words, it is a legislative declaration that such charges are reasonable compensation for the services rendered, but it does not follow therefrom that the legislature has power to reduce any reasonable charges because by reason of the volume of business done by the party he is making more profit than others in the same or other business. The question is always, not, What does he make as the aggregate of his profits? but, What is the value of the services which he renders to the one seeking and receiving such services? Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and is not that which finally determines the question of reasonableness. Now, the controversy in the circuit court proceeded upon the theory that the aggregate of profits was the pivotal fact. To that the testimony was adduced, upon it the findings of the master were made, and in recognition of that fact the opinion of the court was announced. Obviously, as we think, in all this the lines of inquiry were too narrowly pursued.

It may be said that the conclusion of the court was directly against the plaintiffs, and therefore was a decision against all their contentions. It was found, however,

that the charges made by the defendant were no greater (and in many instances, less) than those of any other stock yards in the country. Nothing is stated to outweigh the significance of that finding. While custom is not controlling, for there may be a custom on **the part of all stock-yard companies to* [98] make excessive charges, yet in the absence of testimony to the contrary a customary charge should be regarded as reasonable and rightful. In *Gunning, Law of Tolls*, the author says (p. 61): "Long usage and acquiescence in one uniform payment for toll is undoubtedly cogent evidence that it is reasonable." In *Shepherd v. Payne*, 12 C. B. N. S. 414, 433, Willes, J., said:

"A fee need not be of a fixed and ascertained, but may be of a reasonable amount; and, exercising the power conferred upon us by the case, to draw inferences of fact, we may conclude that, if the claim can be sustained in point of law, it was in fact for a reasonable fee. If so, then, looking to the amount established for similar services by other officers, and remembering what fees have been paid and received within the memory of us all in the Courts of Westminster Hall and at the Assizes, we think there can be little doubt that the fees in question, so far as amount is concerned, are in fact reasonable."

In *Louisville, E. & St. L. R. Co. v. Wilson*, 119 Ind. 352, 358, 4 L. R. A. 244, 247, 21 N. E. 341, 343, is this language:

"The law makes it the duty of every common carrier to receive and carry all goods, . . . and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure, subject to the agreement of the parties; but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained by the amount commonly or customarily paid for other like services. *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731; *Angell, Carr.* § 392; *Lawson, Carr.* § 125."

Again, the findings show that the gross receipts for the year 1896 were \$1,012,271.22; that the total number of stock received during the same time was 5,471,246. In other words, the charge *per capita* was 18 cents and 5 mills. So that one shipping to the stock yards 100 head of stock was charged \$18.50 for the privileges of the yard, the attendance of the employees, and the feed furnished. While from these figures alone we might not say that the charges were reasonable or unreasonable, we cannot but be impressed with the fact that the **smallness of the charge suggests no extor-* [99] *tion*. Further, as heretofore noticed, the findings show that the establishment of these yards has operated to secure to the shippers during a single year \$1,500,000 more than they would have realized in case of their nonexistence and a consequent shipment to Chicago, the other great stock market of the country.

It is not to be wondered that the trial court, in deciding the case, observed:

"Conceding, as we must, that the legis-

lation complained of was radical in its nature and effect, that it reduced the company's income about 50 per cent, and that it prevents it from realizing on the capital invested in its plant such a per cent as is ordinarily realized on capital invested in other mercantile and business enterprises, still," etc.

But inasmuch as the inquiry in that court proceeded upon lines which we have indicated were too narrow, it might well be that if there were no other questions we ought to simply send back the case for further investigation upon the true lines of inquiry. There are, however, other questions which compel notice, and one is that suggested by the 7th section in the statute, which provides a punishment for the first offense of not more than \$100, for the second offense not less than \$100 nor more than \$200, for the third offense not less than \$200 nor more than \$500 and imprisonment in the county jail not exceeding six months, and for each subsequent offense a fine of not less than \$1,000 and imprisonment not less than six months. The language of this section, taken in connection with the balance of the statute, is not entirely clear. The previous prescriptions of the statute are of a certain charge per head. Now, does this section contemplate a separate offense with a separate penalty for each excessive charge per head, or does it contemplate a single penalty for a violation of the statute in respect to the entire number of stock received in one shipment? The difference is significant. Taking the total number shipped to these stock yards in the year 1896, it amounted to an average of about 15,000 head per day. Would that, in case of an excessive charge for each head, mean 15,000 violations of the statute? If so, as after the third offense [100] the fine could not be less than \$1,000 for each offense, a single day's penalties would aggregate at least \$15,000,000. While the fact is not clearly disclosed by the testimony, doubtless the shipments were made by separate shippers in bunches all the way from 50 to 500 in number. If the penalty attaches simply to the charge for each shipment as a single act, the burden, though large, might not be deemed excessive; but if it attaches to that for each particular head of stock the penalties become enormous. It may be said that this is a penal statute, and therefore it is to be construed in favor of the delinquent, and that we have a right to expect that the state courts will construe the penalty as not attaching to the charge for each head of stock, but only to that upon the separate bunches shipped by different individuals. But is the language so clear that there is no doubt as to the construction? Is there not enough in it to justify a construction which may be accepted by the trial courts and approved by the supreme court of the state? And the construction of a state statute by the supreme court of the state is in a case like this conclusive upon us. Must the party upon whom such a liability is threatened take

the chances of the construction of a doubtful statute? If the one construction is placed upon it, then obviously, even accepting the largest estimate of value placed by any witness upon the property of the company, a single day's violation of the statute would exhaust such entire value in satisfaction of the penalties incurred. In this feature of the case we are brought face to face with a question which legislation of other states is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought.

Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, *and that such law by [101] its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defense is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defense. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws? Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty; then, even if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? Of course, these are extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. It may be said that these illustrations are not pertinent because they are of civil actions, whereas this statute makes certain conduct by

the stock-yards company a criminal offense, and simply imposes punishment for such offense; that it is within the competency of the legislature to prescribe the penalties for all offenses, either those existing at common law or those created by statute; and, further, that although the penalties herein imposed may be large, yet obedience to a statute like this can only be secured by large penalties; for otherwise the company, being wealthy and powerful, might defiantly disregard its mandates, *trusting to the manifold chances of litigation to prevent any serious loss from disobedience. A penalty of a dollar on a large corporation, whose assets amount to millions, would not be very deterrent from disobedience. It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations; and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

But it is not necessary to rest our decision upon this consideration, which was not fully discussed by counsel, but pass to a question which is of a kindred nature, and in which there is presented no matter of the doubtful construction of a statute.

The act in terms applies only to those stock yards within the state "which for the preceding twelve months shall have had an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep."

It appears affirmatively from the testimony that there are other stock yards in the state, one at Wichita and one at Jamestown, and it is stated by counsel for appellants that there are many others scattered through the state, each doing a small business. Neither the yard at Wichita nor that at Jamestown, so far as the testimony shows, comes within the scope of this act. So it may be assumed from the record that the legislature of Kansas, having regard simply to the stock yards at Kansas City and the volume of business done at those yards, passed this act to reduce their charges. Undoubtedly the act is general in its terms, and we may not, therefore, stop to inquire whether it conflicts with the constitutional prohibition contained in article 2, § 17, of the Constitution of Kansas:

"Sec. 17. All laws of a general nature [103] shall have a uniform *operation throughout the state; and in all cases where a general law can be made applicable no special law shall be enacted."

It may be assumed, for the purposes of the question now to be considered, that so far

as the Constitution of Kansas is concerned its legislature may enact a law general in its terms, and yet so phrased as necessarily to have operation only upon a single individual or corporation; but while making that concession we cannot shut our eyes to the fact that this act is precisely the same in its effect as though the legislature had said in terms that the Kansas City stock yards alone shall be subjected to its provisions. Accepting, however, the full force of the general language in which the statute is couched, it appears that a classification is attempted between stock yards doing a large and those doing a small business. The express and only basis of classification is in the amount of business done by the two classes. As evidence that we are right in our construction, we may refer to the brief of the learned attorney general, in which he says:

"The legislature has by this act classified the stock yards of the state into two classes, and has adopted the most natural and reasonable basis for such purposes that could be used, namely, the volume of business done. The reason for this is obvious; the stock yards doing a large volume of business are necessarily more of monopolies than those doing a smaller business. The public has greater interest in the business of large stock yards than it has in the business of smaller ones.

"Another reason why the classification should be based upon the volume of business done is that rates which are reasonable and proper and furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is large, while in a smaller plant doing a smaller volume of business higher rates may be necessary in order to afford adequate returns."

If the average daily receipts of a stock yard are more than 100 head of cattle, or more than 300 head of hogs, or more than 300 head of sheep, it comes *with- [104] in the purview of this statute. If less than that amount it is free from legislative restriction. No matter what yards it may touch to-day or in the near or far future, the express declaration of the statute is that stock yards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling 100 or more passengers a day to charge only a specified amount per mile for each, leaving those hauling 99 or less to make any charge which would be

reasonable for the service; or if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down.

[105] The question thus presented is of profoundest significance. Is it true in this country that one who by his attention to business, *by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? We cannot shut our eyes to well-known facts. Kansas is an agricultural state. Its extensive and fertile prairies produce each year enormous crops of corn and other grains. While portions of these crops are shipped to mills to be manufactured into meal and flour, it is found by many that there is a profit in feeding them to stock, so that the amount of stock which is raised and fattened in Kansas is large, and makes one of the great industries of the state. Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services; and this, not because any particular charge is unreasonable, but because you are making by the aggregate of those charges too large a sum, and ought therefore to divide with us. The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron, of this court, when in *Vanzant v. Waddel*, 2 Yerg. 262, 270, he said:

"Every partial or private law which directly proposes to destroy or affect individ-

ual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

The 14th Amendment forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." The scope of this prohibition has been frequently considered by this court.

In *Barbier v. Connolly*, 113 U. S. 27, 31, 23 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, 359, it was said:

"The 14th Amendment, in declaring that [106] no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

And in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533, 535:

"The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile *discriminations against [107] particular persons and classes, especially such as are of an unusual character, un-

known to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases."

In *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255, 258, in which was presented solely the question of classification, we said, referring to many cases, both state and national:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1071: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

These authorities are referred to again with approval in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

[108] "But we may, perhaps, come closer to the particular statute when we consider the decisions of the supreme court of Kansas, the state by whose legislature this act was passed. In *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, there was presented for consideration a statute providing for the payment of the wages of laborers in money, coupled with this provision in § 4:

"Sec. 4. This act shall apply only to corporations or trusts, or their agents, lessees, or business managers, that employ ten or more persons."

The act was held unconstitutional. After referring to an alleged defect in the title, the court said (p. 152, L. R. A. p. 372, Pac. p. 342):

"We have no hesitation in saying that if this statute had, without defect as to title,

clearly and in express terms amended corporate charters, retaining the section classifying corporations to which it was applicable by the number of men in their employ, it would be obnoxious to the 14th Amendment to the Constitution of the United States."

Again on pp. 153, 154, L. R. A. p. 372, Pac. p. 343:

"The obvious intent of the act is to protect the laborer, and not to benefit the corporation. Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. Such inequality destroys the law. In the instance cited, two of the eleven men might quit the employment of the company for which they worked, and by this act alone make a method of payment by the corporation lawful which was unlawful while the eleven were employed. The criminality or innocence of an act done ought not to depend on the happening of such a circumstance. Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. . . . A classification of the kind attempted makes a distinction between corporations identically *alike in organization, [109] capital, and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character."

And in support of these views the court quoted from Cooley's *Constitutional Limitations*, 5th ed. 484, 486:

"Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

So we have the clear declaration of the supreme court of Kansas that legislation by which one individual, or even one set of individuals, is selected from others doing the same business in the same way, and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the Constitution of Kansas and in that of the

United States, to the effect that the equal protection of the laws is guaranteed to all.

May we not rightfully accept this declaration of law by the highest tribunal of the state by whose legislature the act in question was passed. and, accepting the reasoning of that decision, does it not follow that, if an act which provides certain regulations for corporations employing ten or more laborers, and leaving corporations employing less than that number free from such regulations, is an unjust discrimination and a denial of the equal protection of the laws, an act which imposes regulations upon corporations doing business over a certain amount, and leaving all corporations doing a like business less than that amount free from such regulations, is equally obnoxious to constitutional prohibition?

[110] *The significance of the question thus clearly stated and forcibly answered by the supreme court of Kansas cannot be overestimated. It is not the province of this or any other court to consider its purely economic features. It may or it may not be wise, looking at it from such standpoint, to say to every citizen that his industry, ability, activity, and foresight may be rewarded up to a certain extent, and that beyond that he may not go. But whether it is wise or unwise is not for the courts to determine. Their limits of inquiry are purely judicial. And the single matter for our present consideration is whether in the restraint which the legislature of Kansas has attempted to impose upon this stock-yards company it has trespassed upon those rights which by the Constitution of the United States are secured to every individual against state action. It has been more than once said judicially that one of the principles upon which this government was founded is that of equality of right. It is emphasized in that clause of the 14th Amendment which prohibits any state to deny to any individual the equal protection of the laws. That constitutional provision does not, it is true, invalidate legislation on the mere ground of inequality in actual result. Tax laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. But that inequality is something which it is impossible to foresee and guard against, and therefore such resultant inequality in the operation of a law does not defeat its validity. As was said in this court in *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 463, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829, 830:

"If it be said that a lack of uniformity renders the statute obnoxious to that part of the 14th Amendment to the Federal Constitution which forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national,

rests the ordinary state tax of 4 mills. To every bank, state and national, and all alike, is given the privilege of discharging all tax obligations *by collecting from its stockhold- [111] ers and paying 8 mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the 8 mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only worth par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course, the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution."

So, again, exercising the undoubted right of classification it may often happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed on certain classes of business while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope, or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another, certain burdens imposed on one which do not rest upon another.

But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal *upon [112] all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and

the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the supreme court of Kansas in *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the 14th Amendment.

There yet remains a question of jurisdiction. The two suits which were consolidated were each brought by a stockholder in behalf of himself and all other stockholders against the corporation, its officers, and also the attorney general of the state of Kansas. The object of the suits was to restrain the attorney general from putting in force the [113] statute, and the *defendants from reducing the funds of the corporation, and therefore the dividends to the stockholders, by yielding compliance to the mandates of the statute, and failing to charge reasonable rates.

Of the jurisdiction of the court over the consolidated suit as one involving a controversy between the stockholders and the corporation and its officers, no serious question is made. *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Hawes v. Oakland*, 104 U. S. 450, *sub nom. Hawes v. Contra Costa Water Co.* 26 L. ed. 827; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, seem conclusive on the question. There is no force in the suggestion that the officers of the corporation agreed with the stockholders as to the unconstitutionality of the statute, and that therefore the suit is a collusive one. That was the condition in *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401, and it only emphasizes the fact that the officers were refusing to protect the interests of the stockholders, not wantonly, it is true, but from prudential reasons.

But the serious contention is that the court had no jurisdiction over the suit as against the attorney general of the state, and this on two grounds: First, because it

is in effect a suit against the state, and therefore forbidden by the 11th Amendment to the Federal Constitution; and, secondly, because it is an attempt on the part of a court of equity to restrain criminal proceedings. It is contended on the other hand that it is not a suit against the state, because it does not in any way involve its pecuniary interest, and is only an effort to prevent an officer of the state from putting in force an unconstitutional statute; that it does not attempt to interfere with criminal proceedings, because none have been commenced and none are pending, but involves simply a challenge of the constitutionality of the statute. It is also urged that the attorney general when served with process did not raise either defense; did not suggest that this was in effect a suit against the state, or that it was an attempt to interfere with criminal proceedings; that he pleaded several defenses and went into a trial of the merits on a motion for permanent injunction; took part in the taking of an immense amount of testimony and in an argument before the trial judge upon the question of the validity of the *statute, and when its [114] validity had been adjudged, then, for the first time and as a preliminary to a final decree to be entered without further testimony, filed an answer containing a formal plea that the suit was one in effect against the state. It is further contended that by the statutes of Kansas (Kan. Comp. Laws 1879, p. 901, § 5589) the governor may require the attorney general to appear for the state in any court and prosecute or defend therein any cause or matter, civil or criminal, in which the state may be a party or interested, and that while no request from the governor was shown the trial court was justified, in the absence of some challenge of its jurisdiction, in assuming that such request had been given, and that it would be grossly inequitable, after a full inquiry upon the merits in such court and an adjudication in favor of the validity of the statute, to permit the attorney general by a formal plea of jurisdiction to prevent any review of the merits in this court.

Without expressing any opinion as to the jurisdiction of the court if it had been properly and seasonably challenged, we think the true solution of this matter will be found in reversing the decree upon the merits, and directing a dismissal of the suit as to the attorney general, without prejudice to any other suit or action. *It is therefore ordered that the decree of the Circuit Court be reversed*, and the case remanded to that court, with instructions to enter a decree in favor of the plaintiffs and against the corporation and its officers, in accordance with the prayer of the bills, and also a decree dismissing the suit as to the attorney general of Kansas, without prejudice to any further suit or action.

Mr. Justice **Harlan**, with whom concurred Mr. Justice **Gray**, Mr. Justice **Brown**, Mr. Justice **Shiras**, Mr. Justice **White**, and Mr. Justice **McKenna**:

We assent to the judgment of reversal—

[115] so far as the merits of this case are concerned—upon the ground that the statute of Kansas in question is in violation of the 14th Amendment of the Constitution of the United States in that it applies only to the Kansas City Stock-Yards Company, and not to *other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws. Upon the question whether the statute is unconstitutional upon the further ground that, by its necessary operation, it will deprive that company of its property without due process of law, we deem it unnecessary to express an opinion.

WILLIAM B. DINSMORE and C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as Executors and Trustees under the Will of William B. Dinsmore, Deceased, *Petitioners*,

v.

SOUTHERN EXPRESS COMPANY, L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, Composing the Railroad Commission of the State of Georgia, *et al.*

(See S. C. Reporter's ed. 115-121.)

War revenue act—express companies—effect of amendatory act.

The exemption of express companies by the amendatory act of March 2, 1901, chap. 806, from the requirement of the war revenue act of June 13, 1898, chap. 448, in relation to adhesive stamps to be placed upon bills of lading, manifests, or other evidences of the receipt of goods for carriage or transportation, requires the affirmance on certiorari, without reference to the merits of the case as affected by the earlier act, of a judgment of the circuit court of appeals effecting the dismissal of a suit to prevent the application by an express company of any of its moneys to meet this requirement.

[No. 136.]

Argued February 25, 1901. Decided November 18, 1901.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision reversing a decree of the Circuit Court for the Southern District of Georgia which enjoined the enforcement of an order of the Railroad Commission of Georgia requiring an express company to pay the war stamp tax. *Affirmed.*

See same case below, 42 C. C. A. 623, 102 Fed. 794.

The facts are stated in the opinion.

NOTE.—On the effect of statutes to defeat or preserve pending civil actions—see *Pritchard v. Savannah Street & Rural Resort R. Co.* (Ga.) 14 L. R. A. 721, and note. And see note to *United States v. Tynen*, 20 L. ed. U. S. 153.

183 U. S.

Mr. Frank H. Miller argued the cause and filed a brief for petitioners.

Mr. William K. Miller also argued the cause for petitioners.

Mr. Joseph M. Terrell argued the cause and filed a brief for respondent, the Railroad Commission of Georgia.

Mr. Fleming duBignon filed a statement for respondent, the Southern Express Company, in response to notice of application for writ of certiorari.

*Mr. Justice Harlan delivered the opinion [116] of the court:

William B. Dinsmore and others, citizens of New York,—some of them being executors and trustees under the will of the late William B. Dinsmore of that state,—brought this action on the 17th day of April, 1897, in the circuit court of the United States for the southern district of Georgia against the Southern Express Company, a corporation of Georgia having its principal place of business in that state, and also against L. N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson, constituting the Railroad Commission of Georgia, and Joseph M. Terrell, Attorney General of Georgia, the individual defendants being citizens of Georgia.

The plaintiffs sued as owners and holders of shares of stock in the defendant express company, and sought a decree that would prevent the application by that corporation of any of its moneys to meet the requirement of the war revenue act of June 13th, 1898, chap. 448, in relation to adhesive stamps to be placed upon bills of lading, manifests, or other evidences of the receipt of goods for carriage or transportation.

The portion of that act to which the bill referred is the following:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, *express company*, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of *the value of one cent: *Provided*, That but [117] one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation, or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 30 Stat. at L. 448, 459, chap. 448.

After the passage of the above act com-

plaint was made by citizens of Georgia to the railroad commission of that state to the effect that the defendant express company required shippers or consignors to supply the requisite stamps for bills of lading or receipts given to them. The commission thereupon, July 11th, 1898, ordered that the Southern Express Company appear before it on the 18th day of July, 1898, "then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

The company appeared and denied the jurisdiction of the commission. But on August 2d, 1898, the commission, after hearing the parties, ordered that the required stamp be supplied by the express company, and not by shippers in whole or in part.

Appropriate allegations having been made to show that the suit was not a collusive one to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance, the relief asked was—

[118] That it be adjudged and decreed that the order of the railroad commission of the state of Georgia of August 2d, 1898, requiring the express company to pay the amount of the war revenue tax on business from one point to another in the state without endeavoring to collect the same from shippers, or requiring them to make the payment thereof before the issuing *of receipts or bills of lading, was unconstitutional, null, and void; that the express company, its officers and agents, be restrained from voluntarily complying with the order of the commission of August 2d, 1898, and paying such tax; that the attorney general of the state be restrained from instituting any suit against the express company for the purpose of enforcing the provisions of the above order of the railroad commission; that a perpetual injunction, of the same purport, tenor, and effect be granted to complainants; and that the plaintiffs have such other and further relief in the premises as the nature of the case required and to a court of equity might seem meet.

The railroad commissioners and the attorney general of the state severally demurred to the bill. The case having been argued upon the demurrers, Judge Speer delivered an opinion which is reported in 92 Fed. 714.

That opinion was accompanied by the following order, entered March 7th, 1899: "It is now upon consideration ordered, adjudged, and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war stamp tax in question be, and the same is hereby, denied; ordered, adjudged, and decreed further that the defendants, the Railroad Commission of Georgia, and each member thereof, to wit, the individual defendants, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, be, and the same

are hereby, enjoined from any and all order, direction, action, or legal steps instituting or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said commission, dated August 2, 1898, for the reason that said order is null and void, and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax." The court in its opinion said: "It is not deemed necessary to enjoin the attorney general, for it is presumed that the eminent lawyer who is the official head of the bar of the state will, without such injunction, accord all appropriate respect to the decision of the court."

*Upon appeal to the circuit court of ap-[119] peals the decree of the circuit court was reversed, June 7th, 1900, with directions to dismiss the case, Judge McCormick delivering the opinion of the court, Judge Shelby dissenting. 42 C. C. A. 623, 102 Fed. 794.

The case was thereupon brought to this court upon writ of certiorari, and was submitted for decision at the last term.

After the submission of the case in this court the above part of the war revenue act of 1898 relating to stamps to be attached to bills of lading, manifests, etc., was amended in important particulars by an act of Congress approved March 2d, 1901, chap. 806. One amendment, which took effect on and after July 1st, 1901, provided that the above part of the act of 1898 should be amended to read as follows:

"Freight: It shall be the duty of every railroad or steamboat company, carrier, or corporation, or person whose occupation is to act as such, *except persons, companies, or corporations engaged in carrying on a local or other express business*, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, or corporation, or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 31 Stat. at L. 938, 945, chap. 806.

This change in the law renders it unnecessary to consider any of the important

questions determined in the circuit court and circuit court of appeals under the act of 1898. The object of this suit was to prevent the enforcement of the order of *the railroad commission based upon its construction of that act. But whatever might be now held as to the meaning and scope of the act of 1898 as applied to express companies, the amendatory statute of 1901, in declaring what companies, corporations, and persons shall attach the required stamp to bills of lading, manifests, and receipts for goods or other property to be transported, distinctly excludes express companies. So that no actual controversy now remains or can arise between the parties. The plaintiffs do not need any relief, because the act of 1901 accomplishes the result they wished.

Although this cause was determined in the circuit court of appeals and was submitted here prior to July 1st, 1901, our judgment must have some reference to the act of 1901. In *United States v. The Peggy*, 1 Craneh, 103, 109, 2 L. ed. 49, 50, the Chief Justice, delivering the opinion of the court, said: "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation." *Mills v. Green*, 159 U. S. 651, 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321, 161 U. S. 101, 40 L. ed. 632, 16 Sup. Ct. Rep. 492.

If the cause had not been submitted in the circuit court of appeals until after the act of 1901 took effect, that court, we apprehend, would have dismissed the suit upon the ground that by the operation of that legislation the whole subject-matter of litigation had disappeared, and that the order of the railroad commission, even if originally valid, ceased to have any effect. The question whether the express company or the shipper was required by the act of 1898 to furnish the required stamp, as well as the question whether the railroad commission had any power to make the order of which complaint is made, would thus have become immaterial, and the dismissal of the suit would have resulted without any reference to the merits of the case as affected by the act of 1898.

[121] *As the order of the circuit court of appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of the act of 1901, we need not consider the grounds upon which that court proceeded, or any of the questions determined by it or by the circuit court; and *the judgment must be affirmed without costs in this court.*

It is so ordered.

183 U. S. U. S., Book 46.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana, *Plff. in Err.*,

v.

MERCHANTS' LOAN & TRUST COMPANY of Chicago, Illinois.

(See S. C. Reporter's ed. 121-129.)

Appeal—agreed statement—when equivalent of special finding—question for review.

An agreed statement of facts cannot be taken as the equivalent of a special finding of facts, within the meaning of U. S. Rev. Stat. §§ 649, 700, providing for a waiver of trial by jury and the proceedings on a trial by the court, so that an exception to a general finding of the court upon such statement will bring up a question for review, where such agreed statement contains, in addition to certain ultimate facts, other evidential facts from which a material ultimate fact might be inferred, but which is not agreed upon or found.

[No. 67.]

Argued October 29, 30, 1901. Decided December 2, 1901.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment affirming a judgment of the District Court of Illinois in favor of defendant in an action to enforce an assessment upon shareholders in a national bank. *Affirmed.*

See same case below, 39 C. C. A. 231, 98 Fed. 688.

The facts are stated in the opinion.

Mr. Delevan A. Holmes argued the cause, and, with Mr. W. E. Mason, filed a brief for plaintiff in error:

The judgment and finding of the court amount to no more than a declaration that the court found the law to be in favor of defendant on the case as stated.

Wayne County v. Kennicott, 103 U. S. 554, 26 L. ed. 486.

If there is an agreed statement of facts submitted to the trial court and upon which its judgment is formed, such agreed statement of facts will be taken as the equivalent of a special finding of fact.

Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481.

A case is entitled to review upon the merits wherever and whenever the record places the appellate tribunal in the same position as to the facts as the trial court, and with all the information touching the questions involved, that the trial court had at the time of entering the judgment complained of.

United States v. Eliason, 16 Pet. 292, 10 L. ed. 969; *Stimpson v. Baltimore & S. R. Co.* 10 How. 329, 13 L. ed. 441; *Suydam v. Williamson*, 20 How. 427, 15 L. ed. 978.

Mr. John N. Jewett argued the cause and filed a brief for defendant in error:

The duty and responsibility of determin-

NOTE.—On review of judgment rendered on agreed statement of facts—see note to *Stimpson v. Baltimore & S. R. Co.* 13 L. ed. U. S. 442.

ing questions of fact in cases at law are, by law, devolved upon the trial court, and there is no authority in this court to examine the testimony in any case and from it make a finding of ultimate facts.

Reed v. Stapp, 3 C. C. A. 244, 9 U. S. App. 34, 52 Fed. 641; *Hudson Furniture Co. v. Harding*, 30 L. R. A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468-470; *Lehnen v. Dickson*, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *Martinton v. Fairbanks*, 112 U. S. 670, 28 L. ed. 862, 5 Sup. Ct. Rep. 321.

This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff, on the question of variance, or because there was no evidence to sustain the verdict rendered.

Lancaster v. Collins, 115 U. S. 222-225, 29 L. ed. 373, 374, 6 Sup. Ct. Rep. 33.

When a case is tried by a Federal judge without a jury the sufficiency of the evidence to sustain the general findings of fact cannot be considered by the appellate court.

Supreme Lodge K. of P. v. England, 36 C. C. A. 298, 94 Fed. 369.

ought not to maintain his action "because it says that it did not, at any time between the 1st day of December, 1894, and the 1st day of June, 1895, or at any other time, purchase or become the owner of 120 shares of the capital stock of the said First National Bank of Helena, Montana, or any share or shares of the capital stock of said bank, and of this the said defendant puts itself upon the country," etc.

Under these pleadings the plaintiff, of course, had the burden of proving ownership of the stock by the defendant.

The parties waived a trial by jury and entered into the following stipulation:

"It is hereby stipulated and agreed between the parties *herein that trial by jury [123] in this case be waived; that this cause may be submitted to the Honorable Christian C. Kohlsaat, judge of this court, upon the foregoing statement of facts duly signed by the attorneys of the parties respectively, and that for the purpose of such trial the said statements of facts shall be taken as absolutely true, and shall be taken and considered as all the facts concerning the transactions therein referred to, subject to any and all objections which might properly be urged to the competency or materiality of any part thereof.

Upon the trial before the court without a jury, the statement of facts as agreed upon between the parties was put in evidence, and such statement contained all the evidence in the case, which was thereupon submitted to the court for its decision. The court made no special findings of facts, but made a general finding of the issues for the defendant, embodied in a judgment which was entered as follows:

"Now come the parties by their attorneys, and thereupon a jury is waived by written stipulation, and this cause is submitted to the court for trial, and the court, having heard the evidence and arguments of counsel, and being now fully advised, finds the issues for the defendants, to which finding the plaintiff excepts, and thereupon the plaintiff enters his motion for a new trial, which is heard and overruled, to which ruling the plaintiff excepts. It is thereupon considered and adjudged by the court that the defendants recover of the plaintiff their costs in this behalf, to be taxed, and that execution issue therefor, to which judgment the plaintiff then and there excepts."

The statement of facts agreed upon and filed in the court was subsequently allowed as a bill of exceptions. There was no exception taken to any fact contained in this statement, nor in the progress of the trial, nor was there any request to find other special facts. The only exception taken was to the general finding of the court in favor of the defendant. From this agreed statement of facts it appears that on April 15, 1893, the defendant loaned to one Ashby of Helena, Montana, \$12,000, and took his note in the usual form payable on August 16, 1893. As collateral security for the payment of the note at maturity, Ashby signed in blank and delivered to the defendant a certificate rep-

[121] *Mr. Justice Peckham delivered the opinion of the court:

The plaintiff in error brings this case here to review a judgment of the United States circuit court of appeals for the seventh circuit (39 C. C. A. 231, 98 Fed. 688) affirming a judgment of the district court of Illinois in favor of the defendant. The plaintiff in error is the receiver of the First National Bank of Helena, *Montana, and brought this action against the defendant to enforce an assessment of 100 per cent ordered by the Comptroller of the Currency on all owners of shares in that bank. In his declaration the plaintiff, after alleging the organization of the bank, his appointment as receiver, and the assessment by the Comptroller, averred that "the Merchants' Loan & Trust Company, a corporation, at some time between the 1st day of December, 1894, and 1st day of June, 1895 (the exact date being to plaintiff unknown), purchased and became the owner of 120 shares of the capital stock of said First National Bank of Helena, Montana, of the par value of \$100 each, and continued to be, and was at the time said bank suspended and ceased to do business, the real owner of the same; but, in order to evade the responsibility imposed by law upon the shareholders in said bank, caused said shares to be placed on the books of said bank in the name of P. C. Peterson, one of its employees, in whose name said shares appeared on the said books at the time of said failure. And the plaintiff avers that the said Peterson was at the time said stock was issued to him as aforesaid, and at the time of the failure of said bank, a person of small means and not responsible financially."

[122] The plaintiff demanded judgment for the sum of \$12,000, being \$100 on each share of the stock in the bank owned (as alleged) by the defendant.

As one of several defenses to the action, the defendant pleaded that the plaintiff

[124] representing *150 shares of the capital stock of the Helena National Bank of Helena, Montana. The note taken for the loan was of the kind usually termed a collateral note, and authorized the sale of the collateral deposited as security therefor upon default in the payment of the note. At the time of the loan Ashby was president of the Helena National Bank. On July 26, 1893, Ashby made a general assignment for the benefit of his creditors, and among the property assigned by him was the certificate for 150 shares of the capital stock of the Helena National Bank, described by the assignor as then held by the Merchants' Loan & Trust Company in pledge. About the date of the assignment Ashby resigned the presidency of the Helena National Bank. In the summer of 1894 the Ashby note still remained unpaid, and the certificate of stock remained in the possession of the defendant, no transfer thereof being made upon the books of the bank. Later in the year 1894 the parties in interest in Helena proposed to consolidate the Helena National Bank with the First National Bank of Helena, and the consent of a sufficient number of shareholders in the bank was obtained before the defendant was asked to consent to the transfer of the shares held by it in pledge, on the same terms upon which the owners of shares in the Helena National Bank had agreed to a consolidation of the two banks, by taking shares in the First National Bank of Helena in exchange for their shares in the Helena National Bank, at the rate of 80 per cent of new shares in exchange for the old. In response to such request the defendant sent the certificates for the 150 shares in the Helena National Bank to the president of that bank. In exchange therefor certificates for 120 shares of stock in the First National Bank of Helena were sent to the defendant, the shares being entered, at request of defendant, on the books of the bank and in the certificates, in the name of P. C. Peterson, an employee of the defendant. Subsequently the First National Bank of Helena went into the hands of a receiver, who found the 120 shares standing on its books in the name of Peterson. The receiver, after the assessment was made, commenced this action against the defendant trust company, alleging that it was the real owner of the stock, and that *it stood in the name of Peterson for the purpose of enabling the defendant to evade liability as owner.

[125]

The note remains unpaid, although two small payments on account have been made by the assignee of the maker since the assignment.

It is part of the statement agreed upon that the original shares of stock were placed in defendant's possession simply as a pledge or collateral security for the payment of the note made by Ashby, and the certificates which have been substituted for them, as already mentioned, "have ever since been and now are in the possession and control of the defendant, and are held by it in the same way and for the same purpose as the certificates for 150 shares of the capital stock of the Helena National Bank were originally

183 U. S.

held, except as the conditions may have been changed by the facts hereinbefore stated, but that neither the defendant nor the said Peterson ever took any part in the management of either of said banks, or participated in the administration of their affairs." The "facts hereinbefore stated" consisted, not only of those which have been given above, but also of correspondence between the officers of defendant and the officers of the Helena National Bank and the assignee of the pledgeor Ashby, which is set out in the agreed statement.

This statement has been referred to for the purpose of understanding the materiality of certain facts found or agreed upon, the failure to do which prevents our use of the statement in the decision of the case. The contention of the plaintiff herein is that the substitution of the original stock for that of the First National Bank of Helena was made without the consent of the pledgeor, and amounted to a conversion of the stock, and made the defendant, when it took the shares of stock in the consolidated bank, the owner thereof, and rendered it liable to assessment as such owner, notwithstanding the fact that the stock was entered and remained on the books of the bank and in the certificate issued by the bank, in the name of Peterson, as owner.

Aside from the question whether the defendant had or had not the right as pledgee of the stock in the Helena National *Bank to [126] cause the same to be transferred into shares of the other bank after a majority of the stockholders had consented to a consolidation, it would seem that if Ashby, the owner, had himself consented to the arrangement, or subsequently ratified it, the substituted stock would remain under the same terms and conditions as attached to the original stock, and it would be simply a pledge to, and not an ownership of stock by, the defendant; and as the stock never stood in the name of the defendant, the case would be governed by that of *Pauly v. State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465, and the cases there cited, and *Jackson v. Emmons*, 176 U. S. 532, 44 L. ed. 576, 20 Sup. Ct. Rep. 465.

The difficulty we meet, which prevents the decision of the case from resting on the statement of facts, lies in the omission therefrom of any finding or agreement upon the question of fact whether the pledgeor had or had not consented to the change; and instead of any such finding or agreement there is placed in the statement certain correspondence from which, together with other facts stated, an inference of consent or perhaps ratification might be drawn, but is not found or agreed upon, thus leaving the ultimate fact of consent or nonconsent a matter of inference, and an inference of fact, and not of law; and this is a material fact arising upon the statement as agreed upon.

Neither is there any finding upon the question of the consent of the assignee of the pledgeor to the substitution of the stock, or upon the question of ratification by him. There are facts from which the consent or ratification might be inferred, or the con-

trary, but there is no finding of any ultimate fact regarding the matter.

The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court (Rev. Stat. §§ 649, 700) is that when there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a [127] material ultimate fact might be *inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.

As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held that upon a trial by the court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties; and if the finding of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions; and in such case the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury. *Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608.

In this case the finding is general, and, strictly construing the statute, the only questions which would be reviewable would be those questions which arose during the progress of the trial, and which were presented by bill of exceptions. It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. *Wayne County Supers. v. Kennicott*, 103 U. S. 554, 26 L. ed. 486. But as such equivalent, there must, of course, be a finding or an agreement upon all ultimate facts, and the statement must not merely present evidence from which such facts or any of them may be inferred.

An exception to a general finding of the court on a trial without a jury brings up no question for review. The finding is conclusive, and there must be exceptions taken to the rulings of the court during the trial in order to permit a review thereof. *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. 237, 21 L. ed. 827.

In *Martinton v. Fairbanks*, 112 U. S. 670, 28 L. ed. 862, 5 Sup. Ct. Rep. 321, which was a trial before the judge without the intervention of a jury, and where there was only a general finding of facts and a judgment for the plaintiff below, the court decided that [128] an exception to the *general finding of the court for the plaintiff upon the evidence ad-

duced at the trial presented no question of law which the court could review. In that case there was no agreed statement of facts.

Here, although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts, together with certain other facts evidential in their nature from which an important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute.

In *Raimond v. Terrebonne Parish*, 132 U. S. 192, 33 L. ed. 309, 10 Sup. Ct. Rep. 57, it was said that the agreed statement of facts by the parties, or a finding of facts by the circuit court, must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred.

In *Glenn v. Fant*, 134 U. S. 398, 33 L. ed. 969, 10 Sup. Ct. Rep. 583, there was a stipulation that the case should be heard upon an agreed statement of facts annexed, with leave to refer to exhibits filed therewith. It was held that the stipulation could not be regarded as taking the place of a special verdict or of a special finding of facts, and that the court had no jurisdiction to determine the question of law arising thereon.

It is true there was no bill of exceptions in that case, but the bill in this case presents no exception taken during the progress of the trial, and only contains an exception to the conclusion of the trial court in ordering judgment upon the issues in favor of the defendant.

Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481, decided that any mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, could not be deemed a special finding of facts within the scope of the statute; and if there were a general finding and no agreed statement of facts, the court must accept that finding as conclusive, and limit its inquiry to the sufficiency of the complaint and to the rulings, if any be preserved on questions of law arising during the trial. The court, in the opinion written by Mr. Justice Brewer, said:

*"But the burden of the statute is not [129] thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts; and in another it may be difficult when the testimony is largely in parol and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine

the testimony in any case, and from it make a finding of the ultimate facts."

In *St. Louis v. Western U. Teleg. Co.* 166 U. S. 388, 41 L. ed. 1044, 17 Sup. Ct. Rep. 608, it was held that the special finding of facts referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties; and if the finding of facts be general, only such rulings made in the progress of the trial can be reviewed as are presented by a bill of exceptions; and in such case the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury.

We now hold, in accordance with the authorities, that an agreed statement of facts which is so defective as to present, in addition to certain ultimate facts, other and evidential facts upon which a material ultimate fact might have been, but which was not, agreed upon or found, cannot be regarded even as a substantial compliance with the statute. Being concluded by the general finding of the issues in favor of defendant, there is no error in the record, and the judgment must be affirmed.

[130]*SEWARD A. HASELTINE *et al.*, Plffs. in
Err.,
v.

CENTRAL NATIONAL BANK.

(See S. C. Reporter's ed. 130-132.)

Appeal—final judgment.

A judgment reversing a judgment of the trial court granting a recovery of usurious interest under U. S. Rev. Stat. § 5198, upon the ground that the plaintiffs had neither paid nor tendered the principal sum due, and remanding the cause "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered," is not a final judgment to which a writ of error will lie.

[No. 62.]

Submitted October 29, 1901. Decided December 2, 1901.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment reversing a judgment of the Circuit Court for Greene County in favor of plaintiffs in an action to recover usurious interest. Dismissed.

See same case below, 155 Mo. 66, 56 S. W. 895.

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 579; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Archison*, T. & S. F. R. Co. 28 C. C. A. 482, and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.
183 U. S.

Statement by Mr. Justice Brown:

*This was an action brought originally in [130] the circuit court for Greene county, Missouri, by the Haseltines against the Central National Bank, to recover double the amount of certain alleged usurious interest paid by the plaintiffs to defendant, and which they sought to recover under the 2d clause of Rev. Stat. § 5198, providing that "in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same."

The trial court rendered judgment in favor of the plaintiffs for \$831.70. From this judgment defendant appealed to the supreme court of the state, which reversed the judgment of the trial court upon the ground that the plaintiffs had neither paid nor tendered the principal sum due, and remanded the cause "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered."

Defendant moved to dismiss the writ of error upon the ground that this was not a final judgment.

Messrs. James Baker and Seward A. Haseltine submitted the cause for plaintiffs in error:

The provision of U. S. Rev. Stat. § 709, for writs of error, would be nugatory if the state supreme courts could prevent this court from reviewing its decisions by deciding a case on its merits and then returning the case to the lower courts to set aside the judgment and dismiss the action.

A judgment is final, for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case.

Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799.

Mr. John Ridout submitted the cause for defendant in error:

The judgment of the highest court of law of a state is not a final judgment within the 25th section of the judiciary act of 1789 (U. S. Rev. Stat. § 709), if the cause has been remanded to the inferior state court for further proceedings consistent with the judgment of the highest court.

Parcels v. Johnson, 20 Wall. 653, 22 L. ed. 410; *McComb v. Knox County*, 91 U. S. 1, 23 L. ed. 185; *Baker v. White*, 92 U. S. 176, 23 L. ed. 480; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Johnson v. Keith*, 117 U. S. 199, 29 L. ed. 888, 6 Sup. Ct. Rep. 669.

*Mr. Justice Brown delivered the opinion [131] of the court:

The motion to dismiss must be granted. We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. The case of *Mower v. Fletcher*, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799, is not in point, as the judgment of the supreme

court of the state remanded that case to the inferior court, with an order to enter a specified judgment, nothing being left to the judicial discretion of the court below. A like ruling was made in *Atherton v. Fowler*, 91 U. S. 143, 23 L. ed. 265, and *Tippecanoe County Comrs. v. Lucas*, 93 U. S. 108, 23 L. ed. 822.

While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the supreme court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the circuit court to dismiss their petition, when, under *Mower v. Fletcher*, they might have sued out a writ of error at once.

McComb v. Knox County Comrs. 91 U. S. 1, 23 L. ed. 185, is a case in point. That was a writ of error to the court of common pleas of the state of Ohio. The case had been taken to the supreme court of the state, where the judgment of the common pleas was reversed for error in sustaining a demurrer to the replies, and overruling that to the answer. Upon suggestion by defendant that he might ask leave to amend his answer, the case was remanded "for further [132] proceedings according to *law." Upon the mandate being filed, defendant did not ask leave to amend his answer, but elected to rely upon his defense already made. Thereupon the court gave judgment against him, and he sued out a writ of error from this court. We held that the judgment of the supreme court, being one of reversal only, was not final; that so far from putting an end to the litigation it purposely left it open; that the law of the case upon the pleadings as they stood was settled, but ample power was left in the common pleas to permit the parties to make a new case by amendment; that the final judgment was that of the common pleas; that "it may have been the necessary result of the decision . . . of the question presented for its determination; but it is none the less, on that account, the act of the common pleas," and was, when rendered, open to review by the supreme court. The writ was dismissed. A similar case is that of *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850.

This writ of error is therefore dismissed upon the authority of *Brown v. Union Bank*, 4 How. 465, 11 L. ed. 1058; *Pepper v. Dun-*
118

lap, 5 How. 51, 12 L. ed. 46; *Tracy v. Holcombe*, 24 How. 426, 16 L. ed. 742; *Moore v. Robbins*, 18 Wall. 588, 21 L. ed. 753; *St. Clair County v. Lovingsston*, 18 Wall. 628, 21 L. ed. 813; *Parcels v. Johnson*, 20 Wall. 653, 22 L. ed. 410; *Baker v. White*, 92 U. S. 176, 23 L. ed. 430; *Bdstwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Johnson v. Keith*, 117 U. S. 199, 29 L. ed. 888, 6 Sup. Ct. Rep. 669.

Dismissed.

SEWARD A. HASELTINE *et al.*, *Plffs. in Err.*,
v.

CENTRAL NATIONAL BANK.

(See S. C. Reporter's ed. 132-137.)

National banks—usurious interest—set-off.

Usurious interest paid in cash upon renewals of a note given to a national bank, and of all other notes of which it was a consolidation, cannot be set off in an action upon the note, as the remedy provided by U. S. Rev. Stat. § 5198, where such usurious interest has been actually paid,—*viz.*, a recovery in an action in the nature of an action of debt, of twice the amount of the interest thus paid,—is exclusive.

[No. 63.]

Submitted October 29, 1901. Decided December 2, 1901.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment affirming a judgment of the Circuit Court of Greene County in favor of plaintiff in an action on a promissory note. *Affirmed.*
See same case below, 155 Mo. 58, 55 S. W. 1015.

Statement by Mr. Justice **Brown**:

*This was an action instituted in the circuit court of Greene county, Missouri, by the Central National Bank, to recover of the defendants the amount of a promissory note for \$2,240, executed June 15, 1896, by two of the defendants as principals and two others as sureties. [133]

The answer was a general denial and a special defense of usury in the original notes, and partial payments, as set up in the several paragraphs of the answer.

The case was referred to a referee, who reported the note sued upon to be a renewal note, and a consolidation of five original notes, the first of which was for \$800, given July 27, 1891; the second for \$100, of the same date; the third for \$500, dated January 24, 1892, and credited by \$100 payment thereon; the fourth for \$340, dated January 16, 1893, and the fifth and last for \$600, dated May 29, 1893.

The referee further found that the defendants had received on this note \$2,240 (or rather out of the notes constituting that

NOTE.—On usury by national banks—see note to *Farmers' & M. Nat. Bank v. Dearing*, 23 L. ed. U. S. 196.

note) the sum of \$2,199.35 in cash, making the amount reserved out of the note when it was made \$40.65. That there had been paid cash discounts upon the several renewals of the notes which constituted the \$2,240 note sued upon, down to October 24, 1894, exclusive of the amounts reserved out of the notes at the time they were originally given, the sum of \$566.70, which cash discounts were paid in advance at the dates of the several renewals. That the whole amount of discounts and interest paid, as well as those deducted by the bank, upon all said loans from the beginning to the end down to and including the note sued on, was \$947.50. That these payments were made in excess of the legal rate for said loans.

Upon this report the court entered judgment in favor of the plaintiff for \$2,199.35 (or, apparently, by mistake \$2,199), that being the face of the note sued on after deducting the discount of \$40.65, reserved when the note was executed. Upon appeal to the supreme court this judgment was affirmed (155 Mo. 58, 55 S. W. 1015), and defendants sued out this writ of error.

Messrs. James Baker and Seward A. Haseltine submitted the cause, and **Mr. James Baker** filed a brief for plaintiffs in error:

Appellants were entitled to have the usurious interest paid applied upon the note of respondent.

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; *Moniteau Nat. Bank v. Miller*, 73 Mo. 187; *First Nat. Bank v. Turner*, 3 Kan. App. 352, 42 Pac. 936; *Guthrie v. Reid*, 107 Pa. 251; *National Bank v. Lewis*, 75 N. Y. 516, 31 Am. Rep. 484; *National Bank v. Davis*, 6 Cent. L. J. 106; *Sydney v. Mt. Sterling Nat. Bank*, 94 Ky. 231, 21 S. W. 1050.

Mr. John Ridout submitted the cause for defendant in error:

By U. S. Rev. Stat. § 5198, a new right and new remedy were created, and the remedy provided by that section is exclusive of any other.

Barnet v. Muncie Nat. Bank, 98 U. S. 558, 25 L. ed. 213; *Driesbach v. Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658; *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336; *Carter v. Carusi*, 112 U. S. 478, 28 L. ed. 820, 5 Sup. Ct. Rep. 281.

The decisions of this court construing the sections of the national bank act must prevail over decisions of the state courts.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 33, 23 L. ed. 198.

[134] ***Mr. Justice Brown** delivered the opinion of the court:

The only question involved in this case is whether, in an action upon a note given to a national bank, the maker may set off usurious interest paid in cash upon renewals of such note, and of all others of which it was a consolidation.

In this case, defendants sought to show that they had paid to the plaintiff bank within two years prior to the execution of

this note, upon other notes of which this was a consolidation, and also upon this note, usurious interest aggregating \$580, which they asked to have deducted from the principal sum of \$2,240, represented by this note, thereby reducing the plaintiff's claim to \$1,660.

We understand it to be conceded that, as the note in question was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the national banking act, and not by the law of the state. *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196. In that case it was held that a law of New York forfeiting the entire debt for usury was superseded by the national banking law, and that such law was only to be regarded in determining the penalty for usury.

That part of the original national banking act which deals with the subject of usury and interest is now embraced in §§ 5197 and 5198 of the Revised Statutes, the first one of which authorizes national banks to charge interest "at the rate allowed by the laws of the state," and, when no rate is fixed by such laws, a maximum rate of 7 per cent. The next section is as follows:

"5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover *back in an action, in the nature of an action [135] of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Two separate and distinct classes of cases are contemplated by this section; *first*, those wherein usurious interest has been taken, received, reserved, or charged, in which case there shall be "a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon;" *second*, in case usurious interest has been paid, the person paying it may recover back twice the amount of the interest "thus paid from the association taking or receiving the same."

While the first class refers to interest taken and received, as well as that reserved or charged, the latter part of the clause apparently limits the forfeiture to such interest as the evidence of debt carries with it, or which has been agreed to be paid, in contradistinction to interest actually paid, which is covered by the second clause of the section. Carrying this perfectly obvious distinction in mind, the cases in this court are entirely harmonious.

That of *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390, arose under the *first* clause. The facts are not stated in the report of the case, but referring to the original record, it appears that plaintiff sued the bank to recover twice

the amount of certain usurious interest paid to it. Another action was consolidated with this, in which plaintiff sought to enjoin defendant from proving certain notes against the estate of which he was assignee, in which a large amount of usurious interest had been included.

[136] In the opinion a distinction is drawn between usurious interest carried with the evidence of debt or which has been agreed to be paid, and interest which has actually been paid, and it was said that interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of § 5198, and become principal; and that, in a suit by a national bank upon the note, the debtor may insist that the entire interest, legal and usurious, included in his *written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit; and that the forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. It was further held that interest included in a renewal note is not interest *paid*, since, if it were so, the borrower could, under the second clause of the section, sue the lender and recover back twice the amount of the interest thus paid, when he had not, in fact, *paid* the debt nor any part of the interest as such. The words, "in case the greater rate of interest has been paid," in § 5198, refer to interest actually paid, as distinguished from interest included in the note and "agreed to be paid."

The cases under the *second* clause of the section are more numerous. *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212, was an action by a national bank upon a bill of exchange. Defendants set up that the acceptors had been constant borrowers from the bank for several years, and that it had taken from them a large amount of usurious interest; that the bill in suit was the last of eight renewals, and that illegal interest had been taken upon the series to the amount of \$1,116, which it was insisted should be applied as a payment upon the bill in question. It was also insisted that illegal interest had been taken upon other bills of exchange to the amount of \$6,363.24, and that the defendants were entitled to recover double this amount from the bank. It was held that the state statutes upon the subject of usury should be laid out of view, and that where a statute created a new right or offense and provided a specific remedy or punishment, that remedy alone could apply; that the *payment* of usurious interest being distinctly averred, it could not be recovered by way of offset or payment of the bill in suit, and that the same rule applied to the payment of interest upon other bills of exchange which the defendants sought to recover back.

The case of *Driesbach v. Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658, was a like
120

suit by a bank upon a note, upon several renewals of *which usurious interest had been [137] paid. It was said that, as the claim was not for interest stipulated for and included in the note sued on, but for the application of what had been actually *paid* as interest to the discharge of principal, there could be no set-off against the face of the notes.

In *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336,—a similar case of interest actually paid,—the averments of the defense were made under the first clause of the section; that "the bank knowingly took, received, and charged" usurious interest, but as it elsewhere appeared that the interest stipulated had not been included in the note, but that interest had been actually paid at the time of the discount and renewals, which it was sought to apply to the discharge of the principal, the defense was held insufficient.

The construction of both clauses of this section having been thus settled by this court, it only remains to determine to which class of cases the one under consideration properly belongs. As to this there can be no room for doubt. The referee finds that there was paid cash discounts on the several renewals of the notes which constitute the \$2,240 note, as well as the renewal of said note as executed, down to October 24, 1894, exclusive of the amounts reserved out of the notes at the time they were originally given, the sum of \$566.70, which cash discounts were paid in advance at the date of the several renewals. He further found that the "defendants in their answer are only asking credit for the payments down to and including October 29, 1894, which aggregate the sum of \$540.40." Under the rulings last above cited the person making these cash payments can only recover them back by a direct action against the association taking or receiving the same.

The supreme court of Missouri was correct in holding that the defendants could not be allowed set-off or credit for the usurious interest thus paid, the remedy provided by the statute being exclusive, and its *judgment is therefore affirmed*.

*LUIGI STORTI, *Appt.*,
v.

[138]

COMMONWEALTH OF MASSACHUSETTS and Benjamin E. Bridges, Warden of the State Prison at Boston, Massachusetts.

(See S. C. Reporter's ed. 138-144.)

Habes corpus—in Federal court—appeal.

1. A writ of habeas corpus will seldom be upheld as a writ of error to review in a Federal court the proceedings in a criminal case in the state court.
2. Questions depending upon state law—such as the lawfulness of a respite granted by the

NOTE.—On the jurisdiction of the United States courts on habeas corpus—see *Re Reintz* (C. C. S. D. N. Y.) 4 L. R. A. 236, and note. See also notes to *State ex rel. Cochran v. Win-*
183 U. S.

governor to a person under sentence of death, or the validity of a sentence before the expiration of a year during which the right to file a motion for a new trial is claimed to continue—will not be reviewed by a Federal court on writ of habeas corpus.

3. The power of the Supreme Court on an appeal from a dismissal of a petition for habeas corpus by a circuit court of the United States for want of jurisdiction, a certificate thereof being given, is not limited to the question of jurisdiction by the act of Congress of March 3, 1891, § 5, but extends, under U. S. Rev. Stat. § 761, to such disposal of the party as law and justice require.

[No. 378.]

Argued November 19, 20, 1901. Decided December 2, 1901.

A PPEAL from a dismissal of a petition in habeas corpus by the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*

See same case below, 109 Fed. 807.

Statement by Mr. Justice **Brewer**:

- [138] *On May 23, 1901, the appellant filed in the circuit court of the United States for the district of Massachusetts his petition in habeas corpus.

In that petition he stated that he was a citizen of Italy, and a subject of its King; that he was detained by the respondent under a warrant issued by the superior court of Suffolk county, reciting a conviction of murder, and directing the warden to inflict death by passing a current of electricity through him; that the time fixed for the execution of the sentence was on the week beginning April 7, 1901; that on April 9, 1901, the governor, with the advice of the council, issued a document purporting to respite the execution of sentence, the respite to expire on Saturday, May 11, 1901; that on May 10, 1901, he presented a petition for a writ of habeas corpus to the said circuit court, which petition was denied on May 11.

- [139] 1901; that *from such denial he forthwith claimed and was allowed an appeal to the Supreme Court of the United States, and that such appeal was there pending and undetermined. The petition further stated that on May 10 he filed in the superior court for the county of Suffolk a motion for a new trial, in accordance with the provisions of the Massachusetts statutes, which motion was still pending and undetermined.

Upon these facts he asserted, first, that no law of Massachusetts provided for the punishment of a person sentenced to death, where the week appointed by the court for the execution had elapsed without execution and without any lawful action by the governor in the way of pardon, commutation, or respite, and therefore that the detention by the warden was contrary to the provisions of the 1st section of the 14th Amendment of the Federal Constitution; second,

that for the same reason the detention was contrary to the 3d article of the treaty between the United States of America and His Majesty the King of Italy (17 Stat. at L. 845), and contrary to § 2 of article 6 of the Constitution of the United States; third, that by § 28 of chapter 214 of the Public Statutes of Massachusetts the court in which the trial of an indictment is had may at the term of the trial, or within one year thereafter, grant a new trial; that therefore execution could not lawfully be done upon him until the expiration of a year from the term at which he was convicted, to wit, in this case before July 1, 1901, and that the execution of the sentence before that date would deprive him of his life without due process of law, and would deny to him the equal protection of the laws, contrary to the 1st section of the 14th Amendment; fourth, that for the same reason the execution of the sentence would be contrary to the 3d article of the treaty between the United States and Italy; fifth, that the execution of the sentence within the year would deprive him of his right under the statutes of Massachusetts to move for a new trial within the year, and of his right to be present at the decision of such motion, which right was guaranteed to him by article 23 of the treaty between the United States and Italy, which reads as follows: "The citizens of either party shall have free access *to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ, in defense of their rights, such advocates, solicitors, notaries, agents, and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials;" sixth, that the motion for a new trial which he had filed on May 10 not having been determined, execution could not lawfully be done upon him until the decision of that motion, notwithstanding which he had reason to apprehend that the respondent intended to immediately, upon the determination of the appeal to the Supreme Court of the United States, cause execution to be done upon him, which execution would deprive him of his rights under the 14th Amendment and article 23 of the treaty; seventh, that the respondent derives his authority to hold the petitioner in custody solely by virtue of the provisions of chapter 326 of the Massachusetts Statutes of 1898, and that by them no authority was given to him to retain the custody of the petitioner after the expiration of the week appointed by the court for the execution of the sentence, except through

ters (Kan.) 10 L. R. A. 616; *Re Huse*, 25 C. C. A. 4, and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

On the province and office of the writ of habeas corpus—see *Bion's Appeal* (Conn.) 11 L. 183 U. S.

R. A. 694, and note. And see notes to *Ex parte Carll*, 27 L. ed. U. S. 288; *Cortes v. Jacobus*, 34 L. ed. U. S. 464; *Pearce v. Texas*, 39 L. ed. U. S. 164, and *Tinsley v. Anderson*, 43 L. ed. U. S. 92.

the lawful action of the governor in granting a respite, that no lawful action had been taken by the governor in the matter, and that therefore the petitioner was deprived of his liberty contrary to the 14th Amendment; and, eighth, that for the same reason he was deprived of his liberty contrary to the 14th Amendment and the 3d article of the treaty between the United States and Italy. The 3d article of the treaty between the United States and Italy, referred to in this petition, is as follows:

“The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect [141] the same rights and privileges *as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.”

On the presentation of this petition to the circuit court, that court dismissed the same for want of jurisdiction, without prejudice to an application to the courts of the state. *Re Storti*, 109 Fed. 807. A certificate of this fact was signed by the circuit judge, and from the order dismissing the petition an appeal was taken to this court.

Messrs. G. Philip Wardner and William M. Stockbridge argued the cause and filed a brief for appellant:

The sole question for determination is whether the circuit court had jurisdiction to entertain the petition.

Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

The question of jurisdiction is entirely distinct from a determination of the cause upon its merits.

Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168.

The earliest statute conferring habeas corpus jurisdiction is the 14th section of the judiciary act of 1789 (1 Stat. at L. 81, chap. 20). This gave the Federal courts jurisdiction “in all cases to which the judicial power of the United States extends, other than those expressly excepted from it.”

Ex parte Yerger, 5 Wall. 85, 19 L. ed. 332.

Under this statute the court, though entertaining a doubt “in favor of liberty, was willing to grant the habeas corpus.”

Ex parte Burford, 3 Cranch, 448, 2 L. ed. 495.

It has been determined that § 753 of the Revised Statutes, in providing that the writ of habeas corpus would in no case be extended to a prisoner in jail, “unless . . . he . . . is in custody in violation of the Constitution or of a law or treaty of the United States,” has by necessary implication affirmatively enacted that the writ shall issue, even in the case of a prisoner in jail, if he is in custody in violation of the Constitu-

tion or of a law or treaty of the United States.

Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; *Re Neagle*, 135 U. S. 1, *sub nom. Cunningham v. Neagle*, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Re Burrus*, 136 U. S. 586, 34 L. ed. 500, 10 Sup. Ct. Rep. 850.

None of the statutes passed since the adoption of the Revised Statutes relating specifically to the jurisdiction of the circuit courts, and involving money values as a condition of such jurisdiction, has taken from said courts their jurisdiction to issue writs of habeas corpus under § 753, in the case of a prisoner in jail, where he is in custody in violation of the Constitution or a law or treaty of the United States.

United States v. Mooney, 116 U. S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. 304; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *King v. McLean Asylum of Mass. General Hospital*, 26 L. R. A. 784, 12 C. C. A. 145, 21 U. S. App. 481, 64 Fed. 331.

This court has repeatedly sustained its jurisdiction of an appeal from, or a writ of error to, the highest court of a state, under U. S. Rev. Stat. § 709, when that question has been raised by motion to dismiss or otherwise, and has nevertheless affirmed the decision of the state court, showing conclusively the distinction between the question of jurisdiction and the determination of the cause upon its merits.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681. See also *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 483.

The principles governing cases arising under § 709 do not necessarily turn on its specific language. Moreover, while the language of § 709 is broad enough to cover any case, however flimsy, nevertheless this court has held that it had no jurisdiction under that section if the claim was fraudulent or frivolous.

Millingar v. Hartuppee, 6 Wall. 258, 18 L. ed. 829; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

It would seem no more difficult to read into § 753 the qualification that the court would have jurisdiction of any petition for habeas corpus by a prisoner in jail, where it was drawn in question, or claimed that his custody was in violation of the Constitution or of a law or treaty of the United States, there being, of course, the same qualification as to fraudulent or frivolous claims.

The decisions of this court under § 5 of the court of appeals act (act March 3, 1891,

chap. 517, 26 Stat. at L. 826) are perhaps even more apposite.

Cornell v. Green, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969. See also *Tennessee v. Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

A similar doctrine has been laid down in determining whether circuit courts have jurisdiction of suits originally brought therein or removed thereto from state courts, on the ground that the proceedings were suits of a civil nature, at law or in equity, and "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653. See also *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Cooke v. Avery*, 147 U. S. 384, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051.

Whether there is a claim which presents a Federal question, and whether that claim is well founded when considered on its merits, are distinct and different questions. The one goes to jurisdiction, and the other to the merits of the case.

See also *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

Unless the appellant's contention is correct the circuit court would never have jurisdiction of a petition for habeas corpus, under that part of § 753 now under consideration, where at any stage of the case it should be of opinion that the petitioner was not in custody in violation of the Constitution or of a law or treaty of the United States, and a decision adverse to the petitioner would always be equivalent to a decision that the court had no jurisdiction; and no costs would in such case be taxable against the petitioner.

Nashville v. Cooper, 6 Wall. 247, 18 L. ed. 851.

Under the practice prior to the act of February 5, 1867, the function of the application or petition was not to determine whether, upon the facts alleged, the petitioner should be discharged from custody, but whether the facts alleged showed sufficient probable cause for such discharge.

Sims's Case, 7 Cush. 285.

Even if the justice in the lower court was satisfied that the facts alleged in the petition would not justify the issuing of the writ, he might, in his discretion, have ordered the writ to issue, and have disposed of the case after a return had been made to the writ, and after a full inquiry into the cause of commitment or detention.

Ex parte Terry, 128 U. S. 289, 32 L. ed. 183 U. S.

405, 9 Sup. Ct. Rep. 77; *Re Burrus*, 136 U. S. 586, 34 L. ed. 500, 10 Sup. Ct. Rep. 850.

The operation of the 14th Amendment is not confined to the cases where the legislature has not done its duty, but covers cases where a person is in danger of being deprived of his life or liberty or property through the unlawful action of the instrumentalities of the state, either legislative, executive, or judicial, or by any person acting by virtue of public position under a state government, and enabled by reason of his position so to act.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *United States v. Ryan*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Smoot v. Kentucky C. R. Co.* 13 Fed. 337; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168; *Ex parte Ulrich*, 42 Fed. 587; *Re Kelley*, 46 Fed. 653; *Re Friedrich*, 51 Fed. 747.

Mr. Hosea M. Knowlton argued the cause, and, with *Mr. Arthur W. De Goosh*, filed a brief for appellees:

No Federal question can arise upon the legality of the first respite granted to the prisoner.

Lambert v. Barrett, 157 U. S. 697, 39 L. ed. 865, 15 Sup. Ct. Rep. 722.

There is no allegation that the statute of 1898, chap. 326, is unconstitutional, or that the courts of Massachusetts have failed to protect the rights of the petitioner whenever they have been properly asserted. In that respect the petition is insufficient, and no question of constitutional law is presented.

Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297.

The 14th Amendment does not confer upon the Federal courts jurisdiction to correct erroneous or wilfully improper acts of state officers or state courts in violation or disregard of law.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; *Virginia v. Rives*, 100 U. S. 313, *sub nom. Ex parte Virginia*, 25 L. ed. 667; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Arrowsmith v. Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023.

The general allegation that the petitioner is held in violation of this section of the treaty is insufficient to confer jurisdiction.

Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297.

**Mr. Justice Brewer* delivered the opin-[141] ion of the court:

The grounds set forth in this petition for a discharge by the Federal court of the petitioner from the custody of the warden are wholly without foundation, and the case is another of the numerous instances in which, as said by *Mr. Chief Justice Fuller*, in *Craemer v. Washington*, 168 U. S. 124, 128,

42 L. ed. 407, 408, 18 Sup. Ct. Rep. 1, 2, "applications for the writ have been made, and appeals taken from refusals to grant it, quite destitute of meritorious grounds, and operating only to delay the administration of justice."

It is an attempt to substitute a writ of habeas corpus for a writ of error, and to review the proceedings in a criminal case in the state court by such collateral attack rather than by direct proceedings in error, —something which this court has repeatedly said ought seldom to be done. See, among other cases, *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; *Tinsley v. Anderson*, 171 U. S. 101, 104, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 305, and cases cited in the opinion; *Markuson v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; *Minnesota v. Brundage*, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455.

Many of the allegations in the petition are general and obscure, and it is not easy to determine therefrom in what particular the petitioner considers the proceedings [142] against him to be *in conflict with the Federal Constitution or the treaty with Italy.

Some of the matters presented involve only the construction of state statutes, and should be determined by the courts of the state, whose determination in respect thereto is binding upon this court. It must be borne in mind that under § 763 of the Revised Statutes the jurisdiction of the Federal court to issue a writ of habeas corpus is limited to "the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States," and to cases arising under the laws of nations.

With these considerations in mind we pass to notice more particularly the matters set forth in the petition. It is stated that the petitioner was sentenced to be put to death at a given time; that he was not then put to death on account of a respite granted by the governor, and that such respite was unlawfully granted. Wherein the unlawfulness consisted is not stated, and whether it were lawful or not is a matter dependent on the laws of the state, and to be determined by its courts. The Federal Constitution neither grants nor forbids to the governor of a state the right to stay the execution of a sentence. So, also, it is said that under the Massachusetts statutes the party convicted has a year in which to file a motion for a new trial, and, therefore, no sentence can be executed on him until that time. Whether that be so or not is also a question depending on the statutes of the state, and to be determined by its courts. The state may see fit to postpone the execution of a capital sentence for a year, or provide that it shall be carried into effect more speedily, and what the state has provided in the matter is for its courts to decide.

It is averred that the proceedings in the Massachusetts courts are in conflict with the rights secured by the treaty between

Italy and the United States, but the articles of the treaty referred to only require equality of treatment and that the same rights and privileges be accorded to a citizen of Italy that are given to a citizen of the United States under like circumstances, and there is nothing in the petition tending to show a lack of *such equality of treat-[14 ment. The petition, therefore, is plainly without merit.

But the principal contention of counsel is that the petition was dismissed by the circuit court for want of jurisdiction and a certificate thereof given, and that under § 5 of the act of March 3, 1891 (26 Stat. at L. 827, chap. 517), the only question that we can consider is one of jurisdiction, and the following cases are referred to: *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40, and *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526.

We do not question that rule as applied to ordinary suits and actions, but § 761, Rev. Stat., provides as to habeas corpus cases that "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." That mandate is applicable to this court, whether it is exercising its original or appellate jurisdiction. Proceedings in habeas corpus are to be disposed of in a summary way. The interests of both the public and the petitioner require promptness; that if he is unlawfully restrained of his liberty it may be given to him as speedily as possible; that if not, all having anything to do with his restraint be advised thereof, and the mind of the public be put at rest, and also that if further action is to be taken in the matter it may be taken without delay. Especially is this true when the habeas corpus proceedings are had in the courts of a jurisdiction different from that in pursuance of whose mandate he is detained. This matter of promptness is not peculiar to these cases in Federal courts, but is the general rule which obtains wherever the common law is in force. It is one of those things which give to such proceedings their special value, and is enforced by statutory provisions, both state and Federal. The command of the section is "to dispose of the party as law and justice require." All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus.

As the petition presented no case entitling the petitioner to *a discharge, as the grounds [14 stated therein are absolutely frivolous, and as the result reached in the Circuit Court was in accordance with law and justice, the judgment is affirmed, and it is further ordered that the mandate issue at once.

H. L. PINNEY, C. L. Pinney, W. C. Patterson, and Thomas Brooks, *Plffs. in Err.*,
v.

R. T. NELSON.

(See S. C. Reporter's ed. 144-151.)

Impairing obligation of contract—law enacted after making of contract—personal liability of stockholder in foreign corporation.

1. The obligation of the contract of the stockholders in a foreign corporation cannot be deemed to be impaired by the provision of Cal. Civ. Code, § 322 (which was enacted prior to the incorporation of such corporation), imposing the same personal liability upon stockholders of foreign corporations doing business within the state as upon stockholders in domestic corporations.
2. California stockholders in a Colorado corporation whose charter specified that one purpose of the incorporation was the transaction of business by the corporation in California must be deemed to have contracted with reference to the provisions of Cal. Civ. Code, § 322, imposing the same personal liability upon stockholders of foreign corporations doing business within the state as upon stockholders in domestic corporations, and are bound thereby, so far, at least, as such liability arises from the corporate business carried on in California.

[No. 65.]

Submitted April 26, 1901. Decided December 2, 1901.

IN ERROR to the Superior Court of Los Angeles County, State of California, to review a judgment in favor of plaintiff in an action to enforce a personal liability of stockholders. *Affirmed.*

Statement by Mr. Justice **Brewer**:

[144] *This was an action to enforce a personal liability of stockholders. It was commenced in a justice's court of Los Angeles city, Los Angeles county, California, on September 30, 1898, by the defendant in error against the plaintiffs in error. It was subsequently transferred to the superior court of the county, where a trial was had on January 17, 1900, before the court without a jury. A stipulation was signed as to the truth of various averments in the complaint and answer, which concluded as follows:

"And it is stipulated that the only question in this case is as to whether § 322 of the Civil Code of California is in violation of the provisions of the Constitution of the United States; and if it is in violation of such provisions defendants are entitled to judgment; but if said section is not in violation of said provisions, then plaintiff is entitled to judgment as prayed for in his complaint."

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey (Vt.) 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20, and Montana Ore-
183 U. S.

Findings of fact were also made, among which were the following:

"2. That the Los Angeles Iron & Steel [145] Company was a corporation organized on the 8th day of March, 1893, and incorporated under the laws of the state of Colorado; that the seventh provision of its articles of incorporation is as follows, to wit: The said company is created for the purpose of carrying on part of its business beyond the limits of the state of Colorado, and the principal office of said company in the state shall be kept at the city of Denver, Arapahoe county, and the principal plant and principal operations of said company, beyond the limits of the state, shall be in Los Angeles county, state of California, and such other places in the state of California as may be decided upon by the board of directors. The principal business of said company in the state of Colorado shall be carried on in Arapahoe county.

"3. That the defendants are and were at all times herein mentioned residents and citizens of the state of California.

"4. That all the indebtedness of said Los Angeles Iron & Steel Company to plaintiff and to plaintiff's assignors was created by contracts made, executed, and to be performed in the state of California."

"6. That at the time the said indebtedness was created and incurred by the said company there were issued of the capital stock thereof the number of 1,311 shares, and that the defendants were at said times the owners respectively of the number of said shares as set opposite their respective names, as follows, to wit: H. L. Pinney, 50 shares; C. L. Pinney, 42 shares; W. C. Patterson, 35 shares; C. W. Damorel, 91 shares; F. E. Little, 22 shares; Thomas Brooks, 38 shares."

Upon the stipulation and findings a judgment was rendered in favor of the plaintiff. A writ of error was subsequently sued out from this to that court, it being the highest court in the state to which the action could be taken.

Article 12, § 15, of the Constitution of California, adopted in 1879, reads:

"No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

*Section 322 of the Civil Code of California [146] as amended March 15, 1876, provides as follows:

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of

Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. 35 C. C. A. 12.

On the individual liability of stockholders for corporate debts—see notes to United States v. Stanford, 40 L. ed. U. S. 751, and Hatch v. Dana, 25 L. ed. U. S. 885.

the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. . . .

"The liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, shall be the same as the liability of a stockholder of a corporation created under the Constitution and laws of this state."

By the stipulation above referred to, the truthfulness of the following averment in the answer was admitted:

"Defendants allege that there is no statute of the state of Colorado providing that stockholders shall be liable for any portion of the indebtedness of a corporation, and allege that under the laws of the state of Colorado a stockholder in a corporation is not liable for any portion of the indebtedness of said corporation."

Mr. M. L. Graff submitted the cause for plaintiffs in error. **Mr. J. W. McKinley** was with him on the brief.

The statutes of Colorado are a part of the contract of subscription, but the laws of California are not, and cannot be a portion of the contract between a Colorado corporation and its stockholders.

Howarth v. Angle, 162 N. Y. 187, 47 L. R. A. 725, 56 N. E. 489; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023; *Russell v. Pacific R. Co.* 113 Cal. 258, 34 L. R. A. 747, 45 Pac. 323; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757.

The individual liability of the stockholder under the national bank act is an essential element in the contract by which the stockholder became a member of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock; its obligation becomes a part of every contract, debt, and engagement of the bank itself,—as much so as if they were made directly by the stockholders, instead of by the corporation.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 221; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; *Bailey v. Hollister*, 26 N. Y. 112.

The obligation of the stockholders under the California statute arises upon contract.

Dennis v. Los Angeles County Super. Ct. 91 Cal. 548, 27 Pac. 1031; *Kennedy v. California Sav. Bank*, 97 Cal. 96, 31 Pac. 846.

Liability depends upon, and is determined by, the charter and statutes of the state which created the corporation.

Morawetz, Priv. Corp. § 874; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Cook, Stock & Stockholders*, § 223.

The act of the corporation in coming into

the state of California to transact business was not the act of the stockholders, nor can it in any way affect their relationship to the corporation or its creditors.

Bank of Augusta v. Earle, 13 Pet. 587, 10 L. ed. 307; *Brown v. Hitchcock*, 36 Ohio St. 667.

The inhibition against statutes which impair the obligation of contracts has received a very broad and liberal construction in a long line of decisions upon the subject.

Re Gibson, 21 N. Y. 14; *Morawetz, Priv. Corp.* §§ 1044, 1045, 1047; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *White v. Hart*, 13 Wall. 647, 20 L. ed. 686; *Von Hoffman v. Quincy*, 4 Wall. 550, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 408; *Robinson v. Magee*, 9 Cal. 84, 70 Am. Dec. 638; *People ex rel. McCauley v. Brooks*, 16 Cal. 33; *Rose v. Estudillo*, 39 Cal. 274; *Bates v. Gregory*, 89 Cal. 393, 26 Pac. 891.

Stockholders in a corporation incorporated by the citizens of one state under the laws of another state for the purpose of doing business within the state of their residence will be treated in the same manner as if they were residents of the state of incorporation.

Second Nat. Bank v. Hall, 35 Ohio St. 166; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639, 28 Atl. 974; *Demarest v. Flack*, 128 N. Y. 219, sub nom. *Demarest v. Grant*, 13 L. R. A. 854, 28 N. E. 645; *Lancaster v. Amsterdam Improv. Co.* 140 N. Y. 582, 24 L. R. A. 322, 35 N. E. 964.

Mr. J. A. Anderson submitted the cause for defendant in error. *Messrs. W. S. Taylor and Edward W. Forgy* were with him on the brief.

The objection that a statute impairs the obligations of their contract cannot be urged by persons either contracting within the jurisdiction of the statute, or voluntarily entering within the jurisdiction of the statute in the performance of their contract, or in the enjoyment of benefits of their contract, many years after the enactment of the statute.

Lehigh Water Co. v. Easton, 121 U. S. 391, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

When plaintiffs in error subscribed to the articles of incorporation they expressly agreed that this corporation could and should do business in California, and they must be held to have agreed to all the personal liabilities which the expressed law of the state then declared to be inseparable incidents to the making of the contract.

A foreign corporation can claim a right to do business in another state to any extent, only subject to the conditions imposed by its laws.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; *Cook, Stock & Stockholders*, § 694; *Morawetz, Priv. Corp.* § 973; *People v. Fire Assn. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380; *Hooper v. California*, 155 U. S. 656, 39 L. ed. 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

A state may forbid a foreign corporation from exercising corporate power within its limits, or may lay such restrictions upon its exercise as will prevent it, except on condi-

tion that the stockholders become bound for the debts of the corporation.

Second Nat. Bank v. Hall, 35 Ohio St. 166.

[146] *Mr. Justice **Brewer** delivered the opinion of the court:

The plaintiffs in error rely upon the proposition that the liability of a stockholder is determined by the charter of the corporation

[147] *and the laws of the state in which the incorporation is had. "If the constitution to which a corporator has agreed does not provide for individual liability to creditors, he cannot be charged with individual liability anywhere." 2 Morawetz, Priv. Corp. 2d ed. § 874. They invoke the *lex loci contractus*, and say that the stockholders' contract was made in Colorado, that being the state in which the Los Angeles Iron & Steel Company was incorporated; that by the laws of that state there is no personal liability of stockholders; that it is not within the power of California to change the terms of that contract, the Federal Constitution (art. 1, § 10) forbidding a state to pass a law impairing the obligation of contracts; that while California, which prescribes an individual liability of stockholders, may if it sees fit exclude every corporation of another state whose stockholders do not assent to such liability, yet if it fails to do so, and such Colorado corporation actually comes into California to transact business, such coming into the state and the transaction of business therein do not change the terms of the stockholders' contracts, or impose a personal liability; and also that in such a case an attempt to enforce the statutory provisions of California so far as to change the personal liability of corporators in the foreign corporation is in conflict with the due process and equal protection clauses of the 1st section of the 14th Amendment.

With reference to the contention that the law of California impairs the obligation of the contract of the stockholders, it is enough to say that that law, both constitutional and statutory, was enacted long before the incorporation of the Los Angeles Iron & Steel Company, and that therefore § 10 of article 1 of the Federal Constitution has no application. "It is equally clear that the law of the state to which the Constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is claimed to be impaired." *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391. 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916, 918. See also *Central Land Co. v. Laidley*, 159 U. S. 103, 111. 40 L. ed. 91, 94. 16 Sup. Ct. Rep. 80; *McCullough v. Virginia*, 172 U. S. 102, 116, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134.

Passing to a consideration of the stockholders' contract in the light of the other [148] contention, it may be said that ordinarily *it is controlled by the law of the state in which the incorporation is had. That is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation, and obligation. While this is so, it is also true that parties in making a contract may have in view some

other law than that of the place, and when that is so that other law will control. That the parties have some other law in view and contract with reference to it is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract and the purpose with which it is entered into. In *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 104, many cases were cited by Mr. Justice Matthews, delivering the opinion of the court, in which these propositions were illustrated and enforced, and on page 136, L. ed. p. 108, Sup. Ct. Rep. p. 112, it was said:

"The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat. 1, 48, 6 L. ed. 253, 264, where he defined it as a principle of universal law,—'the principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1077, 1078: 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an *express* view to the law of another country as the rule by which it is to be governed.' And in *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 120, in the court of exchequer chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or, rather, by what general law it is just to presume that they have submitted themselves in the matter.' *Le Breton v. Miles*, 8 Paige, 261."

The subject was also discussed at length by Mr. Justice Gray in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469. In *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 110, 35 L. ed. 951, 954, 12 Sup. Ct. Rep. 150, 152, Mr. Justice Harlan, referring to these two opinions, observed: "The elaborate and careful review *of the adjudged [149] cases, American and English, in the two cases last cited, leaves nothing to be said upon the general subject."

In *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. ed. 274, 307, Chief Justice Taney said:

"It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. . . . But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible, yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *United States v. Amedy*, 11

Wheat. 412, 6 L. ed. 507, and in *Beaston v. Farmers' Bank*, 12 Pet. 135, 9 L. ed. 1030. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place?"

And then, after discussing the question of comity, added (p. 589, L. ed. p. 308):

"Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction, and we can perceive no sufficient reason for excluding them when they are not contrary to the known policy of the state, or injurious to its interests.

"It is nothing more than the admission of the existence of an artificial person created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state."

[150] *As, then, a corporation can have no legal existence outside of the state in which it is incorporated, the contract of the stockholders with one another, by which the corporation is created, is presumed to have been made with reference to the laws of that state, nothing being said in the charter to the contrary. But as comity permits a corporation to enter another state and do business therein, it is competent for the stockholders in making their charter to contract with reference to the laws of a state in which they propose the corporation shall do business. And in this case the stockholders in their charter specified that the purpose of the incorporation was partly business beyond the limits of Colorado, and that the principal part of such outside business should be carried on in California. Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California and transact business therein, they in terms set forth that a part of the purpose of the incorporation was the transaction of business by the corporation in California. Now, when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that state? Contracting with reference to the laws of that state they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the state, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other states and doing business within California. How can it be said that

those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liabilities created by the partnership business in California? And if this rule obtains as to contracts of partners between themselves, why not also as to contracts of stockholders between themselves in forming a corporation?

*In this case it appears that the business[151] transactions out of which these liabilities arose were carried on in California. They resulted from business done in California by virtue of an express contract made by the stockholders with reference to such business. It is unnecessary to express an opinion upon the question whether any personal liability would be assumed by the stockholders in reference to business transacted in Colorado. Parties may contract with special reference to carrying on business in separate states, and when they make an express contract therefor the business transacted in each of the states will be affected by the laws of those states, and may result in a difference of liability. Neither is it necessary to express any opinion upon the question whether the defendants could have been held liable under the California statutes, independently of the provisions of the Colorado charter. All that we here hold is that when a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business.

The judgment of the Superior Court is affirmed.

HENRY W. DOOLEY *et al.*, *Plffs. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 151-176.)

Constitutional law—Foraker act—duty on exports—imports into Porto Rico.

1. The tax imposed upon goods imported into Porto Rico from New York under the provisions of the Foraker act of April 12, 1900 (31 Stat. at L. 77, chap. 191), is not a tax or duty on articles exported from the United States within the meaning of U. S. Const. art. 1, § 9, declaring that no tax or duty shall be laid on articles exported from any state, since the goods are not exported to a foreign country.
2. A duty on imports to Porto Rico, within the power of Congress under U. S. Const. art. 1, § 8, "to lay and collect taxes, duties, imposts, and excises," is imposed by the Foraker act of April 12, 1900 (31 Stat. at L. 77, chap.

191), as temporary legislation for the island, since the tax is for the benefit of Porto Rico, and can be abolished by the legislative assembly of Porto Rico at will. *Per* Justices Brown, Gray, Shiras, and McKenna.

3. The constitutional provision that "all duties, imposts, and excises shall be uniform throughout the United States" (U. S. Const. art. 1, § 8) does not apply to the tax imposed by the Foraker act of April 12, 1900 (31 Stat. at L. 77, chap. 191), upon goods imported into Porto Rico from New York. *Per* Justice White.

[No. 207.]

Argued January 8, 9, 10, 11, 1901. Decided December 2, 1901.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a dismissal of a petition on demurrer in an action against the United States to recover duties paid under protest upon imports into Porto Rico from New York. *Affirmed.*

Statement by Mr. Justice **Brown**:

[152] *This was an action begun in the circuit court as a court of claims by the firm of Dooley, Smith, & Co., to recover duties exacted of them and paid under protest to the collector of the port of San Juan, Porto Rico, upon merchandise imported into that port from the port of New York after May 1, 1900, and since the Foraker act. This act requires all merchandise "coming into Porto Rico from the United States" to be "entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries." [31 Stat. at L. 77, chap. 191, § 3.]

A demurrer was interposed by the district attorney upon the ground that the court had no jurisdiction of the subject of the action, and also that the complaint did not state facts sufficient to constitute a cause of action. The demurrer to the complaint for insufficiency was sustained, and the petition dismissed.

Mr. Henry M. Ward argued the cause, and, with Messrs. John G. Carlisle and William Edmond Curtis, filed a brief for plaintiffs in error.

For their contentions, see their brief as reported in *Dooley v. United States*, 45 L. ed. U. S. 1075.

Mr. John G. Carlisle also argued the cause for plaintiffs in error.

For his contentions, see his argument as reported in *Dooley v. United States*, 45 L. ed. U. S. 1077.

Mr. Henry M. Ward also filed a separate brief for plaintiffs in error.

For his contentions, see his brief as reported in *Dooley v. United States*, 45 L. ed. U. S. 1077.

Messrs. William G. Choate and Joseph Larocque, Jr., also filed a brief for plaintiffs in error:

As the act in question purports to regulate interstate and foreign commerce, which is exclusively a subject of national legisla-

tion, by imposing duties thereon, it is plainly an attempted exercise of the powers conferred on Congress as a national government, viz., the power to regulate commerce, conferred by cl. 3, § 8, art. 1, of the Constitution, and the power to levy duties, imposts, and excises conferred by clause 1 of the same section; and as such its tariff regulations are unconstitutional and void because the duties levied and collected under them are not uniform throughout the United States.

The uniformity required by the Constitution is a geographical uniformity.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.

Head Money Cases, 112 U. S. 580, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

The geographical uniformity required is not confined to the states, but extends to the whole "American empire."

Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98.

The act, so far as its tariff regulations on commerce between Porto Rico and the states are concerned, cannot be sustained as an exercise of the power of Congress to govern the territories. The tax is not a local tax for local purposes, but a tax laid under the 8th section of the 1st article of the Constitution.

The duties collected under the act of April 12, 1900, from the plaintiffs, at the island of Porto Rico, on articles exported by them from the state of New York, were illegally exacted, and the collection of them was in violation of that provision of the Constitution which says that "no tax or duty shall be laid on articles exported from any state."

This clause, so far as we are aware, has never received judicial interpretation. We believe, however, that the language is explicit, and is susceptible of but one meaning, which is that Congress has, under no condition and in no place where it has jurisdiction to levy a tax, the right to exercise the taxing power with respect to articles which have been, are being, or are to be, exported from any state, whether to a foreign country or to another part of the United States. Viewed from this standpoint, it is immaterial whether the taxing power is exercised in the port of New York or in the port of San Juan with respect to articles exported from New York to Porto Rico.

Solicitor General Richards argued the cause and filed a brief for defendant in error.

For his contentions, see his briefs as reported in *Dooley v. United States*, 45 L. ed. U. S. 1078, and *De Lima v. Bidwell*, 45 L. ed. U. S. 1045.

Attorney General Griggs also argued the cause for defendant in error.

For his contentions, see his brief as reported in *Goetz v. United States*, 45 L. ed. U. S. 1067. See also his argument as re-

ported in *De Lima v. Bidwell*, 45 L. ed. U. S. 1046.

Mr. Justice **Brown** delivered the opinion of the court:

[153] This case raises the question of the constitutionality of the *Foraker act, so far as it fixes the duties to be paid upon merchandise imported into Porto Rico from the port of New York. The validity of this requirement is attacked upon the ground of its violation of that clause of the Constitution (art. 1, § 9) declaring that "no tax or duty shall be laid on articles exported from any state."

While the words "import" and "export" are sometimes used to denote goods passing from one state to another, the word "import," in connection with the provision of the Constitution that "no state shall levy any imposts or duties on imports or exports," was held in *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, to apply only to articles imported from foreign countries into the United States.

That was an action to recover a tax imposed by the city of Mobile for municipal purposes, upon sales at auction. Defendants, who were auctioneers, received in the course of their business for themselves, or as consignees or agents for others, large amounts of goods and merchandise the products of other states than Alabama, and sold the same in Mobile to purchasers in unbroken and original packages. The supreme court of Alabama decided the case in favor of the tax, and the case came here for review.

The question, as stated by Mr. Justice Miller, was "whether merchandise brought from other states and sold, under the circumstances stated, comes within the prohibition of the Federal Constitution that no state shall, without the consent of Congress, levy any imposts or duties on imports or exports." Defendants relied largely upon a dictum in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, to the effect that the principles laid down in that case as to the non-taxability of imports from foreign countries might perhaps apply equally to importations from a sister state.

In discussing this question, and particularly of the power of Congress to levy and collect taxes, duties, imposts, and excises, Mr. Justice Miller observed: "Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one state into another? Or is the power limited to duties on foreign imports? If the [154] *former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the 9th section, which declares that no tax shall be laid on articles exported from any state, for no article can be imported from one state into another which is not at the same time exported from the former. But if we give to the word 'imposts' as used in the first-mentioned clause the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to

lay duties on imports from abroad and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts."

"It is not too much to say that, so far as our research has extended, neither the word 'export,' 'import,' or 'impost' is to be found in the discussion on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. . . . Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit by this clause" (that no state shall, without the consent of Congress, levy any impost or duty upon any export or import) "the right of one state to tax articles brought into it from another." This definition of the word "impost" was afterwards approved in *Brown v. Houston*, 114 U. S. 623, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. See also *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

It follows, and is the logical sequence of the case of *Woodruff v. Parham*, that the word "export" should be given a correlative meaning, and applied only to goods exported to a foreign country. *Muller v. Baldwin*, L. R. 9 Q. B. 457. If, then, Porto Rico be no longer a foreign country under the Dingley act, as was held by a majority of this court in *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743, and *Dooley v. United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762, we find it impossible to say that goods carried from New York to Porto Rico can be considered as "exported" from New York within the [155] meaning of that clause of the Constitution. If they are neither exports nor imports, they are still liable to be taxed by Congress under the ample and comprehensive authority conferred by the Constitution "to lay and collect taxes, duties, imposts, and excises." Art. 1, § 8.

In another view, however, the case presented by the record is whether a duty laid by Congress upon goods arriving at Porto Rico from New York is a duty upon an export from New York, or upon an import to Porto Rico. The fact that the duty is exacted upon the arrival of the goods at San Juan certainly creates a presumption in favor of the latter theory. At the same time it is possible that it may also be a duty upon an export. [The mere fact that the duty is not laid at the port of departure is by no means decisive against its being such.] It is too clear for argument that, if vessels bound for a foreign country were compelled to stop at an intermediate port and pay into the Treasury of the United States a duty upon their cargoes, such duty would be a tax upon an export, and the place of its exaction would be of little significance. [The manner in which and the place at which the tax is

levied are of minor consequence. Thus, in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, it was held that an act of a state legislature requiring importers of foreign goods to take out a license was a violation of the Constitution declaring that no state shall, without the consent of Congress, lay any impost or duty on imports or exports; and in the recent case of *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, we held that a discriminating stamp tax upon bills of lading covering goods to be carried to a foreign country was a tax upon exports within the same provision of the Constitution.

One thing, however, is entirely clear. The tax in question was imposed upon goods imported into Porto Rico, since it was exacted by the collector of the port of San Juan after the arrival of the goods within the limits of that port. From this moment the duties became payable as upon imported merchandise. *United States v. Vowell*, 5 Cranch, 368, 3 L. ed. 128; *Arnold v. United States*, 9 Cranch, 104, 3 L. ed. 671; *Meredith v. United States*, 13 Pet. 486, 10 L. ed. 258. Now, while an import into one port almost necessarily involves a prior export from another, still, in determining the character *of the tax imposed, it is important to consider whether the duty be laid for the purpose of adding to the revenues of the country from which the export takes place, or for the benefit of the territory into which they are imported. By the 3d section of the Foraker act, imposing duties upon merchandise coming into Porto Rico from the United States, it is declared that "whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty." And by § 4, "the duties and taxes collected in Porto Rico in pursuance of this act, less the cost of collecting the same and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico until the government of Porto Rico, herein provided for, shall have been organized. when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico."

Now, there can be no doubt whatever that if the legislative assembly of Porto Rico should, with the consent of Congress, lay a tax upon goods arriving from ports of the United States, such tax, if legally im-

posed, would be a duty upon imports to Porto Rico, and not upon exports from the United States; and we think the same result must follow if the duty be laid by Congress in the interest and for the benefit of Porto Rico. The truth is that, in imposing the duty as a temporary expedient, with a proviso that it may be abolished by the legislative assembly of Porto Rico at its will, Congress thereby shows that it is undertaking to legislate for the island for the time being *and only until the local government^[157] is put into operation. The mere fact that the duty passes through the hands of the revenue officers of the United States is immaterial, in view of the requirement that it shall not be covered into the general fund of the Treasury, but be held as a separate fund for the government and benefit of Porto Rico.

The action is really correlative to that of *Downes v. Bidwell*. 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770, in which we held that Congress could lawfully impose a duty upon imports from Porto Rico, notwithstanding the provision of the Constitution that all duties, imposts, and excises shall be uniform throughout the United States. It is true that this conclusion was reached by a majority of the court by different processes of reasoning, but it is none the less true that in the conclusion that certain provisions of the Constitution did apply to Porto Rico, and that certain others did not, there was no difference of opinion.

It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one state to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the 1st paragraph of art. 1, § 8, that "all duties, imposts, and excises shall be uniform throughout the United States." There is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the states, which is merely incidental to its right to regulate interstate commerce. The question, however, is not involved in this case, and we do not desire to express an opinion upon it.

These duties were properly collected, and the action of the Circuit Court in sustaining the demurrer to the complaint was correct, and it is therefore affirmed.

Mr. Justice **White** concurring:

While agreeing to the judgment of affirmance and in substance concurring in the opinion of the court just announced, by *which the affirmance is sustained, I propose^[158] to summarize in my own language the reasoning which the opinion embodies as it is by me understood.

In my judgment the opinion of the court in the cases of *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743, and *Dooley v. United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762, decided in the last term, and that just announced in

the case of *The Diamond Rings*, 183 U. S. 176, post, 138, 22 Sup. Ct. Rep. 59, as well as the opinions of the majority of the members of the court in *Dornes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770, also decided at the last term, when considered in connection with the previous adjudications of this court, are conclusive in favor of the affirmance of the judgment in this cause. The question is whether a tax imposed by authority of the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), in Porto Rico, on merchandise coming into that island from the United States, is repugnant to clause 5, § 9, of article 1 of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any state." Is the tax here assailed an export tax within the meaning of the Constitution? If it is, the judgment sustaining it should be reversed; if it is not, affirmance is required.

In *Woodruff v. Parham* (1868) 8 Wall. 123, 19 L. ed. 382, the validity of a tax on auction sales levied by the city of Mobile pursuant to authority conferred by the laws of the state of Alabama was called in question. One of the contentions was that, as the tax was on sales at auction of goods in the original packages brought into the state of Alabama from other states, it was repugnant to that clause of § 9 of article 1 of the Constitution, which forbids any state, without the consent of Congress, from laying imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. In approaching the consideration of the question thus presented, the court, in its opinion, which was announced by Mr. Justice Miller, said (p. 131, L. ed. 384):

"The words 'imposts,' 'imports,' and 'exports' are frequently used in the Constitution. They have a necessary co-relation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same *instrument.

... Leaving, then, for a moment, the clause of the Constitution under consideration" (forbidding a state to lay an import or an export tax), "we find the first use of these co-relative terms in that clause of the 8th section of the 1st article, which begins the enumeration of the powers confided to Congress. 'The Congress shall have power to levy and collect taxes, duties, imposts, and excises. . . . But all duties, imposts, and excises shall be uniform throughout the United States.' Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one state into another? or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the 9th section, which declares that no tax shall be laid on articles exported from any state, for no article can be imported from one state into another, which is not, at the same time, exported

from the former. But if we give to the word 'imposts,' as used in the first-mentioned clause, the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts."

The opinion then proceeded to elaborately consider the meaning of the words "imports," "exports," and "imposts" in the Constitution, with reference to the powers of Congress, and concluded that they related only to the bringing in of goods from a country foreign to the United States, or the taking out of goods from the United States to such a country. From this conclusion the deduction was drawn that the words "imports" and "exports," when used in the Constitution with reference to the power of the several states, had a similar meaning, and hence the tax levied by the city of Mobile was decided not to be repugnant to the clause of the Constitution heretofore referred to, prohibiting a state "from laying imposts or duties on imports or exports." In the course of the opinion an intimation of Mr. Chief Justice Marshall in *Brown v. Maryland*, that the words "imports" and "exports" *might relate to the movement of goods between the states, was referred to, and it was expressly said that this was a mere suggestion on the part of the Chief Justice, not involved in the cause, and not therefore decided. So, also, the attention of the court was directed to the case of *Almy v. California* (1860) 24 How. 169, 16 L. ed. 644. That case involved the validity of a stamp tax imposed in California on all bills of lading for the shipment of gold from California to a point without the state. The particular bill of lading which was in question was for the shipment of gold from California to New York. It was held that this stamp tax was at least an indirect burden on exports, and hence was void, because an export tax within the meaning of the Constitution. In the opinion in *Woodruff v. Parham* it was expressly decided that although the conclusion in *Almy v. California*, that the tax was void, was sustained by the commerce clause of the Constitution, which had been referred to in the argument of that case, it had been erroneously held that "import" or "export," within the constitutional sense of the words, related to the movement of goods between the states, and not exclusively to foreign commerce. To the extent, therefore, that *Almy v. California* held or intimated that an export or import tax within the meaning of the Constitution embraced anything but foreign commerce, it was expressly overruled.

In *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, decided in 1884, fourteen years after the decision in *Woodruff v. Parham*, the question which arose in the latter case was again presented. A tax levied by the state of Louisiana on

certain coal which had come down the Ohio river was assailed on the ground that it amounted to both an export and import tax within the meaning of the Constitution. The court, speaking through Mr. Justice Bradley, said (p. 628, L. ed. p. 259, Sup. Ct. Rep. p. 1094):

"It was decided by this court, in the case of *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, that the term 'imports,' as used in that clause of the Constitution which declares that 'no state shall without the consent of Congress lay any imposts or duties on imports or exports,' does not refer to articles carried from one state into another, but only to articles imported from foreign countries into the United States."

[161] *The opinion, after stating the facts which were presented in *Woodruff v. Parham*, and the contention which was in that case based upon them, said (pp. 628, 629, L. ed. 259):

"This court, however, after an elaborate examination of the question, held that the terms 'imports' and 'exports' in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one state to another. It is unnecessary, therefore, to consider further the question raised by the plaintiffs in error under their third assignment of error, so far forth as it is based on the assumption that the tax complained of was an impost or duty on imports."

Thus treating the meaning of the words "imports" and "exports" as having been conclusively determined by *Woodruff v. Parham*, the court passed to the consideration of the contention that the tax levied in the state of Louisiana was an export tax within the meaning of the Constitution, because some of the coal was intended for export to a foreign country, or had been, as it was claimed, in part actually exported to such country.

Again, in *Fairbank v. United States* (1900) 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, the court was called upon to determine whether the requirement in an act of Congress that a revenue stamp be affixed to every bill of lading for goods shipped to a foreign country was a tax on exports. In the course of the opinion, in considering the question, the court referred to *Almy v. California*, 24 How. 169, 16 L. ed. 644, as authority for the proposition that a tax on the bill of lading was a tax on the movement of the goods which the bill of lading evidenced. But in referring to the *Almy Case* the court was careful to say (p. 294, L. ed. p. 867, Sup. Ct. Rep. p. 650):

"It is true that thereafter, in *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, it was held that the words 'imports' and 'exports' as used in the Constitution were used to define the shipment of articles between this and a foreign country, and not that between the states, and while, therefore, that case is no longer an authority as to what is or what is not an export, the proposition that a stamp duty on a bill of lading is in effect a duty on the article transported remains unaffected."

183 U. S.

A consideration of the opinions in *Woodruff v. Parham* and **Brown v. Houston*, so [162] recently in effect approved by this court in the case of *Fairbank v. United States*, will make it clear that an adherence to the interpretation of the words "export" and "import," which was expounded in those cases, is essential to the preservation of the necessary powers of taxation of the several states, as well as of those of the government of the United States. And, by implication, in a number of cases decided by this court since the decision in *Woodruff v. Parham*, the doctrine of export and import there defined has been, if not expressly, at least tacitly, approved in many ways. Indeed, it may be safely assumed that many state statutes levying taxes and much legislation of Congress has been enacted upon the express or implied recognition of the settled construction of the Constitution hitherto affixed to the import and export clauses by this court in the cases referred to. And this will be made obvious when it is considered that if the words "export" and "import" as used in the Constitution be applied to the movement of goods between the states, then it amounts to not only an express prohibition on the states to impose any direct, but also any indirect, burden, and therefore, under the doctrine of *Brown v. Maryland*, any state tax law which would indirectly burden the coming of goods from one state to the other would be wholly void. So also as to the government of the United States, if the provision as to the laying and collection of imposts be not construed as a "distinct" provision relating to foreign commerce and co-related with the clause as to exports, it would follow, as was clearly pointed out in *Woodruff v. Parham*, that the Constitution had granted on the one hand a power and immediately denied it. Besides, it would follow that all the general powers of taxation conferred upon Congress would be limited by the export clause, and thus any domestic tax, although fulfilling the requirements of uniformity and not violating the prohibition against preferences which indirectly burdened the ultimate export, would be void, — a doctrine which would manifestly cause to be invalid methods of taxation exercised by Congress from the beginning without question.

It being, then, beyond doubt that this court has, in a line of well-considered cases, determined that the words "export" and "import" *when employed in the Constitution re- [163] late to the bringing in of goods from a country foreign to the United States and to the carrying out of goods from the United States to such a country, the only question remaining is, Is Porto Rico a country foreign to the United States? In answering this question it is manifest, from the entire reasoning of the court, in the cases in which it was decided that the terms "export" and "import" relate to a foreign country alone, that the words "foreign country," as used in those opinions, signified a country outside of the sovereignty of the United States and beyond its legislative authority, and that

such meaning of those words was absolutely essential to the process of reasoning by which the conclusion in the cases referred to was reached.

Is Porto Rico a country foreign to the United States in the sense that it is not within the sovereignty and not subject to the legislative authority of the United States?—is, then, the issue. In *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743, and *Dooley v. United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762, it was held that, instantly upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country within the meaning of the tariff laws of the United States. In the case of *The Diamond Rings*, 183 U. S. 176, *post*, 38, 22 Sup. Ct. Rep. 59, it has just been held that the Philippine islands immediately upon the ratification of the treaty ceased to be foreign country within the meaning of the tariff laws; and of course, as these islands were acquired by the same treaty by which Porto Rico was acquired, this ruling is predicated on the decisions in *De Lima* and *Dooley*, above referred to. It is true that both in the *De Lima* and the *Dooley* cases, as well as in the case of *The Diamond Rings*, just decided, dissents were announced. None of the dissents rested, however, upon the theory that Porto Rico or the Philippine islands had not come under the sovereignty and become subject to the legislative authority of the United States, but were based on the ground that legislation by Congress was necessary to bring the territory within the line of the tariff laws in force at the time of the acquisition; and especially was this the case where the new territory had not, as the result of the acquisition, been incorporated into the United States as an integral part [164] thereof, though coming *under its sovereignty and subject, as a possession, to the legislative power of Congress.

In *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770, the question was whether a tax imposed by Congress on goods coming into the United States from Porto Rico was repugnant to that clause of the Constitution requiring uniformity "throughout the United States" of all "duties, imposts, and excises." The contention on the one hand was that, as Porto Rico had by the treaty with Spain been acquired by the United States, Congress could not impose a burden on goods coming from Porto Rico, in disregard of the requirement of uniformity "throughout the United States." On the other hand, it was contended that, although Porto Rico had become territory of the United States and was subject to the legislative authority of Congress, it had not been so made a part of the United States as to cause Congress to be subject, in legislating with regard to that island, to the uniformity provision of the Constitution. The court maintained the latter view. While it is true the members of the court who agreed in this conclusion did so for different reasons, nevertheless, in all the opinions delivered by the justices who

formed the majority of the court, it was declared that Porto Rico had come under the sovereignty and was subject to the legislative authority of the United States. Indeed, this was controverted by no one, since the members of the court who dissented did so because they deemed that Porto Rico had so entirely ceased to be foreign country, and had so completely been made a part of the United States, that Congress could not, in legislating for that island, disregard the provision of uniformity throughout the United States.

It having been thus affirmatively repeatedly determined that the export and import clauses of the Constitution refer only to commerce with foreign countries,—that is, to a country or countries without the sovereignty and entirely beyond the legislative authority of the United States,—and it having been conclusively settled that Porto Rico is not such a country, it seems to me the claim here made that the tax imposed by Congress in Porto Rico is an export or an import within the meaning of the Constitution is untenable. But, it is said, if Porto Rico is *not foreign, and therefore the tax [165] laid on goods in that island on their arrival from the United States is not within the purview of the import and the inhibition of the export clauses of the Constitution, then Porto Rico is domestic, and the tax is void because repugnant to the 1st clause of § 8 of article 1 of the Constitution, conferring upon Congress "the power to lay and collect taxes, duties, imposts, and excises, . . . but all duties, imposts, and excises shall be uniform throughout the United States." This contention, however, is but a restatement of the proposition which the court held to be unsound in *Downes v. Bidwell*; for in that case it was expressly decided that a provision of the statute now in question, which imposes a tax on goods coming to the United States from Porto Rico, was valid because that island occupied such a relation to the United States as empowered Congress to exact such a tax, since the requirement of uniformity throughout the United States was inapplicable. I do not propose to recapitulate the grounds of the conclusion so elaborately expressed by the opinions of the majority of the court in that case, since it suffices to say, for the purposes of the uniformity clause, that decision is controlling in this case. If the contention be that because the impost clause of the Constitution refers only to foreign commerce, therefore there was no power in Congress to impose the tax in question, or that such power is impliedly denied, the contention is unfounded and really but amounts to an indirect attack upon the doctrines announced in *Woodruff v. Parham*, *Brown v. Houston*, and *Fairbank v. United States*. As held in *Woodruff v. Parham*, the impost clause and the export clause are co-related and refer to a distinct subject, that is, foreign commerce. By what process of reasoning it can be said that because a special enumeration on a particular subject of taxation and a particular limitation as to that subject is expressed in

the Constitution, therefore other and general powers of taxation not relating to the subject in question are taken away, is not by me perceived. Certainly the argument cannot be that because a power has been conferred on Congress by the Constitution to levy a tax on foreign commerce, therefore the Constitution has taken away from Congress power to tax even incirectly domestic commerce. Because *the grant of power as to imposts contained in the 1st clause of § 8 of article 1 of the Constitution relates to foreign commerce, there arises no limitation on the general authority to tax as to all other subjects, which flows from the other provisions of the same clause. Referring to such power—the authority to levy and collect taxes, duties, imposts, and excises—the court, in the *License Tax Cases* (1866) 5 Wall. 462, 471, 18 L. ed. 497, 500, said:

“The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.”

Of course, the Constitution contemplates freedom of commerce between the states, but it also confers upon Congress the powers of taxation to which I have referred, and safeguarded the freedom of commerce and equality of taxation between the states by conferring upon Congress the power to regulate such commerce, by providing for the apportionment of direct taxes, by exacting uniformity throughout the United States in the laying of duties, imposts, and excises, and by prohibiting preferences between ports of different states. Indeed, when the argument which I am considering is properly analyzed, it amounts to a denial, as I have said, of the substantial powers of Congress with regard to domestic taxation, and, as I understand it, overthrows the settled interpretation of the Constitution, long since announced and consistently adhered to.

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Peckham**, dissenting:

This is an action brought to recover back duties levied and collected under the Porto Rican act of April 12, 1900 (31 Stat. at L. 77, chap. 191). at San Juan, on articles shipped to that port by citizens of New York from the state of New York. Plaintiffs were

[167] engaged *in the business of commission merchants, having their main office in the city of New York and a branch office at San Juan.

The 2d section of the act provides that, from the time of its passage, “the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from for-

eign countries,” with some exceptions not material here.

The 3d section, by which these duties are imposed, reads: “That on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries; and, in addition thereto, upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale, upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture;” and it was further provided that articles of merchandise manufactured in the United States coming into Porto Rico should, after entry, be subject to whatever internal revenue taxes might be in force on the island. And also that whenever the legislative assembly of Porto Rico should have enacted and put into operation a system of local taxation, and proclamation thereof had been made, “all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease.”

Assuming that “the United States” as referred to is the United States as constituted at the date of the proclamation of the treaty, the act, explicitly recognizing the distinction between tariff duties and internal taxes, is in respect of such duties an act to raise revenue by taxing the commerce of the people of every state and territory.

The fact that the net proceeds of the duties are appropriated *by the act for use [168] in Porto Rico does not affect their character any more than if so appropriated by another and separate act. The taxation reaches the people of the states directly, and is national, and not local, even though the revenue derived therefrom is devoted to local purposes.

Customs duties are duties imposed on imports or exports, and, according to the terms of this act, these are customs duties, not levied according to the rule of uniformity, and laid on exports as well as imports.

By the 1st clause of § 8 of article 1 of the Constitution, Congress is empowered to lay and collect duties, imposts, and excises, subject to the rule of uniformity, but this court has held that customs duties are only leviable on foreign commerce (*Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382), and that the uniformity required is geographical merely (*Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747). By the 3d clause of the same section, Congress is empowered “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The power to tax and the power to regulate commerce are distinct powers, yet the power of taxation may be so exercised as to operate in regulation of commerce.

Clauses 5 and 6 of § 9 provide:

"No tax or duty shall be laid on any articles exported from any state.

"No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

These provisions were intended to prevent the application of the power to lay taxes or duties, or the power to regulate commerce, so as to discriminate between one part of the country and another. The regulation of commerce by a majority vote, and the exemption of exports from duties or taxes, were parts of one of the great compromises of the Constitution.

If, after the cession, Porto Rico remained a foreign country, the prohibition of clause 5 would be fatal to these duties; while if Porto Rico became domestic, then, as they are customs duties, they could not be sustained, according to *Woodruff v. Parham*, [169] under *the 1st clause of § 8; and were also prohibited by clause 5 of § 9, whether customs duties or not, if the application of that clause is not limited to foreign commerce.

The prohibition that "no tax or duty shall be laid on articles exported from any state" negatives the existence of any power in Congress to lay taxes or duties in any form on articles exported from a state, *irrespective of their destination*, and, this being so, the act in imposing the duties in question is invalid, whether Porto Rico after its passage was a foreign or reputed foreign territory, a domestic territory, or a territory subject to be dealt with at the will of Congress regardless of constitutional limitations.

Confessedly the prohibition applies to foreign commerce, and the question is whether it is confined to that; in other words, whether language which embraces all articles exported can be properly restricted to particular exports. On what ground can the insertion in this comprehensive denial of power of the words "to foreign countries," thereby depriving it of effect on commerce other than foreign, be justified?

If the words "exported from any state" apply only to articles exported from a state to a foreign country, it would seem to follow that the broad power granted to Congress "to lay and collect taxes," for the purposes specified in the Constitution, may be exerted in the way of taxation on articles exported from one state to another. The right to carry legitimate articles of commerce from one state to another state without interference by national or state authority was, it has always been supposed, firmly established and secured by the Constitution. But that right may be destroyed or greatly impaired if it be true that articles may be taxed by Congress by reason of their being carried from one state to another.

Undoubtedly the clause confines the power to lay customs duties or imposts to imports only. This was so stated by Mr. Hamilton in the thirty-second number of *The Federalist*: "The 1st clause of the

same section [§ 8] empowers Congress 'to lay and collect taxes, duties, imposts, and excises;' and the 2d clause of the 10th section of the same article declares that 'no state shall, without the consent of Congress, lay any imposts or *duties on imports or ex- [170] ports, except for the purpose of executing its inspection laws.' Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned. But this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any state; in consequence of which qualification it now only extends to the duties on imports."

Nevertheless, because the clause secured that object, it is not to be assumed that it was not also intended to secure unrestrained intercourse between the different parts of a common country.

As was said in *Gibbons v. Ogden*, the right of intercourse between state and state was derived "from those laws whose authority is acknowledged by civilized man throughout the world. . . . The Constitution found it an existing right, and gave to Congress the power to regulate it." 9 Wheat. 211, 6 L. ed. 73. From this grant, however, the power to regulate by the levy of any tax or duty on articles exported from any state was expressly withheld.

In *Woodruff v. Parham*, 8 Wall. 132, 19 L. ed. 384, Mr. Justice Miller, in support of the conclusion that clause 1 of § 8 was confined as to customs duties to foreign commerce, said: "Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one state into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the 9th section, which declares that no tax shall be laid on articles exported from any state, for no article can be imported from one state into another, which is not, at the same time, exported from the former."

In that case, clause 2 of § 10 was under consideration: "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the *United States; and all such [171] laws shall be subject to the revision and control of the Congress."

It was held that this referred to foreign commerce only, and "that no intention existed to prohibit, by *this clause*, the right of one state to tax articles brought into it from another." This was reaffirmed in *Brown v. Houston*, 114 U. S. 622, 630, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091, 1095, and Mr. Justice Bradley said: "But in holding, with the decision in *Woodruff v. Parham*, that goods carried from one state to another are not imports or exports within the meaning of the clause which prohibits a state

from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a state may levy import or export duties on goods imported from or exported to another state. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by a state would not violate some other provision of the Constitution—that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes—is a different question.”

That question has been repeatedly answered by this court to the effect “that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.” *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 146, 10 Sup. Ct. Rep. 726. But if that power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure can be set at naught by a legislative body created by that instrument.

Such a conclusion is wholly inadmissible. The power to regulate interstate commerce was granted in order that trade between the states might be left free from discriminating legislation, and not to impart the power to create antagonistic commercial relations between them.

[172] The prohibition of preference of ports was coupled with the prohibition of taxation on articles exported. The citizens of each state were declared “entitled to all privileges and immunities of citizens in the several states,” and that included the right of ingress and egress, and the enjoyment of the privileges of trade and commerce. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

And so the court, in *Woodruff v. Parham*, as the quotation from its opinion by Mr. Justice Miller demonstrates, did not put upon the absolute and general prohibition of power to lay any tax or duty on articles exported from any state that narrow construction which would limit it to exports to a foreign country, and would concede the power to Congress to impose duties on exports from one state to another in regulation of interstate commerce.

The power to lay duties in regulation of commerce with foreign nations is relied on as the source of power to pass laws for the protection and encouragement of domestic industries, and except for this clause the same effect would be attributed to the power to regulate commerce among the states. This, however, the clause, literally read, prevents, and to limit its application to foreign commerce, as the power to lay customs duties under the 1st clause of § 8 has been limited, would defeat the manifest purpose of the Constitution by enabling discrim-

inating taxes and duties to be laid against one section of the country as distinguished from another.

And if the prohibition be not confined to foreign commerce, then it applies to all commerce not wholly internal to the respective states, and the destination of articles exported from a state cannot affect, or be laid hold of to affect, the result.

In short, clause 5 operates, and was intended to operate, to except the power to lay any tax or duty on articles exported from the general power to regulate commerce, whether interstate or foreign. And this is equally true in respect of commerce with the territories, for the power to regulate commerce includes the power to regulate it, not only as between foreign countries and the territories, but also by necessary implication as between the states and territories. *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

Nothing is better settled than that the states cannot interfere with interstate commerce, yet it is easy to see that if the *ex-[173] clusive delegation to Congress of the power to regulate commerce did not embrace commerce between the states and territories, the interference by the states with such commerce might be justified.

Again, if in any view these duties could be treated as other than custom duties the result would be the same, inasmuch as the goods were articles exported from New York, and there was a total lack of power to lay any tax or duty on such articles.

The prohibition on Congress is explicit, and noticeably different from the prohibition on the states. The state is forbidden to lay “any imposts or duties;” Congress is forbidden to lay “any tax or duty.” The state is forbidden from laying imposts or duties “on imports or exports,” that is, articles coming into or going out of the United States. Congress is forbidden to tax “articles exported from any state.”

The plain language of the Constitution should not be made “blank paper by construction,” and its specific mandate ought to be obeyed.

As said in *Marbury v. Madison*, “It is declared that ‘no tax or duty shall be laid on articles exported from any state.’ Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?” 1 Cranch, 178, 2 L. ed. 74.

Nor is the result affected by the fact that the collection of these duties was at Porto Rico.

In *Brown v. Maryland*, 12 Wheat. 437, 6 L. ed. 685, Chief Justice Marshall said: “An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an

[174] impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition,*unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country."

And so of exports. They are the things exported,—the articles themselves. A duty on exports is not merely a duty on the act of exportation, but is a duty on the article exported, and the article exported remains such until it has reached its final destination. The place of collection is purely incidental, and immaterial on the question of power.

But we are told that these duties were laid, not on articles exported from the state of New York, but on articles imported into Porto Rico. The language used, however, precludes this contention, and there is nothing in the act to indicate that at some particular point on a voyage articles exported were to cease to be such and to become imports, and nothing in the facts in this case to indicate a sea change of that sort as to these goods. The geographical origin of the shipment controls, and, as heretofore said, it is not material whether the duties were collectible at the place of exportation or at Porto Rico. They were imposed on articles exported from the state of New York, and before the articles had reached their ultimate destination and been mingled with the common mass of property on the island.

Chief Justice Marshall disposed of the suggested evasion thus: "Suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things [175]imported, ceased the *instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?" 12 Wheat. 445, 6 L. ed. 688.

There is no difference in principle between the case supposed and that before us. The course of transportation is arrested until the exaction is paid.

The proposition that because the proceeds of these duties were to be used for the benefit of Porto Rico they might be regarded as if laid by Porto Rico itself with the consent

of Congress, and were therefore lawful, will not bear examination. No money can be drawn from the Treasury except in consequence of appropriations made by law. This act does not appropriate a fixed sum for the benefit of Porto Rico, but provides that the money collected, and collected from citizens of the United States in every port of the United States, shall be placed in a separate fund or subsequently in the treasury of Porto Rico, to be expended for the government and benefit thereof. And although the destination of the proceeds in this way were lawful, it would not convert duties on articles exported from the states into local taxes.

States may, indeed, under the Constitution, lay duties on foreign imports and exports, for the use of the Treasury of the United States, with the consent of Congress, but they do not derive the power from the general government. The power pre-existed, and it is its exercise only that is subjected to the discretion of Congress.

Congress may lay local taxes in the territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one state to another, or from any state to the territories, or from any state to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress as will enable it, under the guise of taxation, to exclude the products of Porto Rico from the states as well as the products of the states from Porto Rico; and this, notwithstanding it was held in *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743, that Porto Rico after the ratification of the *treaty with [176] Spain ceased to be foreign and became domestic territory.

My Brothers **Harlan**, **Brewer**, and **Peckham** concur in this dissent.

We think it clear on this record that plaintiffs were entitled to recover, and that the judgment should be reversed.

THE DIAMOND RINGS.†

(See S. C. Reporter's ed. 176-185.)

Duties — importation from Philippine islands — what is foreign country — force of Senate resolution explaining intent of ratification of treaty — effect of insurrection on title of United States to Philippine islands.

1. Diamond rings brought into the United States from the island of Luzon, in the Philippine Islands, subsequent to the proclamation of the ratification of the treaty of peace between the United States and Spain, are not imported from a foreign country within the

†The title of this case in the Official Report is *Fourteen Diamond Rings, Emil J. Pepke, Claimant v. United States*.

NOTE.—On the construction and operation of treaties—see note to *United States v. The Amistad*, 10 L. ed. U. S. 826.

meaning of the tariff act of July 24, 1897, providing for duties on articles so imported.

2. The meaning of the treaty of peace with Spain by which the Philippine islands were ceded to the United States cannot be controlled by a Senate resolution adopted, after the ratification of the treaty, by a vote of less than two thirds of a quorum, that it was not intended to incorporate the inhabitants of the Philippines into citizenship of the United States, or to permanently annex those islands.
3. The legal title and possession of the United States to the Philippine islands, derived from the cession in the treaty of peace with Spain, whose sovereignty and possession under claim of title had existed for many years prior to the war with the United States, is unaffected by the continuance in insurrection against the United States of those who had been previously in insurrection against Spain.

[No. 158.]

Argued December 17, 18, 19, 20, 1900. Decided December 2, 1901.

IN ERROR to the District Court of the United States for the Northern District of Illinois to review a decree of forfeiture and sale of articles alleged to have been imported without payment of duties. *Reversed*, and cause remanded, with directions to quash the information.

The facts are stated in the opinion.

Messrs. Lawrence Harmon and Charles H. Aldrich argued the cause and filed a brief for plaintiff in error:

The treaty of peace between the United States and Spain, so far as it relates to the Philippine islands, constitutes an absolute grant to the United States, both of the land and waters within the defined boundaries, and of all sovereignty and dominion over them. All that Spain granted the United States received, but the political sovereignty thus received was subject to the Constitution.

New Orleans v. United States, 10 Pet. 662, 9 L. ed. 573.

The right of the United States to acquire territory by all the means recognized in international law is now too well established to require argument or illustration.

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242; *Pollard v. Kibbe*, 14 Pet. 353, 10 L. ed. 490; *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. ed. 681; *Scott v. Sandford*, 19 How. 398, 15 L. ed. 691; *United States v. Huckabee*, 16 Wall. 414, 21 L. ed. 457; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792.

One sovereign cannot grant away its sovereignty over defined territory to another power, and by the same deed the grantee stipulate to take less than the grant.

New Orleans v. United States, 10 Pet. 662, 9 L. ed. 573.

The provision of the treaty, that "the civil rights and political status of the native inhabitants of the territories hereby ceded shall be determined by Congress," does not refer to the territory acquired, but to the status of the Spanish subjects and

native inhabitants, and is a mere declaration of the accepted principles of international law applicable thereto, as repeatedly declared in this court.

United States v. Percheman, 7 Pet. 51, 8 L. ed. 604; *Delassus v. United States*, 9 Pet. 117, 9 L. ed. 71; *Mitchel v. United States*, 9 Pet. 711, 9 L. ed. 283; *Strother v. Lucas*, 12 Pet. 410, 9 L. ed. 1137.

It is also an accepted principle of international law, that the laws, usages, and municipal regulations in force at the time of the conquest or cession remain in force until changed by the new sovereign. The conqueror may deal with the inhabitants and give them what law he pleases, unless restrained by the capitulation or treaty of cession; but, until an alteration is made, the former laws continue.

Calvin's Case, 7 Coke, 17; *Mitchel v. United States*, 9 Pet. 711, 9 L. ed. 283; *Strother v. Lucas*, 12 Pet. 410, 9 L. ed. 1137.

The uncivilized native inhabitants, subject to tribal relations, are not considered independent communities having a permanent property in the soil, capable of alienation to private individuals. They are, in the accepted view of civilized nations, mere occupants, and pass with the cession by one sovereignty to another, though such civilized nations assume to respect such rights of occupancy. These tribes and communities are said to remain in a state of nature, and have never been admitted into the general society of nations.

Penn v. Baltimore, 1 Ves. Sr. 445.

They are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights.

Johnson v. McIntosh, 8 Wheat. 543, 5 L. ed. 681.

In the absence of special enactment by Congress, the establishment of American institutions and government in and over those islands does not necessarily constitute all of their inhabitants a part of "the people of the United States" to whom the civic status incident to that appellation is at once extended by territorial expansion.

Scott v. Sandford, 19 How. 398, 15 L. ed. 691.

From the date of the ratification of the treaty of Paris this territory became a part of the United States. Congress and the Executive in dealing therewith are subject to the provisions of the Constitution, and neither can exercise any power over such territory or the person or property of any citizen of the United States therein beyond what that instrument confers, nor lawfully deny any right which it has reserved.

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242; *Pollard v. Kibbe*, 14 Pet. 356, 10 L. ed. 492; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *United States v. Rice*, 4 Wheat. 247, 4 L. ed. 562; *Scott v. Sandford*, 19 How. 398, 15 L. ed. 691; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046; *Shively v. Bowlby*, 152 U. S. 48, 38 L. ed. 349, 14 Sup. Ct. Rep. 548; *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep.

649; *Fong Yue Ting v. United States*, 149 U. S. 716, 37 L. ed. 914, 13 Sup. Ct. Rep. 1016; *The City of Panama*, 101 U. S. 453, *sub nom. The City of Panama v. Phelps*, 25 L. ed. 1061; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. ed. 891; *Murphy v. Ramsey*, 114 U. S. 44, 29 L. ed. 57, 5 Sup. Ct. Rep. 747; *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

This court has drawn a clear and sharp distinction between political power and the personal and constitutional rights of the inhabitants of a territory. The former are held at the discretion of Congress; the latter guaranteed "to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national."

Murphy v. Ramsey, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

Being a part of the United States, the Philippine islands are subject to the provisions of cl. 1, § 8, art. 1, and of cl. 5, 6, § 9, art. 1. U. S. Const. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage.

Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Talbot v. Silver Bow County*, 139 U. S. 438, 35 L. ed. 210, 11 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427; *Scott v. Sandford*, 19 How. 398, 15 L. ed. 691; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745; *Slaughter-House Cases*, 16 Wall. 73, 21 L. ed. 407; President's Message (1899) 50; *United States v. Dickson*, 15 Pet. 161, 10 L. ed. 697; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; Synopsis of Treasury Decisions (1868) 10, 20.

The President of the United States has no legislative power. The imposition of customs duties upon commerce between these islands and other parts of the United States after the treaty of peace and exchange of ratifications, by executive order, is without lawful authority, and the seizure of the property of the plaintiff in error, a citizen of the United States, under such pretended authority, constitutes a taking of his property without due process of law.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *Campbell v. Hall*, 1 Cowp. 204; 3 Bancroft, U. S. History, 166.

Mr. Charles H. Aldrich also argued the cause for plaintiff in error in reply:

Sovereign power, in the sense that the words are used in the law of nations, as prerogative rights of the King or Emperor, not only is not vested in the United States or in any branch of its government, but cannot be so vested. The sovereign power is with the people.

Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; *Martin v. Waddell*, 16 Pet. 410, 10 L. ed. 1012; *Gibbons v. Ogden*, 9 Wheat. 196, 6 L. ed. 70; *New Orleans v. United States*, 10 Pet. 662, 9 L. ed. 573.

As the political department of the government has accepted the Philippine islands as a settlement of war, and has entered into possession, and is exercising jurisdiction therein, this court is bound to assume that they are United States territory.

Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415.

Territory acquired subsequent to the formation of the Constitution is a part of the United States.

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242; *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98; *Pollard v. Kibbe*, 14 Pet. 353, 10 L. ed. 490; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649.

The application of the Constitution in its operation is coextensive with our political jurisdiction, and is not to be given or taken away by Congress.

Keynolds v. United States, 98 U. S. 145, 25 L. ed. 244; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046; *The City of Panama*, 101 U. S. 453, *sub nom. The City of Panama v. Phelps*, 25 L. ed. 1061; *Murphy v. Ramsey*, 114 U. S. 44, 29 L. ed. 57, 5 Sup. Ct. Rep. 747; *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

The theory of every government under a written Constitution must be that an act of the legislature repugnant to the Constitution is void.

Marbury v. Madison, 1 Cranch, 172, 2 L. ed. 72.

From the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

A decision by this court that the clauses of the treaty of peace between the United States and Spain relating to imports and preferences as to the ports in the Philippine islands are within the Constitution and forbidden is not equivalent to holding that the

native inhabitants of such islands must become citizens. As to this question the court will be guided by the decisions holding that members of Indian tribes owing allegiance to such tribes, though dwelling within the United States, are not citizens of the United States within the 14th Amendment of the Constitution.

Elk v. Wilkins, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

Attorney General Griggs argued the cause and filed a brief for defendant in error.

For his contentions, see his brief as reported in *Goetze v. United States*, 45 L. ed. U. S. 1067.

[177] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

Emil J. Pepke, a citizen of the United States and of the state of North Dakota, enlisted in the First Regiment of the North Dakota United States Volunteer Infantry, and was assigned for duty with his regiment in the island of Luzon, in the Philippine islands, and continued in the military service of the United States until the regiment was ordered to return, and, on arriving at San Francisco, was discharged September 25, 1899.

He brought with him from Luzon four-teen diamond rings, which he had there purchased, or acquired through a loan, subsequent to the ratification of the treaty of peace between the United States and Spain, February 6, 1899, and the proclamation thereof by the President of the United States, April 11, 1899.

In May 1900, in Chicago, these rings were seized by a customs officer as having been imported contrary to law, without entry, or declaration, or payment of duties, and an information was filed to enforce the forfeiture thereof.

To this Pepke filed a plea setting up the facts, and claiming that the rings were not subject to customs duties; the plea was held insufficient; forfeiture and sale were decreed; and this writ of error was prosecuted.

The tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11), in regulation of commerce with foreign nations, levied duties "upon all articles imported from foreign countries."

Were these rings, acquired by this soldier after the ratification of the treaty was proclaimed, when brought by him from Luzon to California, on his return with his regiment to be discharged, imported from a foreign country?

This question has already been answered in the negative, in respect of Porto Rico, in *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743, and unless the cases can be distinguished, which we are of opinion they cannot be in this particular, that decision is controlling.

[178] *The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory, or territory ceded by way of indemnity. 183 U. S.

ty. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, "cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part." *Thorington v. Smith*, 8 Wall. 10, 19 L. ed. 363. The Philippines were not simply occupied, but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation.

In *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889, the question was whether goods imported from a foreign country into California after the cession were subject to our tariff laws, and this court held that they were.

In *De Lima v. Bidwell* the question was whether goods imported into New York from Porto Rico, after the cession, were subject to duties imposed by the act of 1897 on "articles imported from foreign countries," and this court held that they were not. That act regulated commerce with foreign nations, and Porto Rico had ceased to be within that category; nor could territory be foreign and domestic at the same time.

Among other things it was there said: "The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. . . . This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections *maybe [179] suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that, until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words."

No reason is perceived for any different

ruling as to the Philippines. By the 3d article of the treaty Spain ceded to the United States "the archipelago known as the Philippine islands," and the United States agreed to pay Spain the sum of \$20,000,000 within three months. The treaty was ratified; Congress appropriated the money; the ratification was proclaimed. The treaty-making power, the executive power, the legislative power, concurred in the completion of the transaction.

The Philippines thereby ceased, in the language of the treaty, "to be Spanish." Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States, and they became entitled to its protection.

But it is said that the case of the Philippines is to be distinguished from that of Porto Rico because on February 14, 1899, after the ratification of the treaty, the Senate resolved, as given in the margin,[†] that it was not intended to incorporate the inhabitants* of the Philippines into citizenship of the United States, nor to permanently annex those islands.

We need not consider the force and effect of a resolution of this sort, if adopted by Congress, not like that of April 20, 1898, in respect of Cuba, preliminary to the declaration of war, but after title had passed by ratified cession. It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two thirds of a quorum; and that it is absolutely without legal significance on the question before us. The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.

It is further contended that a distinction exists in that, while complete possession of Porto Rico was taken by the United States, this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

We must decline to assume that the gov-

ernment wishes thus to disparage the title of the United States, or to place itself in the position of waging a war of conquest.

The sovereignty of Spain over the Philippines and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her, or that uncivilized tribes may have defied her will, did not affect the validity of her title. She granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant.

*If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected. [181]

We do not understand that it is claimed that in carrying on the pending hostilities the government is seeking to subjugate the people of a foreign country, but, on the contrary, that it is preserving order and suppressing insurrection in the territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable.

But it is sought to detract from the weight of the ruling in *De Lima v. Bidwell* because one of the five justices concurring in the judgment in that case concurred in the judgment in *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

In *De Lima v. Bidwell* Porto Rico was held not to be a foreign country after the cession, and that a prior act exclusively applicable to foreign countries became inapplicable.

In *Downes v. Bidwell* the conclusion of a majority of the court was that an act of Congress levying duties on goods imported from Porto Rico into New York, not in conformity with the provisions of the Constitution in respect to the imposition of duties, imposts, and excises, was valid. Four of the members of the court dissented from and five concurred, though not on the same grounds, in this conclusion. The justice who delivered the opinion in *De Lima's Case* was one of the majority, and was of opinion that although by the cession Porto Rico ceased to be a foreign country, and became a territory of the United States and domestic, yet that it was merely "appurtenant" territory, and "not a part of the United States within the revenue clauses of the Constitution."

This view placed the territory, though not foreign, outside of the restrictions applicable to interstate commerce, and treated the power of Congress, when affirmatively exercised over a territory, situated as supposed, as uncontrolled by the provisions of the Con-

[†]Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the

United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands." Cong. Rec., 55th Cong. 3d Sess. vol. 32, p. 1847.

stitution in respect of national taxation. The distinction was drawn between a special act in respect of the particular country and a general and prior act only applicable to [182] *countries foreign to ours in every sense. The latter was obliged to conform to the rule of uniformity, which was wholly disregarded in the former.

The ruling in the *Case of De Lima* remained unaffected, and controls that under consideration. And this is so notwithstanding four members of the majority in the *De Lima Case* were of opinion that Porto Rico did not become by the cession subjected to the exercise of governmental power in the levy of duties unrestricted by constitutional limitations.

Decree reversed and cause remanded, with directions to quash the information.

Mr. Justice **Gray**, Mr. Justice **Shiras**, Mr. Justice **White** and Mr. Justice **McKenna** dissented, for the reasons stated in their opinions in *De Lima v. Bidwell*, 182 U. S. 1, 200-220, 45 L. ed. 1041, 1057-1065, 21 Sup. Ct. Rep. 743, in *Dooley v. United States*, 182 U. S. 222, 236-243, 45 L. ed. 1074, 1083-1085, 21 Sup. Ct. Rep. 762, and in *Downes v. Bidwell*, 182 U. S. 244, 287-347, 45 L. ed. 1088, 1106-1129, 21 Sup. Ct. Rep. 770.

Mr. Justice **Brown**, concurring:

I concur in the conclusion of the court in this case, and in the reasons given therefor in the opinion of the Chief Justice.

The case is distinguishable from *De Lima v. Bidwell* in but one particular, viz., the Senate resolution of February 6, 1899. With regard to this, I would say that in my view the case would not be essentially different if this resolution had been adopted by a unanimous vote of the Senate. To be efficacious such resolution must be considered either (1) as an amendment to the treaty, or (2) as a legislative act qualifying or modifying the treaty. It is neither.

It cannot be regarded as part of the treaty, since it received neither the approval of the President nor the consent of the other contracting power. A treaty in its legal sense is defined by Bouvier as "a compact made between two or more independent nations with a view to the public welfare" (2 Law Dict. 1136), and by Webster as "an agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state." In its essence it is a contract. It differs from an ordinary contract only in being an agreement between independent states instead of private parties. *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. ed. 415, 435; *Head Money Cases*, 112 U. S. 580, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247. By the Constitution (art. 2, § 2) the President "shall have power, by and with the

[183] advice *and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." Obviously the treaty must contain the whole contract between the par-

ties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty. If, for instance, the treaty with Spain had contained a provision instating the inhabitants of the Philippines as citizens of the United States, the Senate might have refused to ratify it until this provision was stricken out. But it could not, in my opinion, ratify the treaty and then adopt a resolution declaring it not to be its intention to admit the inhabitants of the Philippine islands to the privileges of citizenship of the United States. Such resolution would be inoperative as an amendment to the treaty, since it had not received the assent of the President or the Spanish commissioners.

Allusion was made to this question in the *New York Indians v. United States*, 170 U. S. 1, 21, 42 L. ed. 927, 934, 18 Sup. Ct. Rep. 531, wherein it appeared that, when a treaty with certain Indian tribes was laid before the Senate for ratification, several articles were stricken out, several others amended, a new article added, and a proviso adopted that the treaty should have no force or effect whatever until the amendment had been submitted to the tribes, and they had given their free and voluntary assent thereto. This resolution, however, was not found in the original or in the published copy of the treaty, or in the proclamation of the President, which contained the treaty without the amendments. With reference to this the court observed: "The power to make treaties is vested by the Constitution in the President and Senate, and, while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate, and House of Representatives. There is something, too, which shocks the conscience *in the idea that a treaty can be put [184] forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty embodied in the presidential proclamation contained all the terms of the arrangement."

In short, it seems to me entirely clear that this resolution cannot be considered a part of the treaty.

I think it equally clear that it cannot be treated as a legislative act, though it may be conceded that under the decisions of this court Congress has the power to disregard

or modify a treaty with a foreign state. This was not done.

The resolution in question was introduced as a *joint* resolution, but it never received the assent of the House of Representatives or the signature of the President. While a joint resolution, when approved by the President, or, being disapproved, is passed by two thirds of each House, has the effect of a law (Const. art. 1, § 7), no such effect can be given to a resolution of either House acting independently of the other. Indeed, the above clause expressly requires concurrent action upon a resolution "before the same shall take effect."

This question was considered by Mr. Attorney General Cushing in his opinion on certain Resolutions of Congress (6 Ops. Atty. Gen. 680), in which he held that while joint resolutions of Congress are not distinguishable from bills, and have the effect of law, separate resolutions of either House of Congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or heads of departments. The whole subject is there elaborately discussed.

In any view taken of this resolution it appears to me that it can be considered only as expressing the individual views of the Senators voting upon it.

[185] I have no doubt the treaty might have provided, as did the act of Congress annexing Hawaii, that the existing customs relations *between the Spanish possessions ceded by the treaty and the United States should remain unchanged until legislation had been had upon the subject; but in the absence of such provision the case is clearly controlled by that of *De Lima v. Bidwell*.

STATE OF ARKANSAS, *Appt.*,
v.

KANSAS & TEXAS COAL COMPANY and
St. Louis & San Francisco Railroad Com-
pany.

(See S. C. Reporter's ed. 185-191.)

Removal of causes—diverse citizenship—state not a citizen—judicial notice—suit arising under Constitution and laws of United States.

1. A suit in a state court between a state and foreign corporations is not removable to the United States circuit court as a controversy between citizens of different states, as a state is not a citizen.

NOTE.—On removal of causes generally—see notes to *Whelan v. New York, L. E. & W. R. Co.* (C. C. N. D. Ohio) 1 L. R. A. 65; *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 346, and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

On removal of causes from state to Federal courts, where the Constitution of the United States, or an act of Congress, or a treaty, comes in question—see note to *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656. See also *Ferguson v. Ross* (C. C. E. D. N. Y.) 3 L. R. A. 322, and note; *Austin v.*

2. A United States circuit court cannot, on a petition for removal from a state court of a suit to enjoin the importation of armed men into Sebastian county, Arkansas, and the town of Huntington therein, where a strike exists, take judicial notice, for the purpose of maintaining jurisdiction, that such persons could only be brought to Huntington by way of the Indian territory, and that the word "Import," as used in the bill, means to bring into from another state or foreign country, as the court cannot make the complainant's case other than it made it by taking judicial notice of facts which it did not choose to rely on in its pleading.

3. A suit brought in the state court to enjoin the threatened importation of armed men into a county where a strike existed, on the ground that this would amount to a public nuisance and would endanger the health, morals, peace, and good order of the community, is not removable to a United States circuit court, under the act of March 3, 1887, as corrected by the act of August 13, 1888, as one arising under the Constitution and laws of the United States, since, even assuming that the bill shows upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the 14th Amendment, it only demonstrates that the bill cannot be maintained, and not that the cause of action arose under the Constitution or laws of the United States.

[No. 42.]

Submitted October 23, 1901. Decided December 2, 1901.

APPEAL from an order of the Circuit Court of the United States for the Western District of Arkansas overruling a motion to remand the cause to the state court. *Reversed* and remanded, with a direction to remand to the state court.

See same case below, 96 Fed. 353.

Statement by Mr. Chief Justice Fuller:

This was a bill filed in the circuit court of Sebastian county, for the district of Greenwood, Arkansas, *by "The state of Ar- [186] kansas, on the relation of Jo Johnson, prosecuting attorney for the twelfth judicial circuit," against the Kansas & Texas Coal Company and the St. Louis & San Francisco Railroad Company, which "for her cause of action" alleged that the railroad company was "a corporation organized under the laws of the state of Missouri, owning and operating a railroad in the twelfth judicial circuit of Arkansas and more particularly in Sebastian county, of said circuit;" that the coal company was "a corporation duly organized under the laws of the state of Mis-

souri." (C. C. N. D. Cal.) and 5 L. R. A. 476 and note.

On removal of causes in cases of diverse citizenship—see notes to *Delaware R. Constr. Co. v. Meyer*, 25 L. ed. U. S. 593; *Whelan v. New York, L. E. & W. R. Co.* (C. C. N. D. Ohio) 1 L. R. A. 65; *Seddon v. Virginia, T. & C. Steel & I. Co.* (C. C. W. D. Va.) 1 L. R. A. 108; *Huskins v. Cincinnati, N. O. & T. P. R. Co.* (C. C. N. D. Tenn.) 3 L. R. A. 545; *Brodhead v. Shoemaker* (C. C. N. D. Ga.) 11 L. R. A. 567.

On judicial notice—see *Ollive v. State* (Ala.) 4 L. R. A. 33, and note.

souri, owning and operating a coal mine in Huntington, in the Greenwood district of Sebastian county." "That a high state of excitement and condition of hot blood now prevails between striking miners and their sympathizers in large numbers, on the one side, and said coal company and its employees, on the other. That said coal company is threatening and is about to import into said county and town of Huntington, over the line of their codefendant's railroad, a large number of armed men of the low and lawless type of humanity, to wit, about 200, to the great danger of the public peace, morals, and good health of said county, and more particularly of said town. That said threatened action on the part of said defendant, if permitted to be executed, would become a great public nuisance, and would destroy the peace, morals, and good health of said county and town, and would lead to riot, bloodshed, and to the dissemination of contagious and infectious diseases."

The bill prayed "that the defendant Kansas & Texas Coal Company, its agents, servants, and employees, and each of them, be restrained and prohibited from importing or causing to be imported or brought into Sebastian county or the twelfth judicial circuit of Arkansas, and that the St. Louis & San Francisco Railroad Company, its agents, servants, and employees,—each, both, and all of them,—be enjoined, restrained, and prohibited from importing, hauling, or bringing, or causing to be imported, hauled, or brought, in the said county or circuit, and from unloading or attempting to unload from any of its cars in said county or circuit, any and all large bodies of armed, lawless, or riotous persons or persons affected with contagious or infectious diseases that might endanger the [187] peace, good order, or good *health of the state, or create a public nuisance in said county or circuit, under the pains and penalty of the law."

A preliminary injunction was granted and process issued. Defendants filed their petition and bond for removal, and made application therefor, which was denied by the circuit court of Sebastian county, whereupon defendants filed in the United States circuit court for the western district of Arkansas a certified transcript of the record and of the pleadings and papers in the case.

The petition for removal averred that Jo Johnson was a citizen of Arkansas, that defendants were citizens of Missouri, and that the controversy in suit was wholly between citizens of different states; and also that, treating the state of Arkansas as complainant, the suit was one arising under the Constitution and laws of the United States because defendants were engaged in interstate commerce, and the action was an unlawful interference therewith by reason of the commerce clause of the Federal Constitution and of laws passed in pursuance thereof; and which constituted a defense in the premises.

Complainant moved to remand the cause, and defendants moved to dissolve the injunction and that complainant be restrained from the prosecution of the suit in the state
183 U. S. U. S., Book 46.

court. The circuit court of the United States overruled the motion to remand, and sustained the motion to dissolve, but declined to enjoin complainant. 96 Fed. 353. The cause came on subsequently for final hearing, the bill was dismissed, and this appeal was prosecuted.

Mr. Ben T. Duval, submitted the cause for appellant:

The record must show all the facts essential to give the court jurisdiction, else the court has no authority to assume jurisdiction.

Tod v. Cleveland & M. Valley R. Co. 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145.

Under the acts of March 3d, 1887, chap. 373 (24 Stat. at L. 433), and August 13, 1888, chap. 866 (25 Stat. at L. 433), a case not depending upon the citizenship of the parties, nor otherwise especially provided for, cannot be removed from a state court into the circuit court of the United States, as one arising under the Constitution of the United States, unless the fact appears by the plaintiff's statement of his own claim.

Ogden Short Line & U. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 102, 15 Sup. Ct. Rep. 34.

The statement of that fact in the petition for removal, or in a subsequent pleading, is not sufficient.

Postal Teleg. Cable Co. v. United States, 155 U. S. 482, *sub nom. Postal Teleg. Cable Co. v. Alabama*, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357.

This action, although brought upon the relation of Jo Johnson, as prosecuting attorney for the twelfth judicial circuit, is really a suit brought by the state, and therefore not removable on the ground of citizenship under the act of March 3, 1887, or August 13, 1888.

Ferguson v. Ross, 3 L. R. A. 322, 38 Fed. 161.

A suit instituted by the state in one of its own courts against a citizen of another state is not removable on the ground of diverse citizenship of the parties.

Alabama v. Wolffe, 18 Fed. 836; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; *Ames v. Kansas ex rel. Johnston*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437.

To give jurisdiction to a United States circuit court of the case by removal from a state under the act of 1875, the construction of the Constitution or a law or treaty of the United States must be directly involved in it.

Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; *Carson v. Dunham*. 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030.

Messrs. Joseph M. Hill, James Brizolara, and Adiel Sherwood submitted the cause for appellees:

The verb "import" means to bring into the state from another state or foreign country.

New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; *Standard Dict.*; *Webster's Dict.*; *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; *United States v. Laws*, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; *Wilson v. United States*, 1 Brock. 423, 30 Fed. Cas. No. 17,846.

Although a state is one of the parties, the case can be removed to the Federal court where a Federal question is involved.

Ames v. Kansas ex rel. Johnston, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260.

The test to determine the presence of a Federal question is whether the complaint shows on its face that some right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction.

Ames v. Kansas ex rel. Johnston, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; *Southern P. R. Co. v. California*, 118 U. S. 109, 30 L. ed. 103, 6 Sup. Ct. Rep. 993; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210.

These cases all arose prior to the present judiciary act, but in this respect the act of 1887-88, makes no change, and this line of authorities has been expressly approved and adopted in cases arising since the passage of the present judiciary act.

New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905.

In determining this question the court looks into the real controversy, irrespective of any suppressions or omissions, etc., in the complaint, and if it is found, by fair intendment, to raise a Federal question, it is removable.

South Carolina ex rel. Tillman v. Coosaw Min. Co. 45 Fed. 804.

Causes are removable notwithstanding the complaint is demurrable.

St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Schunk v. Moline, M. & S. Co.* 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416; *Moon, Removal of Causes*, § 44.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The gravamen of the bill was the injury to the health, morals, peace, and good order of the people of the town and county, the infiction of which was alleged to be threatened by the *bringing within their precincts of certain persons by defendants. No statute of the state was referred to as applicable, but the enforcement of the police power was sought through the interposition of a court of equity by way of prevention of an impending public nuisance. The circuit

court was of opinion that the bill could not be maintained: but, without intimating any conclusion to the contrary, or criticising its formal sufficiency, the question that meets us on the threshold is whether the case ought to have been remanded to the state court.

We need not spend any time on the contention that this was a controversy between citizens of different states. The circuit court correctly held otherwise. The state of Arkansas was the party complainant, and a state is not a citizen. *Postal Telegr. Cable Co. v. United States*, 155 U. S. 482, *sub nom. Postal Telegr. Cable Co. v. Alabama*, 39 L. ed. 231, 15 Sup. Ct. Rep. 192.

We inquire, then, if the cause was removable because arising under the Constitution or laws of the United States.

The general policy of the act of March 3, 1887, as corrected by the act of August 13, 1888 (24 Stat. at L. 552, chap. 373; 25 Stat. at L. 433, chap. 866), as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the circuit courts. Those cases, and those only, were made removable under § 2, in respect of which original jurisdiction was given to the circuit courts by § 1. Hence it has been settled that a case cannot be removed from a state court into the circuit court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. And, moreover, that jurisdiction is not conferred by allegations that defendant intends to assert a defense based on the Constitution or a law or treaty of the United States, or under statutes of the United States or of a state, in conflict with the Constitution. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Sawyer v. Koehersperger*, 170 U. S. 303, 42 L. ed. 1046, 18 Sup. Ct. Rep. 946; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

*In this case the state asserted no right[189] under the Constitution or laws of the United States, and put forward no ground of relief derived from either. There were no averments on which the state could have invoked the original jurisdiction of the circuit court under § 1 of the act, and that is the test of the right of removal under § 2.

The police power was appealed to, the power to protect life, liberty, and property, to conserve the public health and good order, which always belonged to the states, and was not surrendered to the general government, or directly restrained by the Constitution. The 14th Amendment, in forbidding a state to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty, or property with-

out due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest Congress with power to legislate upon subjects which are within the domain of state legislation. *Re Rahrer*, 140 U. S. 554, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 574, 11 Sup. Ct. Rep. 865. It is true that when the police power and the commercial power come into collision, that which is not supreme must give way to that which is supreme. But how is such collision made to appear?

Defendants argue that the circuit court might have properly taken judicial notice, or did so, of the fact that the persons whose advent was objected to as perilous to the community could only be brought to Huntington by way of the Indian territory, and also that the word "import" as used in the bill meant to bring into from another state or foreign country; that, therefore, "the question is fairly presented by the complaint whether the state of Arkansas has the authority to prevent the coal company and the railroad company from bringing into the state, over the line of this railroad, laborers from other states or foreign countries;" and hence that the circuit court had jurisdiction. We do not agree with either premise or conclusion.

The word "import" necessarily meant bringing into the county and town from outside their boundaries, but we do not think, taking the whole bill together, that as here used its necessary signification was the bringing in from outside of the state.

[190] *And as to judicial knowledge, the principle applies "that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." Thayer, *Ev. chap. 7*, 281.

In *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488, which was a petition for removal, the suit was one brought in support of an adverse claim under the Revised Statutes, §§ 2325, 2326, and it had been previously decided that such a suit was not one arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal courts regardless of the citizenship of the parties. And we said: "It is conceded by counsel on both sides that those decisions are controlling, unless the circuit court was entitled to maintain jurisdiction by taking judicial notice of the fact 'that the Mountain View lode claim was located upon what had been or was an Indian reservation,' and 'of the act of Congress declaring the north half of the reservation upon which the claim was located, to have been restored to the public domain,' notwithstanding no claim based on these facts was stated in the complaint. But the circuit court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be
183 U. S.

had to judicial knowledge." *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Com. v. Wheeler*, 162 Mass. 429, 38 N. E. 1115; *Partridge v. Strange*, 1 Plowd. 77.

But even assuming that the bill showed upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the 14th Amendment, as contended, it would only demonstrate that the bill could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States.

When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them. *If errors supervene, the remedy by [191] writ of error is open to the party aggrieved. *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544.

Decree reversed and cause remanded, with a direction to remand to the state court. Costs of this court and of the circuit court to be paid by the appellees and defendants.

WILSON BROTHERS, a Corporation, and Jacob Kahn, Henry Kahn, Jacob Wohlbach, Copartners under the Name of Kahn Brothers & Company, and A. W. Becker, Harry L. Mayer, Joseph Mayer, and Henry B. Mayer, Copartners under the Firm Name of Becker, Mayer, & Company, *Appts.*,

v.

CASSIUS B. NELSON.

(See S. C. Reporter's ed. 191-216.)

Bankruptcy—permitting creditor to obtain preference.

The failure of an insolvent debtor to file a voluntary petition in bankruptcy at least five days before a sale of his property under a judgment entered against him upon an irrevocable power of attorney given years before constitutes the suffering or permitting of the creditor to obtain a preference, which amounts to an act of bankruptcy under the bankrupt act of July 1, 1898, chap. 541, § 3, though the judgment is entered without the knowledge or consent of the debtor and he is unable to prevent its enforcement in any other way than by filing his petition in bankruptcy.

[No. 31.]

Argued March 20, 1901. Restored to Docket with Leave to Submit on Briefs April 8, 1901. Submitted April 22, 1901. Decided December 9, 1901.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit desiring instructions upon questions arising in a bankruptcy case brought by Wilson Brothers *et al.* in the District Court of the United States for the Western District of Wisconsin against

Cassius B. Nelson for the purpose of having him adjudicated a bankrupt. *Questions answered in the affirmative.*

Statement by Mr. Justice Gray:

[191] *The circuit court of appeals for the seventh circuit certified to this court the following statement of facts and questions of law:

"On February 5, 1885, Cassius B. Nelson executed and delivered to Sarah Johnstone his promissory note in writing for the sum of \$8,960, payable 'five years or before after date,' with interest at the rate of 4 per cent per annum until paid. To this note was attached an irrevocable power of attorney, duly executed by the said Nelson under his hand and seal in the usual form, authorizing any attorney of any court of record in his name to confess judgment thereon after maturity of the note. *This note was given

[192] for so much money at the time loaned to Nelson, and the interest on the note was paid from time to time up to November 1, 1898. Nelson was a trader, and entered into business as such at the city of Madison, Wisconsin, soon after the giving of the note, and carried on such business until his stock in trade was levied upon by the sheriff under execution, as hereinafter stated. On November 1, 1898, Nelson, as he well knew, was and had long been insolvent, and thereafter continued to be and is now insolvent, his liabilities largely exceeding his assets.

"On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in the circuit court of the state of Wisconsin for the county of Dane against said Nelson upon the note and warrant of attorney aforesaid for the sum of \$8,975, damages and costs, being the face of the note and \$15 costs. Upon that judgment execution was immediately thereafter issued out of the court to the sheriff of that county, who thereunder and by authority thereof on the same day levied upon the stock and goods of Nelson, and thereafter and on December 15, 1898, sold the same at public auction, and applied the proceeds thereof, to wit, the sum of \$4,400, upon and in part payment of the judgment so rendered. This proceeding left the said Nelson without means to meet any other of his obligations. The judgment was so entered and the levy made without the procurement of Nelson and without his knowledge or consent. Such judgment was not subject to attack by Nelson, and could not have been vacated or discharged by any legal proceedings which might have been instituted by him in that behalf; nor could the levy under the execution issued upon such judgment have been set aside or vacated by Nelson, except by his filing his voluntary petition in bankruptcy prior to the sale, and obtaining an adjudication of bankruptcy thereunder, or by payment of the judgment.

"On December 10, 1898, creditors of the said Nelson, of the requisite number and holding debts against him to the requisite amount, filed their petition against the said Nelson in the district court of the United States for the western district of Wisconsin,

sitting in bankruptcy, to procure an adjudication against *him as a bankrupt. The [193] act of bankruptcy therein alleged was in substance that while insolvent he suffered and permitted the said Sarah Johnstone, one of his creditors, to obtain preference upon his property, through legal proceedings, by the entry of the said judgment and the levy thereunder upon his stock of goods, and failed to vacate or discharge the preference obtained through such legal proceedings at least five days before the sale of the property under such judgment and execution. Upon issue joined, the district court ruled that the said Nelson had not, by reason of the premises, committed an act of bankruptcy, and this ruling is before us for review.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy, within the meaning of § 3a, subd. (3), of the bankrupt act.

"2. Whether the judgment so entered and the levy of the execution thereon was a preference 'suffered' or 'permitted' by the said Nelson within the meaning of clause (3) of § 3a of the bankrupt law.

"3. Whether the failure of Nelson to vacate and discharge the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy."

Mr. Harrison Musgrave argued the cause, and, with Messrs. Daniel K. Tenney and James M. Flower, filed a brief for appellants:

The three questions certified should be answered in the affirmative.

Re Reichman, 91 Fed. 624; *Re Moyer*, 93 Fed. 188; *Re Cliffe*, 94 Fed. 354; *Re Arnold*, 94 Fed. 1001; *Re Ferguson*, 95 Fed. 429; *Re Rome Planing Mill*, 96 Fed. 812; *Parmenter Mfg. Co. v. Stoecker*, 38 C. C. A. 209, 97 Fed. 330; *Re Chapman*, 99 Fed. 395; *Bear v. Chase*, 40 C. C. A. 182, 99 Fed. 920; *Re Thomas*, 103 Fed. 272; *Re Meyers*, 1 Am. Bankr. Rep. 1, 1 N. B. N. 207; *Collier, Bankruptcy*, 3d ed. p. 37; *Re Storm*, 103 Fed. 618.

The word "preference," as used in the act, has no necessary reference to the intent of the debtor.

Re Richards, 37 C. C. A. 634, 96 Fed. 936; *Bear v. Chase*, 40 C. C. A. 182, 99 Fed. 920; *Re Kenney*, 45 C. C. A. 113, 105 Fed. 897.

The payment of a matured account in the course of business is a "transfer" within the meaning of the bankruptcy act, and, if made during insolvency, and within four months of the filing of a petition in bankruptcy, is a preference under § 60a.

Columbus Electric Co. v. Worden, 39 C. C. A. 582, 99 Fed. 400.

The true question is, Did the debtor suffer a preference through the legal proceedings of a judgment, levy, and impending sale, he taking no steps to avoid the consummation of such preference?

Parmenter Mfg. Co. v. Stoeber, 38 C. C. A. 200, 97 Fed. 330.

Mr. William F. Vilas argued the cause, and, with Mr. R. M. Bashford, filed a brief for appellee:

The judgment and levy were not a preference, nor suffered or permitted by Nelson, the appellee.

Wilson v. City Bank, 17 Wall. 473, 21 L. ed. 723; *Clark v. Iselin*, 21 Wall. 360, 22 L. ed. 568; *Tenth Nat. Bank v. Warren*, 96 U. S. 539, 24 L. ed. 640; *McCaul v. Thayer*, 70 Wis. 138, 35 N. W. 353; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 39 L. R. A. 569, 73 N. W. 31.

The entry of judgment was not imputable to the debtor.

Clark v. Iselin, 21 Wall. 373, 22 L. ed. 572.

The mere nonresistance of a debtor to judicial proceedings against him, when the debt is due and there is no valid defense to it, is not the suffering and giving a preference under the bankrupt act.

Tenth Nat. Bank v. Warren, 96 U. S. 539, 24 L. ed. 640.

It is not an act of bankruptcy by an insolvent to refrain from voluntary bankruptcy. Legislation of this character ought not to be extended by implication, because, like acts imposing penalties in new cases, it deprives the citizen of rights which he otherwise possessed under the laws; and though the remedial purposes of the act should be rather aided than straitened by interpretation, this can be rightfully done only in the cases prescribed for its application.

Collier, Bankruptcy, 3d ed. 23; *Re Empire Metallic Bedstead Co.* 39 C. C. A. 372, 98 Fed. 981.

The policy of equal distribution was designed, not for cases of insolvency, but for cases of bankruptcy; not to be the law for governing the conduct of all insolvents, but only to control the administration of estates in the court of bankruptcy; and the estates of all insolvents, not by their own petition or upon proper adjudication brought within the jurisdiction of that court, remain subject to the operation of the laws and the authority of courts, not relating to bankruptcy.

Wilson v. City Bank, 17 Wall. 480, 21 L. ed. 726.

There is not a line or word in the bankrupt act that vacates or discharges, or authorizes to be vacated or discharged, any judgment in any other court, lawfully entered, before bankruptcy, in a hostile proceeding against the bankrupt without his procurement or sufferance.

Nothing in the facts stated in the certificate warrants the assumption of appellants' counsel that Nelson could have vacated or discharged the judgment of Mrs. Johnstone, or even have caused the lien of her execution to be dissolved, by filing his voluntary petition.

To render the security void the debtor must have contemplated an act of bankruptcy, or an application by himself to be decreed a bankrupt.

Buckingham v. McLean, 13 How. 167, 14 L. ed. 97.

The property levied on was then in the custody of the sheriff. To recover it or the proceeds of its sale, a suit by the trustee would be necessary.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

*Mr. Justice Gray delivered the opinion of the court:

On February 5, 1885, Nelson, in consideration of so much *money then lent to him by Sarah Johnstone, executed and delivered to her his promissory note for the sum of \$8,960, payable in five years, with interest until paid. Attached to that note was an irrevocable power of attorney, executed by Nelson, in the usual form, authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. The interest on the note was paid until November 1, 1898. At that date Nelson, as he wellknew, was, and long had been, and ever since continued to be, insolvent. On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in a court of Wisconsin upon the note and the warrant of attorney for the face of the note and costs. Upon that judgment, execution was issued to the sheriff, who on the same day levied on Nelson's goods, and on December 15, 1898, sold the goods by auction, and applied the proceeds thereof in part payment of the judgment. This proceeding left Nelson without means to meet any other of his obligations. The judgment was entered and the levy made without the procurement of Nelson and without his knowledge or consent. The judgment and levy were unassailable in law, and could not have been vacated or discharged by any legal proceedings, except by his voluntary petition in bankruptcy. On December 10, 1898, a petition in bankruptcy was filed against Nelson; and the questions certified present, in various forms, the question whether Nelson committed an act of bankruptcy within the meaning of § 3, cl. 3, of the bankrupt act of 1898.

In considering these questions, strict regard must be had to the provisions of that act, which, as this court has already had occasion to observe, differ in important respects from those of the earlier bankrupt acts. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Bryan v. Bernheimer*, 181 U. S. 183, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845, 21 Sup. Ct. Rep. 642; *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

In § 3 of the bankrupt act of July 1, 1898, chap. 541, acts of bankruptcy are defined as follows: "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay,

[195] or defraud his creditors, or any of them; or (2) transferred, while insolvent, *any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.” [30 Stat. at L. 544.]

In the first and second of these an intent on the part of the bankrupt, either to hinder, delay, or defraud his creditors, or to prefer over other creditors, is necessary to constitute the act of bankruptcy. But in the third, fourth, and fifth no such intent is required.

The third, which is that in issue in the case at bar, is in these words: “(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference.”

By the corresponding provision of the bankrupt act of 1867, any person who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, “procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors,” “or with the intent, by such disposition of his property, to defeat or delay the operation of this act,” was deemed to have committed an act of bankruptcy. Act of March 2, 1867, chap. 176, § 39, 14 Stat. at L. 536; Rev. Stat. § 5021.

The act of 1898 differs from that of 1867 in wholly omitting the clauses, “with intent to give a preference to one or more of his creditors” or “to defeat or delay the operation of this act;” and in substituting for the words “procures or suffers his property to be taken on legal process,” the words “suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings,” and not having, five days before a sale of the property affected, “vacated or discharged such preference.”

[196] *There is a similar difference in the two statutes in regard to the preferences declared to be avoided.

The act of 1867 enacted that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, “with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution,” or makes any payment, pledge, or conveyance of any part of his property, the person receiving such payment, pledge, or conveyance, or to be benefited thereby,

“or by such attachment,” having reasonable cause to believe that such person is insolvent and that the same is made in fraud of this act, the same should be void and the assignee might recover the property. Act of March 2, 1867, chap. 176, § 35, 14 Stat. at L. 534; Rev. Stat. § 5128.

The corresponding provisions of the act of 1898 omit the requisite of the act of 1867, “with a view to give a preference.”

Section 60 of the act of 1898, relating to “preferred creditors,” begins by providing that “a person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.”

Section 67, relating to “liens,” provides, in subd. c, as follows: “A lien created by, or obtained in, or pursuant to, any suit or proceeding at law or in equity, including an attachment upon mesne process, or a judgment by confession, which was begun against a person within four months before the filing of the petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant *was insolvent and in contempla-[197] tion of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act.”

The same section provides, in subd. f, “that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt.” This provision evidently includes voluntary, as well as involuntary, bankrupts; for the 1st clause of the 1st section of the act, defining the meaning of words and phrases used in the act, declares that “‘a person against whom a petition has been filed’ shall include a person who has filed a voluntary petition.”

Taking together all the provisions of the act of 1898 on this subject, and contrasting them with the provisions of the act of 1867, there can be no doubt of their meaning.

The 3d clause of § 3, omitting the word “procure,” and the phrase “intent to give a preference,” of the former statute, makes it an act of bankruptcy if the debtor has “suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings,” and has not “vacated or discharged such preference” five days before a sale of the property. By § 60 he is “deemed to have given a preference” if, being insolvent, he has “suffered a judgment to be en-

tered against himself in favor of any person, . . . and the effect of the enforcement of such judgment . . . will be to enable any one of his creditors to obtain a greater percentage of his debt" than other creditors. By § 67, subd. c, a lien obtained in any suit, "including an attachment upon mesne process, or a judgment by confession," begun within four months before the filing of the petition in bankruptcy, is dissolved by the adjudication in bankruptcy, not only if "such lien was sought and permitted in fraud of the provisions of this act," but also if "its existence and enforcement will work a preference." And by subd. f of the same section "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent," [198] within the four months, shall be deemed null and void in case he is adjudged a bankrupt.

The act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact.

In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, "suffered or permitted" a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors; and the lien obtained by which, in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy, because "its existence and enforcement will work a preference." And the debtor did not, within five days before the sale of the property on execution, vacate or discharge such preference, or file a petition in bankruptcy. By failing to do so, he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate.

The cases on which the appellee relies, of *Wilson v. City Bank*, 17 Wall. 473, 21 L. ed. 723; *Clark v. Iselin*, 21 Wall. 360, 22 L. ed. 568; and *Tenth Nat. Bank v. Warren*, 96 U. S. 539, 24 L. ed. 640, have no application, because they were decided under the act of 1867, which expressly required the debtor to have acted with intent to give a preference.

The case of *Buckingham v. McLean*, 13 How. 150, 14 L. ed. 90, arose under the still earlier bankrupt act of August 19, 1841, chap. 9, § 2 (5 Stat. at L. 442). And the point there decided was that a power of attorney to confess a judgment was an act of the bankrupt creating a "security," which that bankrupt act in express terms declared void only if made in contemplation of bankruptcy and for the purpose of giving a preference or priority over general creditors.

The careful change in the language of all the provisions of the bankrupt act of 1898 from those of the former bankrupt acts upon the subject must have been intended by Congress to prevent a debtor from giving a

creditor an irrevocable warrant of attorney which would enable him, at any time during the insolvency *of the debtor, and within [199] four months before a petition in bankruptcy, to obtain a judgment and levy the execution on all the property of the bankrupt, to the exclusion of his other creditors.

The answer to the second and third questions certified must be that the judgment so entered and the levy of the execution thereon were a preference "suffered or permitted" by Nelson, within the meaning of clause 3 of § 3 of the bankrupt act; and that the failure of Nelson to vacate and discharge, at least five days before the sale on execution, the preference so obtained, was an act of bankruptcy; and it becomes unnecessary to answer the first question.

Second and third questions answered in the affirmative.

Mr. Justice Shiras dissenting:

On February 5, 1885, Cassius B. Nelson made and delivered to Sarah Johnstone his promissory note for the sum of \$8,960, payable in five years, with interest at the rate of 4 cent per annum until paid. To this note was attached an irrevocable power of attorney, duly executed by said Nelson under his hand and seal in the usual form, authorizing any attorney of any court of record in his name to confess judgment thereon after maturity of the note. This note was given for so much money at the time loaned to Nelson. The interest on the note was paid from time to time up to the 1st day of November, 1898.

On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in the circuit court of the county of Dane, state of Wisconsin, against said Nelson upon the note and warrant of attorney aforesaid for the sum of \$8,975. Upon that judgment, execution was immediately issued out of the court to the sheriff of that county, who levied upon the stock and goods of Nelson, and on December 15, 1898, sold the same at public auction, and applied the proceeds thereof, to wit, the sum of \$4,400, upon and in part payment of the judgment so rendered.

*It is admitted that such a judgment note [200] was, at the time it was made and delivered under the law of the state of Wisconsin, a legal and usual form of security for money loaned. *McCaul v. Thayer*, 70 Wis. 138, 35 N. W. 353; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 39 L. R. A. 569, 73 N. W. 31, 37.

It is also admitted that the judgment was executed and the levy made without the procurement of Nelson and without his knowledge or consent, and that such judgment was not subject to attack by Nelson, and could not have been vacated or discharged by any legal proceedings which might have been instituted by him; nor could the levy issued under the execution have been set aside or vacated by Nelson, unless his filing his voluntary petition in bankruptcy prior to the sale, and obtaining an adjudication of bankruptcy thereunder, would have had that effect, or by payment of the judgment.

On December 10, 1898, creditors of said Nelson filed a petition in involuntary bankruptcy against him in the district court of the United States for the western district of Wisconsin. The act of bankruptcy therein alleged was in substance that while insolvent he suffered and permitted the said Sarah Johnstone, one of his creditors, to obtain preference upon his property, through legal proceedings, by the entry of said judgment and the levy thereunder upon his stock of goods, and failed to vacate or discharge the preference obtained through such legal proceedings at least five days before the sale of the property under such judgment and execution. Upon issue joined, the district court ruled that Nelson had not, by reason of the premises, committed an act of bankruptcy, and dismissed the petition. An appeal was taken to the United States circuit court of appeals for the seventh circuit, and that court has certified certain questions for the consideration of this court.

The essential question in the case is whether, under the facts disclosed, Nelson was guilty of an act of bankruptcy in failing to file a petition in voluntary bankruptcy. This question must be answered in the negative if we respect previous decisions of this court in similar cases.

The subject was considered in *Buckingham v. McLean*, 13 How. 151, 14 L. ed. 91. The case arose under the bankrupt act of 1841,* and it appeared that one John Mahard had (on April 7, 1842) executed a power of attorney to confess judgment in favor of Buckingham for \$14,000; judgment was entered the next day; execution was issued April 20, and levy was made and sale of property, real and personal. On May 27, 1842, Mahard petitioned to be declared a bankrupt.

There were other questions in the case, but Mr. Justice Curtis, in his discussion of the question now before us, and speaking for the court, made the following observations:

"In many of the states a bond and warrant of attorney to enter up judgment is a usual mode of taking security for a debt, and judgments thus entered are treated as securities, and an equitable jurisdiction exercised over them by courts of law. In some states they operate only as a lien on the lands of the debtor, in others on his personal estate also (*Brown v. Clarke*, 4 How. 4, 11 L. ed. 850), and wherever, by the local law, a judgment or an execution operates to make a lien on property, we are of opinion it is to be deemed a security; and when rendered upon confession, under a power given by the debtor for that purpose, it is a security made or given by him within the meaning of the bankrupt act, and is void if accompanied by the facts made necessary by that act to render securities void. These facts are that the security was given 'in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety or other person a preference or priority over the general creditors of such bankrupt.'

"The inquiry whether this security was

given in contemplation of bankruptcy involves the question, What is meant by those words? It is understood that, while the bankrupt law was in operation, different interpretations were placed upon them in different circuits. By some judges they were held to mean contemplation of insolvency—a simple inability to pay as debts should become payable—whereby his business would be broken up; this was considered to be a state of bankruptcy, the contemplation of which was sufficient. By other judges it was held that the debtor must contemplate an act of bankruptcy, or a voluntary application for the bankrupt law. . . . It is somewhat remarkable that this question should be presented *for the first time for the [202] decision of this court after the law has been so long repealed, and nearly all proceedings under it terminated. Perhaps the explanation may be found in the fact that when securities have been given within two months before the presentation of a petition by or against the debtor, the evidence would usually bring the case within either interpretation of the law. However this may be, it is now presented for decision; and we are of opinion that, to render the security void, the debtor must have contemplated an act of bankruptcy, or an application by himself to be decreed a bankrupt.

"Under the common law, conveyances by a debtor to bona fide creditors are valid, though the debtor has become insolvent, and failed, and makes the conveyance for the sole purpose of giving a preference over his other creditors. This common-law right it was the object of the 2d section of the act to restrain; but, at the same time, in so guarded a way as not to interfere with transactions consistent with the reasonable accomplishment of the objects of the act. To give to these words, contemplation of bankruptcy, a broad scope and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.

"The word 'bankruptcy' occurs many times in this act. It is entitled 'An Act to Establish a Uniform System of Bankruptcy.' And the word is manifestly used in other parts of the law to describe a particular legal status, to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very precise and definite term is used in this clause to signify something quite different. It is certainly true in point of fact that even a merchant may contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, and the state of his affairs, and the disposition of his creditors, are such that when they shall have examined into his condition they will extend the times of payment of their debts and enable him to resume his business. A person not a merchant, banker, etc., and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states *not he-[203]

ing in fact the contemplation of the other, to say that both were included in a term which describes only one of them would be a departure from sound principles of interpretation. Moreover, the provisos in this section tend to show what was the real meaning of this first enacting clause. The object of these provisos was to protect bona fide dealings with the bankrupt more than two months before the filing of the petition by or against him, provided the other party was ignorant of such an intent on the part of the bankrupt as made the security invalid under the first enacting clause. And the language is: 'Provided, that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy or of the intention of the bankrupt to take the benefit of this act.' These facts, of one of which a bona fide creditor must have notice, to render his security void if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the first clause; or, in other words, if it be enough for the debtor to contemplate a state of insolvency it could hardly be required that the creditor should have notice of an act of bankruptcy or an intention to take the benefit of the act. It would seem that notice to the creditor of what is sufficient to avoid the security must deprive him of its benefits, and, consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid, and that we may safely take this description of the facts which a creditor must have notice of to avoid the security as descriptive also of what the bankrupt must contemplate to render it void.

"In construing a similar clause in the English bankrupt law, there have been conflicting decisions. It has been held that contemplation of a state of insolvency was sufficient. *Pulling v. Tucker*, 4 Barn. & Ald. 382; *Poland v. Glyn*, 2 Dowl. & R. 310. But both the earlier and later decisions were otherwise, and, in our judgment, they contain the sounder rule. *Fidgeon v. Sharpe*, 5 Taunt. 545; *Hartshorn v. Slodden*, 2 Bos. & P. 582; *Gibbins v. Philipps*, 7 Barn. & C. 529; *Belcher v. Prittie*, 10 Bing. 408. [204] **Morgan v. Brundrett*, 5 Barn. & Ad. 297. And see the opinion of Patterson, J., in the last case.

"Considering, then, that it is necessary to show that the debtor contemplated an act of bankruptcy, or a decree adjudging him a bankrupt on his own petition, at what time in this case must he have had this in contemplation? He gave the power of attorney on the 7th of April; the judgment was confessed and entered upon the next day; the execution was taken out and levied and the lien created thereby on the 22d of May; and five days afterwards, being less than two months after the execution of the power, the debtor presented the petition under which he was decreed a bankrupt. The only act done by the debtor was the execution and delivery of the power of attorney.

It was a security by him made or given only by reason of that instrument. What followed were acts of the creditor and of officers of the law, with which the debtor is no more connected than with the delivery by the creditor of a deed to the office of the register, to be recorded, or the act of the register in recording it. It would seem that if the intent of the debtor is to give a legal quality to a transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting; and that consequently we must inquire whether the debtor contemplated bankruptcy when he executed the power.

"It is true this construction would put it in the power of creditors, by taking a bond and warrant of attorney while the debtor was solvent and did not contemplate bankruptcy, to enter up a judgment and issue execution, and by a levy acquire a valid lien, down to the very moment when the title of the assignee began. But this was undoubtedly so under the statute of James, which, like ours, contained no provision to meet this mischief; and it became so great that by the 108th section of the revising act of 6 Geo. IV. it was enacted that 'no creditor, though for a valuable consideration, who shall sue out execution on any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid ratably *with such creditors.' If the [205] bankrupt act of 1841 had continued to exist, a similar addition to its provisions would doubtless have become necessary."

This suggestion of Justice Curtis was justified by provisions contained in the bankruptcy acts of 1867 and 1898, which enacted that liens obtained by attachments upon mesne process, or judgment by confession, within four months before the filing of the petition in bankruptcy by or against the creditor, shall be dissolved by the adjudication of the debtor to be a bankrupt, if it appear that such a lien was *procured or suffered, obtained and permitted*, while the debtor was insolvent and contemplating bankruptcy, the party or parties to be benefited thereby having reasonable cause to believe that the debtor was insolvent and in contemplation of insolvency. But, as we shall presently see, such provisions do not affect the question before us now.

In *Wilson v. City Bank*, 17 Wall. 473, 21 L. ed. 723, decided under the provisions of the act of 1867, it was held that something more than passive nonresistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defense; and that in such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law. In his opinion, discussing the facts of the case, Mr. Justice Miller said:

"There is nothing morally wrong in their course [of the defendants] in this matter. They were sued for a just debt. They had no defense to it, and they made none. To have made an effort, by dilatory or false pleas, to delay a judgment in the state court, would have been a moral wrong and a fraud upon the due administration of the law. There was no obligation on them to do this, either in law or in ethics. Any other creditor whose debt was due could have sued as well as this one, and any of them could have instituted compulsory bankrupt proceedings. The debtor neither hindered nor facilitated any one of them. How is it possible from [206] this to infer, logically, an actual *purpose to prefer one creditor to another, or to hinder or delay the operation of the bankrupt act?

"It is said, however, that such an intent is a legal inference from such inaction by the debtor, necessary to the successful operation of the bankrupt law; that the grand feature of that law is to secure equality of distribution among creditors in all cases of insolvency, and that, to secure this, it is the legal duty of the insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy, and that this duty is one to be inferred from the spirit of the law, and is essential to its successful operation.

"The argument is not without force, and has received the assent of a large number of the district judges, to whom the administration of the bankrupt law is more immediately confided. We are, nevertheless, not satisfied of its soundness. We have already said that there is no moral obligation on the part of the insolvent to do this, unless the statute requires it, and then only because it is a duty imposed by the law. It is equally clear that there is no such duty imposed by that act in express terms. It is, therefore, an argument solely of implication. This implication is said to arise from the supposed purpose of the statute to secure equality of distribution in *all cases* of insolvency, and to make the argument complete it is further necessary to hold that this can only be done in bankruptcy proceedings under that statute. Does the statute justify so broad a proposition? Does it in effect forbid all proceedings to collect debts in cases of insolvency, in other courts and in all other modes than by bankruptcy? We do not think that its purpose of securing equality of distribution is designed to be carried so far. As before remarked, the voluntary clause is wholly voluntary. No intimation is given that the bankrupt *must* file a petition under any circumstances. While his *right* to do so is without any other limit than his own sworn averment that he is unable to pay all his debts, there is not a word from which we can infer any legal obligation on him to do so. Such an obligation would take from the right the character of a privilege, and confer on it that of a burdensome and, often, ruinous duty. It is, [207] in its essence, *involuntary bankruptcy. But the initiation in this kind of bankruptcy is,

154

by the statute, given to the creditor, and is not imposed on the debtor. And it is only given to the creditor in a limited class of cases. The argument, we are combatting goes upon the hypothesis that there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt and fails to do it. We do not see the soundness of this implication from anything in the statute.

"We do not construe the act as intended to cover *all* cases of insolvency to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy. Many find themselves with ample means, good credit, large business, technically insolvent, that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not, of itself, to be construed into an act of bankruptcy or a fraud upon the act.

"It is also argued that, inasmuch as to lay by and permit one creditor to obtain judgment and levy on property necessarily gives that creditor a preference, the debtor must be supposed to intend that which he knows will follow. The general legal proposition is true, where a person does a positive act, the consequences of which he knows beforehand, he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, promoting, or procuring *it, a re-[208] sult of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

"Argument confirmatory of these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned, in direct context with the one under consideration, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to others. Why, then, should a passive indifference and inaction, where no action is required by positive law or good morals, be construed into such a preference as the law forbids? The construction thus contended for is, in our opinion, not justified by the words of either of the sections referred to,

, 183 U. S.

and can only be sustained by imputing to the general scope of the bankrupt act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment."

The principles of this case were approved and applied in *Clark v. Iselin*, 21 Wall. 360, 22 L. ed. 568, where it was held that the giving by a debtor, for a consideration of equal value, passing at the time, of a warrant of attorney to confess judgment, is not an act of bankruptcy, though such warrant or confession be not entered of record, but be kept as such things usually are, in the creditor's own custody, and with their existence unknown to others; that the creditor may enter judgment of record thereon when he pleases, even upon insolvency apparent, and issue execution and sell; and that his action is valid and not in fraud of the bankrupt law, unless he is assisted by the debtor.

The facts of that case were, in respect to the question before us, similar to those of the present. In the opinion Mr. Justice Strong, after citing with approval *Wilson v. City Bank*, said:

"Now, in a case where a creditor holding a confession of judgment perfectly lawful when it was given causes the judgment to be entered of record, how can it be said the debtor procures the entry at the time it is made? It is true the judgment is entered in virtue of his authority, an authority given when the confession was signed. That may have been years before, or, if not, it may have been when the debtor was perfectly [209]ly *solvent. But no consent is given when the entry is made, where the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has nothing to do with the entry. As to that he is entirely passive. Ordinarily he knows nothing of it, and he could not prevent it if he would. It is impossible, therefore, to maintain that such a judgment is obtained by him when his confession is placed on record. Such an assertion, if made, must rest on a mere fiction. And so it has been decided by the supreme court of Pennsylvania. *Sleek v. Turner*, Legal Intelligencer, Sept. 25, 1874 [76 Pa. 142].

"More than this, as we have seen, in order to make a judgment and execution against an insolvent debtor a preference fraudulent under the law, the debtor must have procured them with a view or intent to give a preference, and that intent must have existed when the judgment was entered. But how can a debtor be said to intend a wrongful preference at the time a judgment is obtained against him, when he knows nothing of the judgment? That years before he may have contemplated the possibility that thereafter a judgment might be obtained against him; that long before he may have given a warrant of attorney to confess a judgment, or by a written confession, as in this case, have put it in the power of his creditor to cause a judgment to be entered against him without his knowledge or subsequent assent,—is wholly impertinent to the inquiry whether he had in view

or intended an unlawful preference at a later time, at the time when the creditor sees fit to cause the judgment to be entered. For, we repeat, it is a fraudulent intent existing in the mind of the debtor at this later time which the act of Congress has in view. The preference must be accompanied by a fraudulent intent, and it is that intent that taints the transaction. Without it the judgment and execution are not void. . . .

"It has been suggested, in opposition to the view we have taken, that if a creditor may hold a confession of judgment by his debtor, or a warrant of attorney to confess a judgment, without causing it to be entered of record until the insolvency of the debtor appears, the debtor may thereby be able to maintain a *false credit. If this be admitted, it is not perceived that it has any legitimate bearing upon the question before us. The bankrupt act was not aimed against false credits. It did not prohibit holding judgment bonds and notes without entering judgments thereon until the debtors became embarrassed. Such securities are held in some of the states, amounting to millions upon millions. The bankrupt act had a very different purpose. It was to secure equality of distribution of that which insolvents have when proceedings in bankruptcy are commenced, and of that which they have collusively with some of their creditors attempted to withdraw from ratable distribution with intent to prefer some creditors over others."

Similar views prevailed in *Tenth Nat. Bank v. Warren*, 96 U. S. 539, 24 L. ed. 640, where it was held that the mere nonresistance of a debtor to judicial proceedings in which a judgment was rendered against him, when the debt was due and there was no valid defense to it, it is not the suffering and giving a preference under the bankrupt act, and that the judgment is not avoided by the facts that he does not file a petition in bankruptcy, and that his insolvency was known to the creditor.

As, then, the power of attorney given by Nelson to Mrs. Johnstone was a valid security, customary under the law of Wisconsin, as it was given long before the passage of the bankrupt act of 1898, and therefore necessarily without regard to the provisions of that act and without any intention to prevent or defeat their operation, and as the entry of the judgment and the levy of the execution are conceded to have been without the knowledge or consent of Nelson, it is undeniable that, under the provisions of the bankrupt act of 1867, and within the principles laid in *Buckingham v. McLean*, *Wilson v. City Bank*, *Clark v. Iselin*, and *Tenth Nat. Bank v. Warren*, Nelson was under no obligation, legal or moral, to bring upon himself the ruin necessarily occasioned by a decree of bankruptcy, by filing a voluntary petition, and that the questions certified to us by the circuit court of appeals should be answered in the negative.

But it is claimed that, having regard to the phraseology of the act of 1898, and although the warrant to confess judgment *was given [211] by the debtor before the passage of that act.

yet, being irrevocable and continuing in force, the debtor thereby, without any further act of his, suffered or permitted a judgment to be entered against him within four months before the filing of the petition in bankruptcy, and that he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate, by failing to file a voluntary petition.

Such a contention, in view of the various decisions of this court and hereinbefore cited, could not have been heretofore maintained, and it is therefore imperative that those who now urge it should be able to point to some clear and unmistakable declaration in the existing statute. So important a change in the policy of the bankrupt law must be manifested by explicit language, and cannot be, safely and with due regard to sound principles of interpretation, made to depend upon conjecture and inference based upon a mere difference in phraseology between the present and prior acts of bankruptcy. In other words, the question before us must be decided by a consideration of the language actually used in the act of 1898, interpreted in the light of the previous decisions of this court.

We are concerned in the present case with § 3 of the act of 1898, which deals with and describes acts of bankruptcy. The section is headed "Acts of Bankruptcy," and then sets forth what are deemed to be the acts of bankruptcy, as follows:

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

[212] *It is obvious that Congress here had in view voluntary acts of the debtor,—*"acts of bankruptcy by a person."* Concededly clauses 1, 2, 4, and 5 require an affirmative and voluntary act. It would naturally be presumed that the same quality of act would be required by clause 3. The section consists of a single sentence in which the several clauses all depend upon the leading phrase, "acts of bankruptcy shall consist of having done the several things enumerated in the dependent clauses." An act is defined in the Century Dictionary as "an exertion of energy or force, mental or physical; anything that is done or performed; a doing or deed; an operation or performance." And in the same work "an act of bankruptcy" is defined to be "an act the commission of which by a debtor renders him liable to

be adjudged a bankrupt." In Anderson's Law Dictionary the word "act" is defined to be "a thing done or performed; the exercise of power; an effect produced by power exerted;" and it is said, "'act' and 'intention' may mean the same as 'act' alone, for act implies intention, as in the expression, 'death by his own act or intention.'"

Black's Law Dictionary describes "an act" as follows: "In a more technical sense, it means something done voluntarily by a person, and of such a nature that certain legal consequences attach to it. Thus, a grantor acknowledges the conveyance to be 'his act and deed,' the forms being synonymous."

Independently of dictionary definitions, it may be safely said that, in common usage and understanding, the word "act" signifies something done voluntarily, or, in other words, the result of an exercise of the will.

In view, then, of the plain meaning of the language of the clause and of its association, in the section, with other acts which require affirmative and voluntary proceedings on the part of the debtor, it would seem to be clear that mere failure by a debtor, even if insolvent, to file a voluntary petition in bankruptcy, is not in itself, under the facts conceded to exist in this case, an "act of bankruptcy."

Indeed, it seems quite clear that if § 3 of the act of 1898 had been the first enactment by Congress on the subject, no one would ever have suggested the contrary view. The *contention is mainly, if not [213] wholly, founded on the omission of several words used in the previous statutes, or rather in the substitution of different words in § 3 for those used in the corresponding sections of the earlier laws. Those changes may be made best to appear by presenting them in parallel columns:

ACT OF 1867:

Sec. 39. That any person . . . who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall . . . procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, . . . or with the intent by such disposition of his property to defeat or delay the operation of this act, . . . shall be deemed to have committed an act of bankruptcy.

Sec. 35. That if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, pro-

ACT OF 1898:

Sec. 3. Acts of bankruptcy by a person shall consist of his having . . . suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference.

Sec. 60. A person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of

cures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment [payment, pledge, assignment or conveyance], having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void.

Sec. 29. . . . No discharge shall be granted . . . if the bankrupt . . . within four months before the commencement of such proceedings, . . . has procured his lands, goods, money or chattels to be attached, sequestered or seized on execution.

[215] It having been repeatedly ruled in the cases cited that, under these provisions of the act of 1867, no person shall be deemed guilty of an act of bankruptcy except by reason of some affirmative and intentional act intended to defeat the purposes of the act, and that failing to file a voluntary petition in *bankruptcy where a creditor is pursuing, in a state court, a lawful remedy on a lawful security given and received before the act of bankruptcy was passed, and without any knowledge or consent by the debtor to such suit or proceeding, is not an act of bankruptcy, it is now contended that a different conclusion must be reached under the provisions of the act of 1898.

Examination and comparison of the above contrasted provisions will show, as I think, that no change was made by the latter enactment in the vital and decisive purpose that no person shall be visited with the penalty of involuntary bankruptcy, unless he has brought himself within the denunciation of the law by some intentional and volun-

his debt than any other of such creditors of the same class.

Sec. 67. . . . A lien created by, or obtained in, or pursuant to, any suit or proceeding at law or in equity, including an attachment upon mesne process, or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent, and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act. . . .

That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt.

tary act, and that, this being so, the decisions under the previous act, that merely failing to file a voluntary petition is not such voluntary and intentional act in fraud of the statute, are applicable and decisive of the present case.

Arguments based on supposed differences between "permit" and "suffer" and "procure" are too uncertain on which to find that a great and important change in the theory of the bankrupt law was intended by Congress. Such an intention would have been directly and clearly expressed, and not left to uncertain inferences. That such inferences are uncertain plainly appears by the opposite conclusions reached, in respect to the meaning of the clauses in question, by the learned judges of the district and circuit courts. See *Re Moyer*, 93 Fed. 188; *Re Thomas*, 103 Fed. 272; *Re Nelson*, 98 Fed. 77; *Duncan v. Landis*, 45 C. C. A. 666, 106 Fed. 839.

The case of *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906, the most recent decision of this court under the act of 1898, arose under another clause of the act, and is not directly applicable to the question we have here considered, but, so far as it has any bearing, sustains the views herein expressed. The question there was under § 60, and it was held that where a payment or transfer was made by an insolvent debtor, within four months prior to the filing of a petition in bankruptcy, to a creditor who did not have cause to believe that an unlawful preference was intended, the creditor may keep the *payment or transfer, even though the [216] amount of such payment or transfer was thereby withdrawn from the administration of the bankrupt court and satisfaction in full was received by the creditor, but that if such payment was only a partial discharge of his debt the creditor cannot prove, under the distribution in bankruptcy, for the balance of his debt, unless he first surrenders to the trustee the amount of the partial payment.

The conclusion warranted by the words of the statute, interpreted in this light of our previous decisions, is that the questions certified to us by the circuit court of appeals should be answered in the negative.

The Chief Justice, Mr. Justice Brewer, and Mr. Justice Peckham concur in this dissent.

NATIONAL FOUNDRY & PIPE WORKS,
Limited, *Plff. in Err.*,

v.
OCONTO CITY WATER SUPPLY COMPANY.

(See S. C. Reporter's ed. 216-237.)

Federal question—denial of due effect to decree of Federal court—res judicata.

1. A Federal question is presented by a contention that due effect to a decree of a Federal

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U.

court was denied by the action of the court below in sustaining a plea of *res judicata* predicated on a decree of such Federal court, where a determination whether the court correctly applied the plea necessitates deciding whether by sustaining such plea rights were denied which were vested under another decree of the Federal court.

2. Resort may be had to the pleadings and opinions in determining what was decided by a final decree of a United States circuit court entered after receiving the mandate of the circuit court of appeals reversing its prior decree and remanding the case with instructions to dismiss the bill, where from such decree there is uncertainty as to what was really decided.

8. A final decree in a controversy between a judgment creditor of a waterworks company and the latter's mortgagees and their assigns, in which the validity of the mortgage and the foreclosure sale under it was assailed and a mechanics' lien asserted by such creditor,—which decree determines that the mortgagees were lawfully in possession of the mortgaged property by virtue of such sale, and that there was no mechanics' lien in favor of such creditor, as against the mortgagees or their assigns, upon the waterworks plant and franchise, arising either from the laws of the state, the recording of the alleged lien, or a decree recognizing such lien as against the waterworks company,—is a bar to a claim in a suit between the same parties that by virtue of a sale made under the decree recognizing such lien the judgment creditor became the owner of the waterworks plant, entitled to the possession of the same, or, if not the owner, had been vested with a paramount lien, or that in any event there remained in the judgment creditor a right to redeem from the sale under foreclosure.

4. Whether the pleadings in the cause justified a grant of affirmative relief, considered as a mere question of practice, presents no Federal question.

5. A contention that by reason of the pendency in a Federal court of a suit to enforce a mechanics' lien upon the plant of a waterworks company when proceedings to foreclose a mortgage executed by such company were instituted in the state court, the Federal court had exclusive jurisdiction of the *res*, and the state court was without power in the premises, must be raised in a controversy between the lienor and the mortgagees and their assigns in which the validity of title claimed by the latter to have resulted from a sale under foreclosure is in issue and decided, or it will be deemed waived and concluded and foreclosed by the judgment rendered on such issue.

[No. 33.]

Argued and Submitted March 22, 1901. Decided January 6, 1902.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment affirming a judgment of the trial court dis-

missing an action to establish priority of title acquired under the foreclosure of a mechanics' lien. *Affirmed.*

See same case below, 105 Wis. 48, 81 N. W. 125.

Statement by Mr. Justice **White**:

*In January, 1890, the city of Oconto[217] adopted an ordinance authorizing the Oconto Water Company, its successors and assigns, to construct and operate waterworks in said city. Said Oconto Water Company is hereafter referred to as the water company. The water company commenced the construction of its plant. On August 28, 1890, it contracted with the plaintiff in error, the National Foundry & Pipe Works, Limited,—hereafter styled the pipe works,—for a supply of pipe to be used in said water plant, the pipe to be delivered at intervals, and to be paid for partly in cash and partly on credit.

While the pipe was being delivered and placed in position, the water company, by an instrument in writing of date September 13, 1890, agreed with a firm known as Andrews & Whitcomb, whose members were domiciled in the state of Maine, in substance as follows:

In consideration of cash advances to aggregate \$40,000, to be made by said firm from time to time for the completion of the waterworks, the water company was to execute its promissory notes for the amount of each advance. The water company agreed as to collateral security as follows:

"To make an immediate transfer, in trust, to said parties of the first part (Andrews & Whitcomb) of the Oconto Waterworks *franchise as issued to said Oconto Water[218] Company, together with the entire one hundred thousand (\$100,000.00) dollars of stock of said Oconto Water Company; and further agrees to make an immediate issue of one hundred thousand (\$100,000.00) dollars in the first mortgage bonds of the said Oconto Water Company, the same to be secured by deed of trust on the entire Oconto waterworks franchise and all of the rights and privileges of said company in said waterworks franchise; said deed of trust to be made to some trust company to be hereafter mutually agreed upon."

About contemporaneously with the execution of said agreement a formal mortgage was given to Andrews & Whitcomb by the water company upon "all the rights, privileges, immunities, franchises, and powers, of whatsoever name or nature, which had been granted to it."

This mortgage was not at once placed on record, and, moreover, a considerable time elapsed before delivery was made to An-

S. 267 and *Klpley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On the opinion of the court below as part of the record on appeal to the Supreme Court of the United States—see note to *Loeb v. Columbla Twp.* 45 L. ed. U. S. 281.

On conclusiveness of judgments generally—

see notes to *Sharon v. Terry* (C. C. N. D. Cal.) 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank* (Neb.) 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 577; *Morrill v. Morrill* (Or.) 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street Rail Co. v. Wharton*, 38 L. ed. U. S. 429, and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

draws & Whitcomb of the stock and bonds provided for in the agreement previously referred to.

In the meanwhile all the pipe contracted for was delivered, and the same had been used in connection with the waterworks plant. Although the water company was during this time obtaining money from Andrews & Whitcomb, it failed to use the money in payment for the pipe. In consequence the pipe works on September 15, 1890, recorded a claim for a lien on the plant of the water company. After the recording of this lien, and on January 13, 1891, the mortgage in favor of Andrews and Whitcomb, which, as already stated, had been executed on or about September 13, 1890, was placed on record.

On January 30, 1891, the pipe works filed its bill in the circuit court of the United States for the eastern district of Wisconsin to foreclose its asserted lien, and to procure a sale thereunder of the plant of the waterworks company and of the interest of that company in certain real estate upon which the company had constructed its pump and water wells, the legal title to the real estate being in the city, but the company having taken possession, under an agreement by which it secured the right to obtain a conveyance, from the city, upon compliance with certain conditions. To this bill the water company was alone made defendant. The lien asserted was contested by the defendant. This litigation will be hereafter referred to as the mechanics' lien suit.

Andrews & Whitcomb having made the advances provided in the contract of September 13, 1890, and additional advances being required, they were made by Andrews & Whitcomb under contracts executed on March 13 and May 16, 1891, of tenor like unto the September agreement, the collateral security provided under that contract being made liable for the new advances. No independent mortgage was executed.

The water company not having performed the stipulations made in its contracts with Andrews & Whitcomb, on June 17, 1891, that firm commenced proceedings in a court of the state of Wisconsin to foreclose an asserted lien which it claimed was created upon the franchise and property by the mortgage and contracts to which we have already referred. This litigation will be hereafter referred to as the mortgage foreclosure suit. To this suit the water company was alone made defendant. On August 13, 1891, a personal judgment was entered for \$63,889.23 and costs, and a sale was decreed to enforce the lien declared in the following clause of the conclusions of law of the court:

"Third. In addition to such personal judgment, the plaintiffs are entitled to a further judgment decreeing, adjudging, and declaring the amount thereof, together with the proper costs for the enforcement of the same, a lien upon all of the property shown by the complaint in this action and the proofs adduced by the plaintiff herein in support thereof to have been sold, assigned, trans-

ferred, and set over or pledged to the plaintiffs by the defendant in trust and as collateral security for the repayment of the sums loaned and advanced the defendant by the plaintiffs under the contracts set forth in the complaint."

Under this decree a sale was made at public auction to Andrews & Whitcomb, of the rights, privileges, immunities, franchises, and powers granted to the water company by the ordinance of July 9, 1890, and the stock and bonds pledged as aforesaid. The sale was confirmed by the court, and possession of the waterworks plant was taken by Andrews & Whitcomb. At the offering a representative of the pipe works notified those present that the pipe works claimed a paramount lien upon the property proposed to be sold, and that the purchaser would take subject to its rights.

Pending the mechanics' lien suit and the sale and purchase by Andrews & Whitcomb, the pipe works brought an action at law against the water company in the circuit court of the United States for the eastern district of Wisconsin, making also defendants thereto Andrews & Whitcomb, sued as garnishees. A judgment for the amount due was obtained on January 2, 1892, as against the water company, but the action was never prosecuted to a termination as against the garnishees.

On January 11, 1892, the pipe works filed in the circuit court of the United States a creditors' bill based upon its judgment at law and the return of execution thereon unsatisfied. This litigation will be hereafter referred to as the creditors' suit. The water company, Andrews & Whitcomb, an alleged corporation styled the Oconto City Water Supply Company, to be hereafter referred to as the water supply company, as well as various parties whom it was claimed were liable as stockholders for unpaid subscriptions, and others, were made defendants. It would seem that in the original bill the water supply company was averred to be a corporation and a resident or citizen of Wisconsin, but Andrews & Whitcomb denied such averment. Thereafter, in an amendment to the creditors' bill it was alleged that subsequently to the filing of the bill the water supply company had been organized, and that it claimed to have derived, through Andrews & Whitcomb, title to the rights and property of the water company, but that said claim was subordinate to the lien of the plaintiff. Whether at the time of this amendment the water supply company had acquired the waterworks plant, or such acquisition was made subsequently thereto, does not appear, nor is it stated in the record that it was ever served with process.

A full statement of the grounds for the equitable relief asked for in the creditors' bill is contained in the opinion in *Andrews v. National Foundry & Pipe Works*, reported in 36 L. R. A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 167. *It suffices here to say that the bill assailed the validity of the mortgages to Andrews & Whitcomb and

the transfer of stock and bonds to them, and attacked their foreclosure sale, and asserted the liability, as stockholders, of Andrews & Whitcomb and others, for unpaid subscriptions to the stock of the water company. A receiver was asked to take possession of and operate the waterworks plant, then in the possession of Andrews & Whitcomb, and an injunction was prayed to restrain Andrews & Whitcomb from holding, managing, or interfering in any way with the rights, franchises, plant, property, rents, profits, bonds, and affairs in the hands of said receiver, and from asserting any right, title, or interest in the property, or the rents, issues, and profits thereof, until the further order of the court.

The mechanics' lien suit culminated on October 3, 1892, in a decree in favor of the pipe works, recognizing its mechanics' lien for the amount of pipe unpaid for, and a sale was decreed to satisfy such indebtedness. The conclusions of the circuit court were supported by an elaborate opinion holding that, under the laws of the state of Wisconsin, a lien existed which it was the duty of a court of equity to enforce. 52 Fed. 43. From the decree thus rendered an appeal was prosecuted to the circuit court of appeals for the seventh circuit.

On October 10, 1892, the circuit court, in the creditors' suit, appointed a receiver, and allowed a preliminary injunction. 52 Fed. 29. From the interlocutory decree granting an injunction an appeal was prosecuted to the circuit court of appeals for the seventh circuit.

On November 7, 1893, the court of appeals for the seventh circuit (Woods, Circuit Judge, and Bunn and Baker, District Judges, sitting) affirmed the decree of the court below in the mechanics' lien suit, in which decree had been declared the existence of the mechanics' lien asserted by the pipe works. The court in a *per curiam* opinion adopted the reasons expressed by the lower court. 7 C. C. A. 603, 18 U. S. App. 380, 59 Fed. 19, 20.

[222] On January 11, 1894, the circuit court of appeals determined the appeal taken by Andrews & Whitcomb from the "interlocutory order granting an injunction in the creditors' suit. The lower court was reversed, the court holding, for the reasons expressed in its opinion, that the contracts made between the water company and Andrews & Whitcomb were not *ultra vires* or otherwise invalid, and that there had been no legal justification for the allowance of an injunction. The court said, however, 10 C. C. A. 67, 18 U. S. App. 472, 61 Fed. 789: "Whether or not, and to what extent, the mortgage of the franchises covers the plant of the company need not now be considered." After the filing in the circuit court of the mandate from the circuit court of appeals in such cause, the pipe works amended its bill by setting up the final decree it had obtained on October 3, 1892, in the mechanics' lien suit affirmed as above stated by the circuit court of appeals. Such lien, it was averred, was paramount to any rights asserted by An-

draws and Whitcomb or their privies. To the bill and amendment Andrews & Whitcomb filed separate and elaborate answers. Without going into detail, the answers asserted the validity as mortgages of the instruments executed by the water company in favor of Andrews & Whitcomb, and their operative force upon the property and franchises, denied any liability of the members of said firm as stockholders and asserted that they were not bound by the decree in the mechanics' lien suit, because they were neither parties nor privies to that action; and they further claimed that under the statutes of Wisconsin no lien could arise in favor of one furnishing material or supplies in connection with waterworks, and that the decision of the Federal court to the contrary was erroneous, as the supreme court of the state of Wisconsin had, since the decision rendered by the Federal court, held that no mechanics' lien could be created by such a transaction.

Upon these issues and similar issues joined upon certain interventions of creditors asserting mechanics' liens upon the property of the water company, which it is unnecessary to refer to, a decree was entered on July 17, 1895, granting all the relief demanded by the pipe works company and the interveners. 68 Fed. 1006.

The court held, first, that there was a mechanics' lien in favor of the pipe works; that while it was true that, subsequent to its "decision in the mechanics' lien suit, the [223] supreme court of Wisconsin had decided that a mechanics' lien could not arise on the plant of the waterworks, under the circumstances disclosed, the Federal court was not bound by such interpretation of the state statute, and it adhered to its own previous conclusion to the contrary; second, that Andrews & Whitcomb were in legal effect the owners of all or nearly all the stock, and liable for the unpaid subscriptions thereon to the extent necessary to pay the debts of the water company; third, that as stockholders said firm were bound by the decree in the mechanics' lien suit, because, as stockholders, they were privies to the decree; fourth, that, assuming the validity of the mortgage in favor of Andrews & Whitcomb, yet as it was recorded subsequently to the time when the mechanics' lien in favor of the pipe works became operative, the mortgage was subordinate to such mechanics' lien; fifth, that the bonds issued by the water company, and which were delivered to Andrews & Whitcomb and a defendant trust company, were void; and sixth, that the instruments executed in the name of the water company in favor of Andrews & Whitcomb were made in good faith and for a valuable consideration, and were not withheld from record by the consent or procurement of Andrews & Whitcomb, nor in fraud of creditors.

An appeal was prosecuted by the city of Oconto, by Andrews & Whitcomb, and also by the water supply company, as the successor in interest of Andrews & Whitcomb, by reason of having acquired, pending the suit,

the rights of the firm in the matter in controversy. On this appeal the circuit court of appeals (Woods and Showalter, Circuit Judges, and Seaman, District Judge, sitting) first considered whether the alleged mechanics' lien existed in favor of the pipe works. The court declared that by the authority of the thing adjudged, resulting from the decree in the mechanics' lien suit, the existence of such a lien was established as between the pipe works and the water company. Coming to consider whether the lien existed as between the pipe works and Andrews & Whitcomb and their privies, the water supply company, the court held that inasmuch as the supreme court of the state

[224] of Wisconsin, interpreting "the statutes of Wisconsin, since the decision of the circuit court of appeals in the mechanics' lien suit, had held that no mechanics' lien was authorized by such statutes against the plant of the water company, the Federal court should follow the construction of the Wisconsin statute announced by the highest court of the state, even though in doing so it became necessary to take a different view from that which the court had previously announced. The circuit court of appeals therefore decided that there was no mechanics' lien in favor of the pipe works or any of the interveners as against Andrews & Whitcomb or the water supply company.

Approaching next the consideration of the correctness of the ruling of the circuit court that Andrews & Whitcomb were privies to the decree against the water company in favor of the pipe works, because they were stockholders in the company, the court decided that while undoubtedly a stockholder was a privy to actions against the corporation in which he was a stockholder, when brought upon money demands asserted against the corporation, yet, as Andrews & Whitcomb held the stock of the water company, not as subscribing stockholders, but as contract creditors of the water company, the principle upheld by the lower court had been erroneously applied, and therefore Andrews & Whitcomb were not privies to the decree recognizing the mechanics' lien, and were in no respect bound thereby. In so far as it had been decided by the court below that the mortgage to Andrews & Whitcomb was subordinate to the mechanics' lien, because recorded subsequently to the placing on record of the affidavit as to such lien, the court said, 36 L. R. A. 151, 22 C. C. A. 118, 46 U. S. App. 295, 76 Fed. 173: "The lien decrees out of the way all questions concerning the recording of that mortgage, and the antecedent contracts disappear."

The grounds upon which the lower court held that Andrews & Whitcomb were liable as stockholders to make payment of unpaid subscriptions were reviewed and held to be unfounded. The validity of their mortgage for the whole amount of their debt and the paramount nature of its lien were recognized, and the court held that it was unnecessary to determine whether the mortgage bonds were valid, because, as the mortgage

[225] for the "debt to Andrews & Whitcomb, for 183 U. S. U. S., Book 46.

which the bonds were merely collateral, was recognized and enforced, it became unnecessary to consider that subject. In respect to the title of Andrews & Whitcomb, the court, for reason stated, said (36 L. R. A. 153, 22 C. C. A. 120, 46 U. S. App. 299, 76 Fed. 176): "We are of opinion that [under the circumstances] the mortgage of the franchise carried with it the water plant."

The decree of the lower court was reversed, and the cause remanded, with instructions to dismiss the bill. The opinion of the court is reported in 36 L. R. A. 139, 22 C. C. A. 110, 46 U. S. App. 281, and 76 Fed. 166.

In an opinion reported in 36 L. R. A. 153, 23 C. C. A. 454, 46 U. S. App. 619, and 77 Fed. 774, a petition for a rehearing was denied. Among other things the court reiterated its previous ruling that the mortgage to Andrews & Whitcomb of the franchise extended to the waterworks plant, and that Andrews & Whitcomb were not concluded by the mechanics' liens decrees; and hence, though purchasing at public auction upon the sale under the foreclosure proceedings, during the pendency of the mechanics' lien foreclosure suit, the firm was not, as to the latter proceeding, in the category of a purchaser *pendente lite*, and the doctrine of *lis pendens* did not apply. In the course of the opinion the court said (36 L. R. A. 154, 23 C. C. A. 457, 46 U. S. App. 624, 77 Fed. 777):

"The question whether the appellees, as judgment creditors of the Oconto Water Company, have a right to redeem from the sale made to Andrews & Whitcomb upon their foreclosure decree, to which the appellees were not parties, does not, in our opinion, arise upon this record, and will not be prejudiced by our decision."

And taking notice of this court's own records, it is to be observed that after the denial by the circuit court of appeals for the seventh circuit of the petition for a rehearing in the creditors' suit, application was made to this court for a writ of certiorari, which was refused on April 26, 1897. 166 U. S. 721, 41 L. ed. 1188, 17 Sup. Ct. Rep. 996. Subsequently in the circuit court of appeals, on motion by appellants "that mandate should direct that provision be made in the decree for the conveyance to appellant Oconto Water Supply Company of the legal title to the land holding the pump station and wells of the waterworks plant," the court on May 18, 1897, overruled the motion with leave to the court below to "make [226] necessary and proper orders for the transmission of the legal title to the property.

After receipt of the mandate of the circuit court of appeals, the circuit court, on July 29, 1897, entered a decree consisting of eight numbered clauses. The 6th, 7th, and 8th embodied a decree against one Sturtevant (against whom a decree *pro confesso* had been entered), holding him liable in the sum of \$99,000 for unpaid subscriptions, and ordering payment of the sum due the pipe works and the intervening and unsecured creditors, and the costs of the action.

The decree, so far as it affected the other defendants, is as follows:

"This cause came on to be reheard upon the record herein and upon the mandates of the United States circuit court of appeals for the seventh circuit upon the appeals from the decree entered herein on the 17th day of July, 1895, taken by the said defendants, S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company, and the city of Oconto, which said mandates have heretofore been filed herein; and, after argument of counsel, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

"First. That the decree of said court of July 17, 1895, do stand as entered, except that as to said defendants, S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company, and city of Oconto, the bill of complaint herein be, and the same is hereby, dismissed for want of equity, with costs in favor of said defendants, taxed at the sum of one thousand eight hundred and twenty 35/100 dollars, except that the defendant Oconto City Water Supply Company is required to pay the amount adjudged in said decree or judgment in favor of Albert E. Smith, receiver, being the sum of twenty-five hundred dollars (\$2,500).

"Second. That said bill of complaint be, and the same is hereby, dismissed as to the defendants Charles C. Garland, F. H. Todd, Matt. S. Wheeler, A. J. Elkins, and N. S. Todd, for want of service of process upon them, but without costs.

[227] "Third. That a decree *pro confesso* having been heretofore entered against the said defendants, Minneapolis Trust Company, Oconto National Bank, and S. W. Ford, all of which said *defendants were duly served with process or duly appeared herein, the said bill be, and hereby is, dismissed as to said defendants, but without costs.

"Fourth. That the clerk of this court be, and he is hereby, directed to restore to the defendants S. D. Andrews and W. H. Whitcomb the possession of all the bonds secured by the mortgage or trust deed of the Oconto Water Company dated the 1st day of November, 1890, which were deposited with said clerk by said Andrews & Whitcomb; that such restoration by said clerk to said Andrews & Whitcomb is, and shall be, without adjudging the validity or invalidity of the said bonds in their hands or the issue of the same by said Oconto Water Company.

"Fifth. That the legal title to the land upon which the pumping station and wells of the waterworks plant are located, which heretofore by deed dated the 31st day of January, A. D. 1894, was conveyed by the order of this court by the city of Oconto to the said defendant, Oconto Water Company, the description of which said land is more fully set out in said deed as follows, to wit:

. . . be, and the same is hereby, passed and transferred by virtue of the instruments of mortgage dated September 13, 1890, and March 13, 1891, executed by said defendant, Oconto Water Company, to said defendants, S. D. Andrews and W. H. Whitcomb, and

of the sale in the proceedings to foreclose the same to the said defendant, Oconto City Water Supply Company, as the assignee and successor in interest of the said defendants, S. D. Andrews and W. H. Whitcomb, and that the said defendant, Oconto Water Company, and its receiver, Albert E. Smith, by separate instruments duly witnessed and acknowledged so as to entitle the same to record, execute and deliver conveyances thereof to the defendant Oconto City Water Supply Company, but without prejudice to any rights which said complainant or said R. D. Wood & Company may have under their said mechanics' lien decrees or otherwise to redeem from said instruments of mortgage or either of them, or from the sale under the proceedings to foreclose the same."

Although the decree rendered in favor of the pipe works in its *mechanics' lien fore-[228] closure suit authorized a sale of the waterworks plant to enforce the lien found to exist, no sale had taken place up to the time the creditors' suit was decided by the circuit court, because of a restraining order preventing such sale. When, however, the circuit court entered its decree in favor of complainant in the creditors' suit, the 5th clause thereof was couched in the following language: "Fifth. The complainant and R. D. Wood" (an intervening creditor claiming under an alleged mechanics' lien decree) "are authorized to proceed to the enforcement and satisfaction of their respective liens in accordance with their several decrees." The right thus recognized was suspended by the appeal which was taken to the circuit court of appeals.

When the mandate of the circuit court of appeals in the pipe works creditors' suit came to the circuit court, it would seem some difficulty arose as to the form of the decree, and in consequence the court filed a memorandum opinion which we find printed in the brief of counsel for the plaintiff in error. The 6th clause of that memorandum, which indicates the reasons by which the circuit court was led to the conclusion that in executing the mandate of the circuit court of appeals it was unnecessary to insert in the final decree of the circuit court a positive inhibition against any further attempt on the part of the pipe works to enforce, as against Andrews & Whitcomb and the water supply company, its alleged mechanics' lien, if it possessed any, is as follows:

"Sixth. The order of March 5, 1894, restraining the marshal from proceeding to sell under the mechanics' lien decree, was superseded by the 5th clause of the decree of July 17, 1895. There would seem to be no necessity for further order in respect thereto. If the contention of the complainant that the mechanics' lien decree took precedence of subsequent mortgages was not disposed of by the court of appeals, it should be placed in a position to be able to redeem from the sale under the mortgages to Andrews & Whitcomb. If that contention was disposed of by the court of appeals, a sale under the mechanics' lien decree can do no

harm to Andrews & Whitcomb or their successor in interest, beyond possibly creating a [229]*cloud upon their title. The court would not, however, permit this to be done if it was clear from the several opinions of the court of appeals that the contention in that respect had been determined.

"I cannot spell out from the opinions of that court that the precise contention had been considered and determined, unless it must be held to have been so determined by the fact of the reversal of the decree of this court and the dismissal of the bill for want of equity as against Andrews & Whitcomb and their successor in interest."

After the entry in the creditors' suit of the final decree of the circuit court, the pipe works directed the marshal to execute the order of sale contained in the decree of October 3, 1892, in the mechanics' lien suit. On August 23, 1897, in said suit, sale was made to the pipe works of the waterworks plant and all the right, title, and interest of the Oconto Water Company in and to the premises upon which the same were located, together with the franchise of maintaining and operating said plant. A day or two afterwards the sale was confirmed by the circuit court, and a deed was executed and delivered by the marshal to the pipe works, who caused the same to be recorded.

On December 28, 1897, the pipe works commenced the present action in a state court in Wisconsin, naming as sole defendant the Oconto City Water Supply Company. The complaint contained averments as to the incorporation of the defendant, the sale and delivery of pipe by the plaintiff to the Oconto Water Company, the decree of October 3, 1892, in the mechanics' lien suit, and the sale to and purchase by it in August, 1897, under such decree. The making by the water company to Andrews & Whitcomb of the alleged mortgages or pledges heretofore referred to was next averred, as also the proceedings instituted by Andrews & Whitcomb culminating in the foreclosure of said mortgages and the sale thereunder to Andrews & Whitcomb, and the taking possession by virtue of such sale of the plant and its transfer thereafter by Andrews & Whitcomb to the defendant, the water supply company. It was also alleged that Andrews & Whitcomb, prior to the making of the mortgages or pledges in ques-

[230]tion, had knowledge of the fact that *plaintiff had furnished to the water company pipe as aforesaid for use in its plant, and that Andrews & Whitcomb, prior to the commencement of their foreclosure suit, knew that plaintiff had filed its claim for a mechanics' lien upon the plant of the water company, and had commenced proceedings for the enforcement of such lien. It was also averred that the water supply company, when it took possession of the plant, had knowledge or notice that the pipe furnished had not been paid for, and that proceedings were pending to enforce a mechanics' lien therefor. The specific averment was made that the title acquired by the pipe works under its mechanics' lien foreclosure pro-

ceeding was prior to any lien upon or title to said plant then or any time held or acquired by the water supply company. The prayer for relief, as amended, was as follows:

"Wherefore said plaintiff demands judgment against said defendant for the value of said pipe and materials furnished to said Oconto Water Company and for the amount of its said lien against the property of said Oconto Water Company; that the possession and use of said plant be given to it, and that said defendant, its officers, servants, and agents, may be perpetually enjoined from occupying, possessing, or using the same and any of the pipe so furnished by said plaintiff and being a part of the water plant or system now operated by it; or that said defendant, its officers, servants, and agents, may be enjoined from occupying, possessing, or using said plant or any of the pipe so furnished by said plaintiff for said plant, unless within such reasonable time as said court may prescribe for that purpose said defendant shall pay to said plaintiff the amount due to it under its mechanics' lien decree, as hereinbefore set forth; and that said defendant be ordered and required to pay the amount of said plaintiff's judgment against said Oconto Water Company and against said defendant herein, in such manner as to this court shall seem just and pursuant with its equitable powers and in accordance with the practice in such cases; and said plaintiff prays for such other, further, or different relief as to the court shall seem just and proper, and for the costs of this action."

In the answer filed on behalf of the water supply company, the averment of the complaint that the pipe works was the *owner [231] or holder of any right, title, or interest in or to the said waterworks plant, or any pipe constituting a part of said plant, was traversed. By leave of court an amendment was filed to the answer, in which the defendant set up the plea of *res judicata* arising from the decree of the circuit court of appeals in the creditors' suit. The case was tried by the court without a jury, special findings of fact were made respecting the judgment in the creditors' suit, the conclusions of law being embodied in the following decree:

"It is adjudged that the plaintiff has not and never had any lien on the waterworks plant and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by claim and title paramount to and free and clear of any claim or lien of the plaintiff; that the plaintiff is not entitled to any relief demanded in the complaint, as amended or otherwise.

"It is further adjudged that this action be, and the same is hereby, dismissed for want of equity, and that the defendant do have and recover of and from the plaintiff the sum of sixty-three and 92/100 dollars, its costs and disbursements in this action."

On appeal the supreme court of Wisconsin affirmed the judgment of the trial court.

105 Wis. 48, 81 N. W. 125. A writ of error from this court was allowed by the Chief Justice of the supreme court of Wisconsin. It was therein recited that in this suit there "was drawn in question the validity and binding effect of a title, right, and privilege claimed by the said National Foundry & Pipe Works, Limited, under authority exercised under the United States, and decrees duly entered in the circuit court of the United States for the eastern district of Wisconsin," and that "the decision of the said supreme court of the state of Wisconsin was against the right and privilege specially set up by said National Foundry & Pipe Works, Limited, under said authority and decrees."

Mr. George H. Noyes argued the cause and filed a brief for plaintiff in error:

The state court failed to recognize the validity of, and to give due effect to, the decree of the United States circuit court for the eastern district of Wisconsin under and by virtue of which the plaintiff in error acquired and claims its title to the property in question, thus presenting a Federal question.

Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; *Green Bay & M. Canal Co. v. Potter Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Avery v. Popper*, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94.

The state court gave undue effect to the judgment of the state court under which defendant in error claimed title; and also gave undue effect to the decree of the Federal court under which defendant claimed its right by *res judicata*. Whether the defendant in error obtained such rights or title or lawful possession as it claimed by virtue of such judgment or decree is a Federal question which this court will review.

Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773. See also cases above cited.

The plaintiff in error is not estopped to assert its title to the property sold under the mechanics' lien decree, if, as we contend, due effect and due faith and credit only are given to the decree pleaded as *res judicata* on the question of such title. Both the parties therefore rely upon rights under Federal authority, and, as the right of plaintiff in error was denied by the court, the writ of error lies.

Factors' & T. Ins. Co. v. Murphy, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679.

The plaintiff in error proved title to the property and franchise of the Oconto water company by the record, marshal's deed, and order of confirmation in the suit brought to foreclose its mechanic's lien.

Hewitt v. Butterfield, 52 Wis. 384, 9 N. W. 15; *Barr v. Gratz*, 4 Wheat. 220, 4 L. ed. 555; *Baudin v. Roliff*, 1 Mart. N. S. 165, 14 Am. Dec. 181; *Webb v. Den*, 17 How. 576, 15 L. ed. 35; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; 2 Jones, Ev. § 607.

The mechanic's lien decree, sale, marshal's deed on sale, and order of confirmation were conclusive, not only as against the Oconto water company, but as against the defendant in error, unless attacked for want of jurisdiction in the court, or for fraud or collusion.

Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294; 1 Black, Judgments, § 260; 2 Black, Judgments, § 605; *Freeman, Judgments*, §§ 335, 418; *Wells, Res Adjudicata*, pp. 150, 151; *Bigelow, Estoppel*, 5th ed. 150-152; *Lauman's Appeal*, 8 Pa. 473; *Hall v. Spaulding*, 40 N. J. L. 166; *Naylor v. Mettler* (N. J. Eq.) 11 Atl. 859; *Swiggart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418; *Oakes v. Williams*, 107 Ill. 154; *Pickett v. Pipkin*, 64 Ala. 522; *Sidensparker v. Sidensparker*, 52 Me. 481; *Insley v. United States*, 150 U. S. 512, 37 L. ed. 1163, 14 Sup. Ct. Rep. 158; *Ehlsam v. Smith*, 61 Kan. 699, 60 Pac. 740; *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774; *McCoy v. Quick*, 30 Wis. 521; *Hassall v. Wilcox*, 130 U. S. 493, 32 L. ed. 1001, 9 Sup. Ct. Rep. 590; *Southern R. Co. v. Bouknight*, 30 L. R. A. 823, 17 C. C. A. 181, 25 U. S. App. 415, 70 Fed. 442; *Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. 257; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Newark City Nat. Bank v. Crane* (N. J. Eq.) 45 Atl. 975; *Voorhees v. Jackson ex dem. Bank of United States*, 10 Pet. 474, 9 L. ed. 500; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472.

A stockholder is privy to a decree against a corporation, and cannot set up or claim any defense to the action which was available to the corporation, except in case of fraud or collusion, and especially cannot set up collaterally, or in another action, the same defense that was set up and urged by the corporation in the suit in which the decree was entered.

Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Bissit v. Kentucky River Nav. Co.* 15 Fed. 353; *Chicago & A. Bridge Co. v. Anglo-American Pkg. & Provision Co.* 46 Fed. 584; *Hendrickson v. Bradley*, 29 C. C. A. 303, 55 U. S. App. 715, 85 Fed. 508; *Wilson v. Seymour*, 22 C. C. A. 477, 40 U. S. App. 567, 76 Fed. 678; *James v. Central Trust Co.* 39 C. C. A. 126, 98 Fed. 489; *Stutz v. Hundley*, 41 Fed. 531; *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472.

The defendant in error acquired only a contract right, if any at all, and not a title to the water plant.

Oconto City Water Supply Co. v. Oconto, 105 Wis. 76, 80 N. W. 1113. See *Linden Land Co. v. Electric R. & Light Co.* 107 Wis. 493, 83 N. W. 851; *State ex rel. Atty. Gen. v. Portage City Water Co.* 107 Wis. 441, 83 N. W. 697.

Andrews and Whitcomb were privies to the mechanic's lien foreclosure suit so far as their rights under their second mortgage were concerned.

Union Trust Co. v. Southern Inland Nav. & Improv. Co. 130 U. S. 565, 32 L. ed. 1033, 9 Sup. Ct. Rep. 606; *Brown v. Cohn*, 95 Wis. 90, 69 N. W. 71; *Stoddard v. Myers*, 8 Ohio, 203.

The plaintiff in error was an encumbrancer and lien holder, and therefore a necessary party to the mortgage foreclosure proceedings in order to be affected thereby and to be foreclosed of its lien.

Wiltsie, *Mortgage Foreclosure*, §§ 62, 63; *Redmon v. Phoenix F. Ins. Co.* 51 Wis. 292, 37 Am. Rep. 830, 8 N. W. 226; *Davis v. Bilsland*, 18 Wall. 659, 21 L. ed. 969; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 128, 35 L. ed. 961, 12 Sup. Ct. Rep. 181; *Goodman v. Baerlocher*, 88 Wis. 287, 60 N. W. 415; *Re Kerby-Dennis Co.* 36 C. C. A. 677, 95 Fed. 116; *Fitzgerald v. Walsh*, 107 Wis. 92, 82 N. W. 717; *Rees v. Ludington*, 13 Wis. 277, 80 Am. Dec. 741; *McCoy v. Quick*, 30 Wis. 521; *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *Hodson v. Treat*, 7 Wis. 263; *Green v. Dixon*, 9 Wis. 532; *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Title Guarantee & T. Co. v. Studebaker*, 100 Fed. 358; *Atkins v. Volmer*, 21 Fed. 697; *Noyes v. Hall*, 97 U. S. 34, 24 L. ed. 909; *Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428; *Vilas v. McDonough Mfg. Co.* 91 Wis. 607, 30 L. R. A. 778, 65 N. W. 488.

The law in existence when a contract is made enters into and becomes a part of such contract, and becomes a rule of property.

Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; 2 Jones, *Mortg.* § 1051.

The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.

Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547; *Peninsular Lead & Color Works v. Union Oil & Paint Co.* 100 Wis. 488, 42 L. R. A. 331, 76 N. W. 359; *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110, 1135.

The construction given by a state court to a state statute becomes a part of the statute as though such decision was in terms written therein. The mechanic's lien statute had been construed by the supreme court of Wisconsin to give a lien to a

party doing work or furnishing material in the construction of a building or other structure for a quasi public corporation.

Hill v. La Crosse & M. R. Co. 11 Wis. 215; *La Crosse & M. R. Co. v. Vanderpool*, 11 Wis. 120, 78 Am. Dec. 691; *Carney v. La Crosse & M. R. Co.* 15 Wis. 503; *Vanderpool v. La Crosse & M. R. Co.* 44 Wis. 652; *Purtell v. Chicago Forge & Bolt Co.* 74 Wis. 132, 42 N. W. 265.

The judgments of the United States courts of the Wisconsin districts are to be treated as domestic judgments of the superior court of that state.

Ballin v. Loeb, 78 Wis. 404, 10 L. R. A. 742, 47 N. W. 516; *Metcalf v. Watertown*, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947.

The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive.

Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Union Bank v. Oxford*, 90 Fed. 7; *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715.

A decree in equity in the United States court does not in itself transfer or convey title to real estate. The legal title remains as before the decree, unless the parties make the necessary conveyance in accordance with the terms of the decree.

Gay v. Parpart, 106 U. S. 679, 27 L. ed. 256, 1 Sup. Ct. Rep. 456; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586.

If, however, there is a statute in the state where the land is situated, providing that such decree shall have the same operation and effect as if the conveyance ordered thereby had been executed conformably to such decree, the Federal court sitting in that state will enforce such provision of the statute.

Langdon v. Sherwood, 124 U. S. 74, 31 L. ed. 344, 8 Sup. Ct. Rep. 429.

Where, as in this case, the second action is based upon a different claim or demand, the decree in the prior action operates as an estoppel only as to those matters in issue or the point controverted, upon the determination of which the finding or judgment was rendered.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *Story*, *Eq. Pl.* § 791; 1 *Dan. Ch. Pl. & Pr.* 5th ed. § 661.

Under this rule the answer in this case was not sufficient to support a decree of *res judicata*.

Washington R. Co. v. Bradley, 10 Wall. 299, *sub nom. Washington, A. & G. R. Co. v. Washington*, 19 L. ed. 894.

Furthermore, if there is an uncertainty as to what was necessarily involved and decided in a case where several defenses were made and judgment given for defendant, or if the complaint contained more than one count and judgment was for plaintiff, the whole subject is open for disposition, and no estoppel exists.

Russell v. Place, 94 U. S. 606, 24 L. ed. 214; *Belleville & St. L. R. Co. v. Leathe*, 28 C. C. A. 279, 53 U. S. App. 718, 84 Fed. 103.

Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made, and the issues that have been decided.

Barnes v. Chicago, M. & St. P. R. Co. 122 U. S. 1, 30 L. ed. 1128, 7 Sup. Ct. Rep. 1043; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Graham v. Chamberlain*, 3 Wall. 704, 18 L. ed. 247.

A "matter in issue" has been defined in a case of leading authority as "that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleading."

Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

The court could not adjudge to the defendant in error an absolute and paramount title free and clear of any claim, title, or right of redemption on the part of the plaintiff in error, unless such matter was in issue, and unless the defendant in error had, by cross bill, sought such affirmative relief.

Mays v. Pryce, 95 Mo. 603, 8 S. W. 731; *Unfried v. Heberer*, 63 Ind. 67; *Grunert v. Spalding*, 104 Wis. 193, 78 N. W. 606, 80 N. W. 589; *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

An action brought to set aside proceedings on foreclosure of a mortgage in which the defendant, purchaser at the sale, did not seek affirmative relief, but rested upon pure defense, is not a bar to an action instituted by the defendant in the former action against the plaintiff therein for possession of the premises, inasmuch as the determination of the issues in one does not determine the issues in the other.

Piper v. Sawyer, 82 Minn. 474, 85 N. W. 206.

A judgment of default against a party defendant is an admission of the truth of the allegation in the complaint made against such party.

Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 31 L. ed. 309, 8 Sup. Ct. Rep. 337; *Reynolds v. Stockton*, 140 U. S. 254, 35 L.

ed. 464, 11 Sup. Ct. Rep. 773; *Cook v. Good-year*, 79 Wis. 606, 48 N. W. 860; *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585.

Plaintiff in error can recover, as it holds title under a prior lien.

Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432.

In Wisconsin the owner of the legal title to land, though not in possession, may maintain an action in equity against a party claiming under a subsequent lien to set aside a void decree constituting a cloud upon the title, and to recover possession of the land.

Kruczynski v. Neucndorf, 99 Wis. 264, 74 N. W. 974.

An action at law in ejectment will not lie to recover an incorporeal hereditament, such as an easement or franchise, by the owner of the legal title thereto; but the action must be in equity.

Racine v. Crotsenberg, 61 Wis. 481, 50 Am. Rep. 149, 21 N. W. 520; *Miller v. State*, 77 Wis. 271, 45 N. W. 1129.

The plaintiff in error with an existing mechanics' lien, valid as against the owner of the property, not having been made a party to the mortgage foreclosure suit in the state court, had and has the right, if necessary to exercise it, although holding a prior lien or title, to pay off and redeem the mortgage in a suit brought for that purpose and asking for an accounting as to the rents and profits received from the mortgagees in possession, with an offer to pay the amount of such mortgage after deducting therefrom, when ascertained, the amount of the net rents and profits from the operation of the plant.

Murphy v. Farwell, 9 Wis. 102; *Allen v. Case*, 13 Wis. 622; *Clark v. Reyburn*, 8 Wall. 318, 19 L. ed. 354; *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 27 L. ed. 47, 1 Sup. Ct. Rep. 10.

Such action to redeem will lie in favor of the plaintiff in error because it was in privity with the Oconto water company as mortgagor; that is, because it held a valid lien on, or title to, the mortgaged premises, or some part of the same, as against the mortgagor, although such lien or title is held void or for any reason unenforceable, as against the mortgagee, or against a purchaser at the mortgage foreclosure sale, having notice of its rights.

Rand v. Cartwright, 1 Ch. Cas. 59; 1 Powell, Mortg. 261; 1 Robbins, Mortg. 694; 2 Spence, Eq. Jur. 660-669; *Howard v. Harris*, 1 Vern. 190; *Tasker v. Small*, 3 Myl. & C. 63; 2 Story, Eq. Jur. § 1023; *Tiedeman, Real Prop.* § 334; 1 Herman, Mortg. § 30; *Hodson v. Treat*, 7 Wis. 263; *Green v. Dixon*, 9 Wis. 532; *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. 1038; *Turman v. Bell*, 54 Ark. 273, 15 S. W. 886; *Beach v. Cooke*, 28 N. Y. 508; *Powers v. Russell*, 13 Pick. 69; *Stevenson v. Edwards*, 98 Mo. 623, 12 S. W. 255; *Stone v. Wellings*, 14 Mich. 514; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263.

It does not lie in the mouth of the mortgagee or purchaser with notice to say, when offered his money on redemption, that as to him the redeeming creditor has no lien or title, provided the lien or title is valid as against the common debtor.

See authorities *supra*.

In determining what has been adjudged, the courts will regard the decree, and in case of ambiguity, but not otherwise, will be governed by an accompanying opinion; where it is free from ambiguity it speaks for itself, and cannot be qualified by an opinion by which it may have been preceeded.

1 Herman, Estoppel & Res Adjudicata, p. 471; *New Orleans, M. & C. R. Co. v. New Orleans*, 14 Fed. 373.

Anything in a decision or a decree outside of the issues properly raised in the record is invalid, and is treated as a nullity.

Reynolds v. Stockton, 140 U. S. 266, 35 L. ed. 468, 11 Sup. Ct. Rep. 773.

Any attempt to adjudge a paramount title free and clear of any adverse claim, either in Andrews and Whitcomb, or in defendant in error, would have been beyond the issues made by the pleadings, no such affirmative relief having been sought by cross bill or otherwise as a foundation for such adjudication.

Chapin v. Walker, 6 Fed. 794; *Brandt v. Gilchrist*, 18 Fed. 465; *Armstrong v. Chemical Nat. Bank*, 37 Fed. 466; *White v. Bowen*, 48 Fed. 186; *Wood v. Collins*, 8 C. C. A. 522, 60 Fed. 139; *Jackson v. Simmons*, 39 C. C. A. 514, 98 Fed. 768; *Washington, A. & G. R. Co. v. Bradley*, 10 Wall. 299, *sub nom. Washington, A. & G. R. Co. v. Washington*, 19 L. ed. 894; *Armstrong v. Pierson*, 5 Iowa, 317; *McConnel v. Smith*, 23 Ill. 611.

If defendant in error had been aggrieved by the final decree as entered, and had thought that the circuit court had misconstrued the mandate of the court of appeals, or had failed to give full and correct force thereto, or had not granted to it affirmative relief or all the relief possible under the issues made by the pleadings, or had failed to adjudge all that had been considered in the opinions filed by Judge Woods, its remedy was by mandamus or appeal. It is too late now to complain of, or ask unwarranted rights under, such final decree.

Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

Messrs. George G. Greene and Jerome R. North submitted the cause for defendant in error:

Although the decrees in the lien and creditors' suit were by Federal courts, the mere question whether and to what extent the determination in the latter suit was a bar does not present a Federal question.

Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; *San Francisco v. Itsell*, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241.

The question whether the mortgage foreclosure in the state court was void because foreclosure of the mechanics' lien was then
183 U. S.

pending in the Federal court may be in form Federal. But, as the court below said, it is immaterial. The mortgages were valid. Defendant in error was in possession through an attempted foreclosure. If, for any reason the foreclosure was void, it still had the right of possession.

Bryan v. Brasius, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; *Bryan v. Kales*, 162 U. S. 411, 40 L. ed. 1020, 16 Sup. Ct. Rep. 802; *Cunningham v. Macon & B. R. Co.* 156 U. S. 400, 39 L. ed. 471, 15 Sup. Ct. Rep. 361; *McCormick v. Herndon*, 78 Wis. 661, 47 N. W. 939.

The question whether the judgment should give affirmative relief is not Federal. There must be a real Federal question to give this court jurisdiction.

Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Millingar v. Hartupce*, 6 Wall. 258, 18 L. ed. 829.

It is *stare decisis* in the state court, and *res judicata* between these parties, that plaintiff in error never in fact had any lien, and had none by judgment estoppel against defendant in error.

Chapman Valve Mfg. Co. v. Oconto Water Co. 89 Wis. 264, 60 N. W. 1004; *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166, 36 L. R. A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774; *Buncombe County v. Tommey*, 115 U. S. 128, 29 L. ed. 307, 5 Sup. Ct. Rep. 626, 1186; *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 89, 70 N. W. 77; *Corser v. Kindred*, 40 Minn. 467, 42 N. W. 297; *Horn v. Jones*, 28 Cal. 195; *Jaycox v. Smith*, 17 App. Div. 146, 45 N. Y. Supp. 299; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. 397; *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333; 13 Am. & Eng. Enc. Law, p. 899; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

Where, as here, the plaintiff in error seeks legal relief,—possession of the property and a money judgment,—and shows no distinctive ground of equitable relief, the objection is not waived by failure to answer or demur.

Burnham v. Norton, 100 Wis. 13, 75 N. W. 304; *Stein v. Benedict*, 83 Wis. 603, 53 N. W. 891; *Kilbourn Lodge No. 3 of A. F. & A. M. v. Kilbourn*, 74 Wis. 452, 43 N. W. 168; *Avery v. Ryan*, 74 Wis. 599, 43 N. W. 317; *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324.

When the common process of the court will not serve, but a new bill and new decree have become necessary to enforce a former decree, equity will not give relief if the former decree is erroneous.

Lawrence Mfg. Co. v. Jancsville Cotton Mills, 138 U. S. 552, 34 L. ed. 1005, 11 Sup. Ct. Rep. 402; *Wadhams v. Gay*, 73 Ill. 415; *Gay v. Parpart*, 106 U. S. 679, 27 L. ed. 256, 1 Sup. Ct. Rep. 456; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263;

2 Beach, Modern Eq. Jur. § 904, and cases; 3 Enc. Pl. & Pr. 604, and notes; *O'Connell v. Macnamara*, 3 Dru. & War. 411; *Lawrence v. Berney*, 2 Rep. in Ch. 127.

To give the relief here prayed for in effect enforces a mechanics' lien on a water-works plant contrary to the public policy of the state.

Olcott v. Fond du Lac County, 16 Wall. 694, 21 L. ed. 388; *Chapman Valve Mfg. Co. v. Oconto Water Co.* 89 Wis. 272, 60 N. W. 1004; *Cohn v. Wausau Boom Co.* 47 Wis. 324, 2 N. W. 546; *East Alabama R. Co. v. Doe ex dem. Visscher*, 114 U. S. 350, 29 L. ed. 140, 5 Sup. Ct. Rep. 869; *Buncombe County v. Tommey*, 115 U. S. 128, 29 L. ed. 307, 5 Sup. Ct. Rep. 626, 1186.

A corporation which succeeds to the property and franchises of another corporation by purchases is not liable for its debts.

Neff v. Wolf River Boom Co. 50 Wis. 585, 7 N. W. 553; *Menasha v. Milwaukee & N. R. Co.* 52 Wis. 414, 9 N. W. 396; *Pennison v. Chicago, M. & St. P. R. Co.* 93 Wis. 344, 67 N. W. 702; *Wright v. Milwaukee & St. P. R. Co.* 25 Wis. 46; *Child v. New York & N. E. R. Co.* 129 Mass. 170; *Hoard v. Chesapeake & O. R. Co.* 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74; *Memphis Water Co. v. Magens*, 15 Lea, 37; 1 Thomp. Corp. § 263.

A purchaser's rights on foreclosure are not affected by knowledge of claims for the betterment of the mortgaged property which are not liens paramount to the mortgage. This is so whether the consideration for the unsecured claims or junior liens went for the construction, existence, or repair of the mortgaged property.

Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. 482, 20 L. ed. 206, 93 U. S. 352, 23 L. ed. 950; *Wood v. Guarantee Trust & S. D. Co.* 128 U. S. 417, 32 L. ed. 472, 9 Sup. Ct. Rep. 131; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; *Lackawanna Iron & Coal Co. v. Farmers' Loan & T. Co.* 24 C. C. A. 487, 52 U. S. App. 91, 79 Fed. 202; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 26 C. C. A. 30, 47 U. S. App. 663, 80 Fed. 624; *Raht v. Attrill*, 106 N. Y. 423, 13 N. E. 282; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Hale v. Nashua & L. R. Co.* 60 N. H. 333; *Hooper v. Central Trust Co.* 81 Md. 559, 29 L. R. A. 262, 32 Atl. 505.

The mortgage, when executed, embraces the property in its then improved condition, and also embraces all subsequent improvements free from unsecured debts and junior secured debts for the improvements.

2 Jones, Liens, § 1184; *Ellison v. Jackson Water Co.* 12 Cal. 542; *Rees v. Ludington*, 13 Wis. 276, 80 Am. Dec. 741; *Wilson v. Rudd*, 70 Wis. 98, 35 N. W. 321; *Mushlitt v. Silverman*, 50 N. Y. 360; *Benton v. Wickwire*, 54 N. Y. 226.

By mistake the mortgage was not recorded for a few weeks. But as to creditors not obtaining a lien before it was recorded, that is immaterial. It is also immaterial as to one who obtains a mechanics' lien after the execution, before it is recorded.

Mathwig v. Mann, 96 Wis. 213, 71 N. W. 105; *Rees v. Ludington*, 13 Wis. 276, 80 Am. Dec. 741.

The defendant in error as purchaser under foreclosure, even if such foreclosure was void, is entitled to the possession as against those not having paramount claims until the mortgage debt is paid.

Bryan v. Brasius, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; *Bryan v. Kalcs*, 162 U. S. 411, 40 L. ed. 1120, 16 Sup. Ct. Rep. 802; *Cunningham v. Macon & B. R. Co.* 156 U. S. 400, 39 L. ed. 471, 15 Sup. Ct. Rep. 361.

The question is concluded by the decision in the creditors' suit.

Cincinnati v. Emerson, 57 Ohio St. 132, 48 N. E. 667; *Grunert v. Spalding*, 104 Wis. 193, 78 N. W. 606, 80 N. W. 589.

A judgment in suits to enforce mortgages or other liens only affects the parties and the interest of the defendant in the property.

Day v. Micou, 18 Wall. 156, 21 L. ed. 860; *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Hassell v. Wilcox*, 130 U. S. 493, 32 L. ed. 1001, 9 Sup. Ct. Rep. 590; *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333; *McCoy v. Quick*, 30 Wis. 521; *Lampson v. Bowen*, 41 Wis. 484; 2 Black, Judgments, §§ 793, 795; 2 Jones, Liens, § 1571.

At the date of the lien decree, the mortgagees were in possession claiming right to it, and if their foreclosure were void they could not be thus evicted.

Bryan v. Brasius, 162 U. S. 415, 40 L. ed. 1022, 10 Sup. Ct. Rep. 803; *Bryan v. Kalcs*, 162 U. S. 411, 40 L. ed. 1020, 16 Sup. Ct. Rep. 802; *Terrell v. Allison*, 21 Wall. 289, 22 L. ed. 634.

The state court had jurisdiction of the suit to foreclose the mortgages.

Wilmer v. Atlanta & R. Air-Line R. Co. 2 Woods, 409, Fed. Cas. No. 17,775; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 15 L. R. A. 109, 49 Fed. 608; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; *Re Hall & S. Co.* 73 Fed. 527; *Jenks v. Brewster*, 96 Fed. 625; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *United Lines Teleg. Co. v. Boston Safe Deposit & T. Co.* 147 U. S. 431, 37 L. ed. 231, 13 Sup. Ct. Rep. 396; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

The judgment gives the right relief.

5 Enc. Pl. & Pr. 958; Dan. Ch. Pl. & Pr. 1st ed. 635; 1 Black, Judgments, § 146.

There is no right of redemption under the general prayer for relief.

Stout v. Lye, 103 U. S. 66, 26 L. ed. 428.

To redeem from a mortgage after foreclosure one must have had a definite lien or interest before the foreclosure suit was begun.

Ibid.; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 34, 28 L. ed. 59, 3 Sup. Ct. Rep. 485; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; 2 Jones, Mortg. 1048, 1049, 1055.

[232] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

In order to clearly present the simple issue arising on this record for decision, we have been obliged to make the foregoing lengthy statement of the facts which are involved in this unnecessarily protracted litigation.

When the allegations of the complaint by which this action was commenced are ultimately resolved, all the rights which they assert are embraced within the following propositions:

1. A contention that the water supply company, by virtue of its acquisition from **Andrews & Whitcomb**, was a mere successor corporation of the original water company, and became bound for all its indebtedness, including, of course, the debt due the pipe works, and this irrespective of the existence of a mechanics' lien;

2. A claim that in virtue of the sale made in the mechanics' lien suit after the decision of the circuit court of appeals in the creditors' suit and the final entry and execution of the mandate, the pipe works became the owner of the waterworks plant, entitled to the possession of the same, with a right, however, in the defendant, as a junior lienholder, to redeem by paying the indebtedness due the pipe works; and

3. An assertion that if the pipe works had not become the owner of the waterworks plant in virtue of the sale made as just stated, that corporation, in any event, in virtue of its asserted mechanics' lien, had been vested with a paramount right as against the water supply company, which it was the duty of a court of equity to enforce by compelling payment by the defendant.

In effect, these questions were all concluded adversely to the plaintiff in error by the court below, the rights embraced in the first proposition were decided to be without merit because the facts disclosed the water supply company to be an independent corporation and not bound as a successor company for the indebtedness of the original water company. As this proposition does not involve a Federal question, we may not review it. Indeed the finality of the decision below

[233] on the subject is *recognized by the plaintiff in error, since the assignment of error made in this court seeks to raise no question on such subject.

All the rights asserted by the plaintiff in error which are embraced in the second and third propositions were decided adversely below, on the ground that they were not open to inquiry, because concluded by the presumption of the thing adjudged, arising from the final decree in the creditors' suit. And it is upon the asserted erroneous application by the court below of the plea of *res judicata* that all the Federal questions urged must in effect depend.

The proposition is that the court below denied due effect to a decree of the Federal court, by maintaining the plea of *res judicata* predicated on a decree of such court.

This contention, apparently, is not that due effect was denied to the decrees of a Federal court, but that too great an effect was given. When, however, the proposition is stripped of the seeming confusion which arises from the form in which it is stated, it becomes clear that, ultimately considered, it really involves the assertion that the court below refused to give due effect to the decree of a Federal court. This is so because the proposition substantially is that the state court, in maintaining the plea of *res judicata* resulting from the decree in the creditors' suit, denied the rights which were vested in the pipe works by virtue of the decree in the mechanics' lien suit. The argument in substance is therefore that, as the rights under the mechanics' lien decree were not impaired or destroyed by the decree in the creditors' suit, the consequence of erroneously deciding that they were obliterated by the decree in the creditors' suit was to refuse to give due effect to the rights vested in the water company as a result of the decree in its favor in the mechanics' lien suit.

As it is thus demonstrated that the determination whether the court below correctly applied the plea of *res judicata* necessitates our deciding whether due effect was given to the decree in the mechanics' lien suit, a Federal question is presented which it is our duty to determine. *Jacobs v. Marks*, 182 U. S. 583, 587, 45 L. ed. 1241, 1244, 21 Sup. Ct. Rep. 865; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 645, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; **Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 507, 43 L. ed. 528, 19 Sup. Ct. Rep. 238, and cases cited. [234]

In order to correctly decide what was concluded by the decision of the circuit court of appeals in the creditors' suit and the final decree entered in such cause, it must be ascertained who were the parties to that cause, what were the issues therein presented for adjudication, and what was decided thereon. It is elementary that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court, in order to throw light upon the subject. *Baker v. Cummings*, 181 U. S. 117, 45 L. ed. 776, 21 Sup. Ct. Rep. 578; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 684, 688, 39 L. ed. 859, 862, 15 Sup. Ct. Rep. 733.

Conceding for the present that the face of the final decree in the creditors' suit leaves uncertain exactly what was concluded, we will resort to the means of elucidation just referred to, viz., the pleadings and opinions rendered, in order to ascertain who were the opposing parties, what were the issues joined between them, and the matters finally determined in the cause. So doing, it appears that the parties to the cause were the pipe works on the one side and **Andrews & Whitcomb** and the water supply company and others on the opposing side. It also appears that the following, among other con-

troversies, were directly at issue in the cause:

1. Had the pipe works, as to Andrews & Whitcomb and their privies, a lien upon the plant and franchise of the waterworks, arising from the sale of the pipe, the recording of the claim for a lien, and the recognition of such lien in the decree of the circuit court of the United States in the mechanics' lien suit, and this although the plant and franchise had come into the possession of Andrews & Whitcomb under the sale in their mortgage foreclosure suit?

2. Was the mortgage referred to a valid instrument? and,

3. Was title vested in Andrews & Whitcomb to the waterworks plant and franchise by reason of the sale to them under the decree in the mortgage foreclosure suit?

Between the parties we have named and upon the issues just stated it is free from doubt that it was decided that Andrews & [235] *Whitcomb were lawfully in possession in virtue of the sale made in the mortgage foreclosure, and that under the law of Wisconsin there was no lien in favor of the pipe works, as against Andrews & Whitcomb or their assigns, upon the franchise and plant in question, arising either from the law of that state, the recording of the alleged lien, or the decree rendered in the mechanics' lien suit. It hence results that every claim of a Federal right here asserted is without merit, and that the court below, in enforcing the principle of the thing adjudged, did not err, and of course did not refuse to give due effect to the mechanics' lien suit decree.

It is insisted, however, that although these conclusions may be inevitable from a consideration together of the pleadings, the opinions, and the final decree in the creditors' suit, the contrary result is impelled if merely the final decree entered by the circuit court upon the mandate of the circuit court of appeals is taken in view. The argument is that as the decree is unambiguous it is the law of the case, and resort cannot be had to other sources of information. In effect, the contention comes to this, that although it may be patent that the issues between the parties, as above stated, were determined, yet, as the decree entered by the circuit court failed to express such conclusion, the parties are bound by the decree as entered, as they did not avail themselves of a proper remedy, by mandamus or otherwise, to correct the frustration of the results of the decisions of the circuit court of appeals, which the argument necessarily assumes must have been brought about by the decree made by the circuit court.

But the decree of the circuit court does not support the contention based upon it. That decree in express terms dismissed the creditors' bill as to Andrews & Whitcomb and the water supply company, for want of equity, without any qualification or reservation whatever. It in express terms passed the legal title to the real estate upon which was located the pumping station and wells of the water company to the water supply company, as the assignees of Andrews &

Whitcomb, such transfer of title being declared to be made by virtue of the mortgage to Andrews & Whitcomb and the sale to them in *their mortgage foreclosure suit. It [236] is true that in the clause making this transfer it was declared that it was "without prejudice to any right which said plaintiff . . . may have under their mechanics' lien decree or otherwise to redeem from said instruments of mortgage, or either of them, or from the sale under the proceedings to foreclose the same." But this was a mere reservation of the right to redeem, if any existed. It left the pipe works in the position where, if its right had not been foreclosed as the necessary consequence of the dismissal of the bill for want of equity, it would not be so foreclosed in consequence of the specific direction for the transfer of the legal title to the property. In other words, the circuit court, in complying with the positive directions of the circuit court of appeals, but refused to interpret specifically the scope and effect of the mandate of the appellate court, and left that mandate to operate in its own language. At best, the reservation, when considered in connection with the other portions of the decree, can only have the effect of creating an uncertainty as to what was intended; and, this being the case, resort to the proper sources of information, to which we have already alluded, dispels the doubt, and leaves the matter free from difficulty. And this conclusion is equally made imperative by a consideration of the memorandum opinion of the circuit court—set out in our statement of the case—relating to the drawing of the proposed final decree. From that document it is made clear that the circuit court simply declined, in drawing the decree, to construe the opinions of the circuit court of appeals, and therefore deemed that it discharged its duty by obeying the mandate to dismiss the bill for want of equity, without adding any provision which might be construed as adding to or taking away from either of the parties to the record any right which had been established in virtue of the judgment of the circuit court of appeals.

Another contention remaining to be considered is that, even though the court below correctly applied the principle of *res judicata*, it yet, in granting affirmative relief, declined to give due effect to the decree in the mechanics' lien suit. On this subject the argument is that although, as regards Andrews & Whitcomb* and the water supply [237] company, it be recognized that it had been conclusively determined that the pipe works had no mechanics' lien whatever, yet, as such lien was finally decreed in the creditors' suit as against the water company, because of the thing adjudged arising from the decree in the mechanics' lien suit, therefore a right to redeem from the sale to Andrews & Whitcomb existed, and such right was nullified by the broad grant of affirmative relief made in this cause by the court below. Whether the pleadings in the cause justified a grant of affirmative relief, considered as a mere question of practice, pre-

sents no Federal question. The claim that because by the thing adjudged it is indisputable that the pipe works had a lien against the water company, it therefore follows that there is still a right to redeem as against Andrews & Whitcomb and the water supply company, even although it was established by the effect of *res judicata* arising from the creditors' suit that the lien as to the parties named was inoperative and a nullity,—is but another form of asserting that the decree in the creditors' suit was not *res judicata* between the pipe works and Andrews & Whitcomb and the water supply company.

In conclusion we need only remark that the observations just made are equally applicable to the elaborate contention, in the brief of counsel, that as the mechanics' lien suit was pending in a Federal court when Andrews & Whitcomb instituted their foreclosure proceedings in the state court, the Federal court had exclusive jurisdiction of the *res*, and the state court was without power in the premises. The validity of the title claimed by Andrews & Whitcomb to have resulted from the sale to them in the mortgage foreclosure suit having been an issue and decided in the creditors' suit, the contention now being noticed, and all other grounds supposed to establish the invalidity of such title, should have been presented in the creditors' suit, and such as were not must be deemed to have been waived, and were concluded and foreclosed by the judgment rendered in such issue. *Dowell v. Applegate*, 152 U. S. 327, 343, 38 L. ed. 463, 14 Sup. Ct. Rep. 611.

Affirmed.

[238] *CAPITAL CITY DAIRY COMPANY,
Plff. in Err.,
v.

STATE OF OHIO *ex rel.* ATTORNEY
GENERAL.

(See S. C. Reporter's ed. 238-249.)

Error to state court—dismissal—validity of state statute restricting manufacture and sale of oleomargarine—commerce clause—due process of law—equal protection of the laws—Federal question.

1. A writ of error to review a judgment of a

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com. (Va.)* 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

As to constitutional equality of privileges,
183 U. S.

state court ousting a corporation from its franchise for violation of the statutes of the state relating to the manufacture and sale of oleomargarine will not be dismissed on the ground that adequate support for the judgment, irrespective of any substantial Federal question, is afforded by the finding of the state court that the corporation had violated a statute in refusing to furnish samples as therein required, where the judgment of the court was based upon the consideration given by it to all the asserted violations of the statutes jointly, which statutes were contended to be repugnant to the Constitution of the United States.

2. The commerce clause of the Federal Constitution is not violated by the provisions of the statutes of Ohio relating to the manufacture and sale of oleomargarine within the state by a corporation created by its laws.
3. The equal protection of the laws is not denied an Ohio corporation engaged in the manufacture and sale of oleomargarine within the state of Ohio, by the statutes of that state forbidding the manufacture or sale of any oleomargarine which contains any coloring matter, although by the Ohio statutes harmless coloring matter may be used in butter.
4. An Ohio corporation engaged in the manufacture and sale of oleomargarine within the state of Ohio is not deprived of its property without due process of law by the statutes of that state which forbid the manufacture or sale of any oleomargarine which contains any coloring matter, although by the Ohio statutes harmless coloring matter may be used in butter.
5. A general statement in the answer to quo warranto proceedings in a state court to forfeit the franchise of a corporation for its violation of a state statute, that the proper remedy is by a criminal prosecution, and that "this proceeding is in violation of the Constitution of the United States," is not sufficient to raise a Federal question, where no specification is made as to the particular clause of the Constitution relied upon, and there is nothing in the record to show that the attention of the state court was directed to that question.

[No. 45.]

Argued April 19, 22, 1901. Decided January 6, 1902.

IN ERROR to the Supreme Court of the State of Ohio to review a decree ousting a corporation of its franchise for its violation of the statutes restricting the manufacture and sale of oleomargarine.
Affirmed.

immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.)* 14 L. R. A. 579, and note.

As to the validity of class legislation—see *State v. Goodwill (W. Va.)* 6 L. R. A. 621, and note; *State v. Loomis (Mo.)* 21 L. R. A. 789, and note.

As to what constitutes due process of law—see *Kuntz v. Sumption (Ind.)* 2 L. R. A. 655, and note; *Re Gannon (R. I.)* 5 L. R. A. 359, and note; *Ulman v. Baltimore (Md.)* 11 L. R. A. 224, and note; *Gilman v. Tucker (N. Y.)* 13 L. R. A. 304, and note. And see notes to *People v. O'Brien (N. Y.)* 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

See same case below, 62 Ohio St. 350, 57 N. E. 62.

The facts are stated in the opinion.

Mr. Thomas Ewing Steele argued the cause and filed a brief for plaintiff in error:

If it appears from the record that the plaintiff in error raised and presented to the court by pleadings, prayers for instructions, or other appropriate method, the question whether the Ohio statute was repugnant to the Federal Constitution, and the court ruled against him, the jurisdiction of this court attaches.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370.

Statutes, apparently for the mere regulation of an industry, may desire to, and may in fact, destroy it.

Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

The direct and necessary result of a statute must be taken into consideration in deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be formed, its purpose must be determined by its natural effect.

Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

The mere ruling by the supreme court of a state that a statute relied upon to justify the taking of property from a citizen who contends that he is thereby deprived of property without due process of law, or of some privilege or immunity to which he is entitled under the Constitution of the United States, does not violate the Constitution, and is only a reasonable exercise of the police power, and does not conclude the party aggrieved from having this court determine whether or not the Federal question is well taken.

Proprietors of Bridges v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571.

Any restraint upon the right and liberty of contract, to be valid, must appear to be for the common public welfare and equal protection and benefit of the people, not only to the legislature, but also to the courts.

Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313.

A law enacted in the exercise of the police power must be in fact a police law. If it is a law for the promotion of the public health, it must be a health law, having some relation to the public health.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

The mere recitation in the title of an act that it is a measure to promote the public health will not be regarded by this court where it is apparent that such is not the real and sincere purpose of its enactment.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Austin v. Murray*, 16 Pick. 121; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Slaughter-*

House Cases, 16 Wall. 36, 21 L. ed. 394; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

While large discretion is permitted to the states in the matter of legislating for their people where the public health is involved, the fundamental principles underlying all free government are not affected by this concession to legislative power.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Mr. E. B. Dillon argued the cause, and, with *Mr. John M. Sheets*, filed a brief for defendant in error:

Where a state court has based its decision on a local or state question, a writ of error will be dismissed.

Eustis v. Bolles, 150 U. S. 370, 37 L. ed. 1113, 14 Sup. Ct. Rep. 131; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision, to the highest court of the state having jurisdiction, but that its decision was necessary to a determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Beaupre v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296.

Where it does not appear upon what ground the highest court of the state places its judgment, and the judgment may be supported without deciding a Federal question, this court is without jurisdiction of it in error.

Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528.

The legislature has the power to enact laws to prevent a simulated article of butter from being put upon the market in such form and manner as to be calculated to deceive. Such a law is the valid exercise of police power by a state, and is not a violation of the United States Constitution.

Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429; 17 Am. & Eng. Enc. Law, p. 180; *Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308; *McAllister v. State*, 72 Md. 390, 20 Atl. 143; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *Cook v. State*, 110 Ala. 40, 20 So. 360; *Com. v. Huntley*, 156 Mass. 236, 15 L. R. A. 839, 30 N. E. 1127; *State ex rel. Weideman v. Horgan*, 55 Minn. 183, 56 N. W. 688; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277.

It being within the constitutional power of the legislature to establish regulations for the prevention of fraud in the sale of articles of food, it is generally for the legislature to determine what regulations are needed for that purpose.

Cooley, Const. Lim. 3d ed. 168.

[238] *Mr. Justice **White** delivered the opinion of the court:

By a law of the state of Ohio, enacted in 1884, it was made the duty of every one manufacturing or exposing for sale any drug or article of food included in the provisions of the act to furnish, on demand, to the person who should apply for and *tender the value of the same, a sufficient sample to enable an analysis to be made. This law is compiled in Bates's Annotated (Ohio) Statutes, § 4200-7.

By the provisions of another statute enacted in 1886, and amended in 1887, it was made unlawful to sell or offer for sale or exchange any substance purporting, appearing, or represented to be butter or cheese, or having either the semblance of butter or cheese, not wholly made of pure milk or cream, salt, and harmless coloring matter, unless done under its true name; and it was exacted that each package should have distinctly marked upon it, in the manner pointed out in the statute, the true name of the article and its constituent ingredients. And it was further forbidden, in the marking, to use any words or combination of words indicating that the article was either butter, cream, or dairy product. This statute is compiled in Bates's Annotated Statutes of Ohio, § 4200-30.

In 1890 it was further provided that no person should manufacture within the state, or should offer for sale therein, whether manufactured therein or not, any substance made out of any animal or vegetable oil, not produced from unadulterated milk or cream from the same, in imitation or semblance of natural butter or cheese produced from butter, unadulterated milk or cream. The terms "butter" and "cheese," as defined in the statutes, were declared to be articles manufactured exclusively from pure milk or cream, or both, with salt, and with or without any harmless coloring matter.

It was provided, however, in this act, that nothing therein contained "shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient causing it to look like or appear to be butter, as above defined." This statute is compiled in Bates's Annotated Statutes of Ohio, § 4200-13-14.

On May 16, 1894, it was further enacted that "no person shall manufacture, offer, or expose for sale, sell, or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any meth-
[240]ly (methyl), orange, butter *yellow, annatto, aniline dye, or any other coloring matter. Bates's Anno. Stat. § 4200-16.

On January 27, 1893, the plaintiff in error was incorporated under the general laws of the state of Ohio "for the purpose of manufacturing, selling, and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage, and transportation thereof, and all things incident thereto."

183 U. S.

Under this charter the corporation there- after carried on its business in the state of Ohio.

On April 12, 1898, proceedings in quo warranto were begun in the supreme court of the state of Ohio by the attorney general of that state to forfeit the franchise of said corporation, and for the appointment of trustees to wind up its affairs. The relief demanded was based on the charge: That the corporation had "continuously, since about the time of its creation, up to the present day, within this state, . . . of- fended against the laws of this state, mis- used its corporate authority, franchise, and privileges, and assumed franchises and privi- leges not granted to it, and has assumed and exercised rights, privileges, and fran- chises specially inhibited by law," in enumerated particulars. The specifications of the petition are reproduced in the mar- gin.†

*The defendant answered, its defenses be- [241] ing reiterated under seven different head- ings. It suffices for the purposes of the is- sues now before us to summarize the answer as follows:

It traversed all the facts alleged in the petition except as admitted in the answer. It expressly denied that the corporation had abused or misused its corporate powers. It admitted that the corporation had been en- gaged under its charter in the manufacture and sale of oleomargarine. It denied that any such product had been offered for sale

First charge. Said defendant corporation has, during the times and at the places afore- said, manufactured and sold an article in imi- tation and semblance of natural butter; which said article was made out of animal and vege- table oils, and compounded with milk or cream and both; which said article was not then and there in separate and distinct form and in such a manner as would advise consumers of its real character, and was not free from coloring mat- ter or other ingredients causing it to look like and appear to be butter; and said article was not butter, but was an article made in imi- tation and semblance thereof.

Second charge. The defendant corporation has, at the times and places above mentioned, manufactured, and has offered and exposed for sale and has sold and delivered, and had in its possession with the intent to sell and deliver, oleomargarine in large quantities—as your re- lator is informed, in quantities from 10,000 to 20,000 pounds thereof daily; which said oleo- margarine contained coloring matter, to wit, annatto and other coloring matter unknown to relator.

Third charge. The said defendant corporation, during the times and at the places above stated, has manufactured and sold a substance pur- ported and appearing to be butter and having the semblance of butter, but which substance was not butter, but was oleomargarine; but the packages, rolls, and parcels thereof were not dis- tinctly and durably stamped, or painted, or stenciled, or marked in the true name thereof in the ordinary bold-faced capital letters re- quired by the act of May 17, 1886, entitled "An Act to Prevent the Adulteration of and Decep- tion in the Sale of Dairy Products, etc." 83 O. L. 178.

Fourth charge. Said defendant corporation has refused and still refuses to deliver and fur-

as an imitation of butter, and without being plainly marked in conformity with the laws of the state of Ohio and the laws of the United States. It denied that the corporation had refused to deliver samples of its products to the duly qualified inspector and agent of the state, as alleged in the fourth charge of the petition, and averred that the entire matter alleged in the fourth charge [242] was based upon a "personal difficulty which happened on one isolated occasion between an officer of the corporation and one of the agents of the dairy and food commissioners "who was not an assistant commissioner."

The answer admitted that for a brief period between January 1, 1898, and March 1, 1898, the corporation had manufactured oleomargarine and colored it with a coloring matter known as annatto, which was entirely harmless; that this was done in midwinter; that the effect of such use was to give the oleomargarine a yellow color; that the butter made at that period of the year was not naturally yellow, and that therefore the use of the coloring matter did not cause the oleomargarine to look like natural butter; on the contrary, it was averred that oleomargarine cannot be made so as to look unlike butter unless the manufacturer is allowed to color it; that all the oleomargarine thus manufactured during the period stated was made, not for sale in the state of Ohio, but for sale in other states, and was wholly sent out of the state of Ohio to such other states; that the statutes of the state of Ohio enacted in 1890 and 1894, above referred to, did not forbid the use in the manufacture of oleomargarine of a harmless coloring matter, but that if they did they were repugnant to the Constitution of the state of Ohio and to § 8 of article 1 of the Constitution of the United States and § 1 of the 14th Amendment of that Constitution.

The answer additionally alleged that as the statutes which it was alleged had been violated imposed criminal penalties, the proceeding in quo warranto to forfeit the charter was unauthorized, at least until a previous criminal conviction for the acts complained of had been obtained. The portion of the answer setting up this defense concluded as follows: "And that this proceeding is in contravention of the Constitution of the United States."

A demurrer was filed to the defenses, which asserted the repugnancy to the Constitution of the state and of the United

States of certain of the statutes charged to have been violated, but no action seems to have been taken upon such demurrer.

A reply was filed in which the state substantially reiterated the "allegations of the [243] petition, taking issue with the claim that the company had used only a harmless coloring matter for a short period, and in oleomargarine intended solely for sale outside of the state of Ohio. The reply also took issue with the claim that the natural color of oleomargarine was a light yellow, and it was also denied that oleomargarine "cannot be made to look 'unlike' butter, unless the manufacturer is allowed to color it."

The case was heard "upon the petition and answer, testimony, and arguments of counsel." The supreme court of Ohio found the averments of the petition to be true, and entered a decree ousting the corporation from its corporate rights, privileges, and franchise, adjudging that it be dissolved, and appointing two trustees for the creditors and stockholders of the corporation, to wind up its affairs. 62 Ohio St. 350, 57 N. E. 62. The court, on the day this opinion was announced, entered an order, which it declared was made a "part of the record of this case," in which it was stated that at the request of the defendant it was certified that in deciding the case the court had found it necessary to consider whether the Ohio act of 1884 providing for the furnishing of samples, that of 1886, as amended in 1887, requiring all oleomargarine to be marked in a specific manner, the act of 1890 forbidding the manufacture and sale of any oleomargarine colored to look like butter, as well as the act of 1894 forbidding the use of coloring matter in oleomargarine,—were not repugnant to the 3d clause of § 8 of article 1 of the Constitution of the United States conferring upon Congress the power to regulate commerce, and to the 5th and 14th Amendments of that instrument; and that the court had sustained the validity of the statutes, although their unconstitutionality had been asserted by the defendant. A writ of error was allowed by the Chief Justice of the supreme court of Ohio.

Before disposing of the controversies presented by the assignment of errors, it is necessary to notice a motion of the defendant in error to dismiss. It is predicated upon the ground that as the court below found the defendant had violated the statute in refusing to furnish samples as required by the law of 1884, "this affords adequate sup-[244]

ply to the duly appointed, qualified, and acting inspector and agent of the dairy and food commissioner of this state any sample or quantity of the oleomargarine manufactured by it, although duly demanded by him, and the value of the same for a ten-pound package thereof, or any other reasonable quantity thereof, was tendered it for the analysis thereof, contrary to § 4 of the act of March 20, 1884, entitled "An Act to Provide Against the Adulteration of Food and Drugs" (81 O. L. 67); and said defendant has refused and still refuses to permit said inspector and agent to enter into its factory for any purpose whatsoever, and has refused and still refuses to permit him to examine or cause

to be examined any of the products manufactured by it.

Fifth charge. All of said violations of the laws of this state, as set forth in the first, second, third, and fourth charges, have been made and done by said defendant corporation with full knowledge of the said violations of law, and for the expressed purpose and intent of violating said laws and evading the same, and for the purpose of deceiving the people of this state and other states as to the real character of its said product, contrary to the act of March 7, 1890, entitled "An Act to Prevent Deception in the Sale of Dairy Products and to Preserve Public Health." 87 O. L. 51.

port for the judgment of ouster, irrespective of any substantial Federal question. It is true, in the pleadings it was not asserted that the provision of the Ohio law requiring the delivery of samples was repugnant to the Constitution of the United States, but in the certificate made by the supreme court of Ohio on the day its opinion was announced, it is certified that for the purposes of the decision of the case it became necessary to determine whether the act of 1884, providing for the delivery of such samples, was repugnant to the Constitution of the United States. Conceding that the certificate can only serve to aid in elucidating whether a Federal question was presented by the record, and that such certificate cannot, independently in and of itself, import into the record such a question when not otherwise properly inferable from the record, we do not think the motion to dismiss is well taken. We cannot, from an inspection of the opinion of the supreme court of the state of Ohio, conclude that the judgment of ouster which that court rendered was predicated alone upon the fact that the defendant had failed to deliver samples as required by the statute. On the contrary, we think the context of the opinion of the court demonstrates that the judgment against the corporation was based upon, not alone the mere failure to deliver the samples, but because of that failure, as connected with and explained by the acts of the corporation, in continuously, and, as declared by the court, flagrantly, violating, not one, but most of the other statutes relied on. In other words, we think that the judgment of the state court was based upon the consideration given by it to all the asserted violations of the statutes jointly, and hence no one of the particular violations can be said, when considered independently, to be alone adequate to sustain the conclusions of the court below that the judgment of ouster should be entered. We come, then, to the principal contention which the record presents,—the asserted repugnancy of the before-mentioned statutes of the state of Ohio to the Constitution of the United States.

At the outset it is apparent that all the statutes assailed, except the act of May 16, 1894, were on the statute books of the state at the date when the provisions of the general incorporation *law of the state were taken advantage of. The question thus at once arises whether the corporation can be heard to assail the validity of the statutes which were in force when it voluntarily caused itself to be incorporated. We do not, however, pursue this thought further, since it is impossible to separate, for the purposes of the questions here arising, the laws existing at the time of the charter from the act of 1894, which was enacted after the incorporation.

The contention that the statutes in question are repugnant to the commerce clause of the Constitution is manifestly without merit. All the acts of the corporation which were complained of related to oleo-

margarine manufactured by it in the state of Ohio, in violation of the laws of that state, and therefore operated on the corporation within the state, and affected the product manufactured by it before it had become a subject of interstate commerce. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. It results that the plaintiff in error is not in a position to assail the validity of the statutes because of their supposed operation upon interstate commerce, and we are not called upon to express an opinion respecting the constitutionality of the statutes upon this assumption.

The contention that the statutes in question violate the 5th Amendment to the Constitution of the United States need not be dwelt upon, as it is elementary that that amendment operates solely on the national government, and not on the states. *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. ed. 119, 20 Sup. Ct. Rep. 77, and cases cited.

The inquiry, then, is this: Do the provisions of the Ohio statutes, which, although allowing the manufacture and sale of oleomargarine when free from any coloring matter or other ingredient causing it to look like or to appear to be butter as defined in the statute, and which, moreover, expressly forbid the manufacture or sale within the state of any oleomargarine which contains any methyl, orange, butter yellow, annatto, aniline dye, or any other coloring matter, contravene the Constitution of the United States?

The proposition is that, as by the Ohio statutes harmless coloring matter is permitted to be used in butter, the effect of *pro-[246]hibiting the use of such harmless ingredients in oleomargarine is to deprive the manufacturer of oleomargarine of the equal protection of the laws, and to take from him his property without due process of law.

The supreme court of Ohio, however, having before it the evidence introduced upon the issues of fact made in the pleadings, held that oleomargarine was an article which might easily be manufactured so as to be hurtful, and thus result in fraud upon and injury to the public, and that the inhibition of the use of coloring matter in oleomargarine was a reasonable police regulation tending to insure the public against fraud and injury. The purpose of the legislature in permitting the use of harmless coloring matter in butter, and requiring that oleomargarine be sold in its natural state, was declared not to be for the purpose of discriminating in favor of butter, but to provide a ready means by which the public might know, that an article offered for sale was butter, and not oleomargarine.

It cannot in reason be said, as a mere matter of judicial inference, that such regulations for such purpose were a mere arbitrary interference with rights of property, denying the equal protection of the laws, or that they amounted to a taking of property without due process of law. It follows that

the legislature of Ohio had the lawful power to enact the regulations. *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633. Indeed, the controversy is governed by the decisions in *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; and *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154. In the *Powell Case* a statute absolutely forbidding the manufacture and sale in the state of Pennsylvania of oleomargarine was held valid, because designed to prevent fraud. Speaking of the case in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, this court said (p. 15, L. ed. p. 54, Sup. Ct. Rep. p. 762):

"That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the state, and the question was one as to the police power of the state acting upon a subject always within its jurisdiction."

In the *Plumley Case* the power of the state, in legislating for the prevention of deception in the manufacture and sale of imitation *butter, was held to extend to the prohibition of the sale of oleomargarine artificially colored so as to look like yellow butter, although brought into Massachusetts from another state.

Applying the principles enunciated in the cases to which we have just referred, it results that the Ohio statutes under consideration, in so far as they relate to the manufacture and sale of oleomargarine within the state of Ohio by a corporation created by the laws of Ohio, were not repugnant to the Constitution of the United States.

We have previously stated that in the answer of the defendant it was asserted that the remedy for the alleged violations of the Ohio statutes whose constitutionality were assailed was by a criminal proceeding, and not by an action in quo warranto for the purpose of forfeiting the charter of the defendant; and that in said pleading it was averred in general terms that "this proceeding" was "in violation of the Constitution of the United States." Under the assumption that the general reference to the Constitution just adverted authorizes this court to pass upon them, two Federal questions are elaborately pressed upon our attention. they are:

First. That as the acts done by the corporation which are complained of were by the statutes of Ohio made the subject of criminal penalties, such acts could not be availed of as the basis of civil proceedings in quo warranto, until in any event prior thereto there had been criminal conviction, without denying to the defendant the equal protection of the laws or taking its property without due process of law contrary to the 14th Amendment.

Second. That the appointment of trustees to wind up the affairs of the corporation as a consequence of the judgment of ouster produced, not only like results, but also

violated the contract clause of the Constitution of the United States, because amounting to an impairment of the obligations of the contract which the charter of the corporation had engendered. It is conceded that the Ohio statute which authorized the proceedings in quo warranto for any abuse or misuse of corporate powers, and which empowered the court, if it decreed against *the[248] defendant, to appoint trustees to liquidate the affairs of the corporation, was a part of the general law of Ohio at the time the defendant corporation was organized. The contentions then reduce themselves to this, that the contract rights of the corporation arising from the charter were denied, and the 14th Amendment to the Constitution was violated, because the corporation was subjected to the general laws of Ohio, which became impliedly a part of the charter. While thus to bring the propositions to their ultimate analysis may be wholly adequate to dispose of them, we do not pass upon them, since they do not properly arise for decision on this record.

It is settled that this court, on error to a state court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause. *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 62, 67, 43 L. ed. 365, 368, 19 Sup. Ct. Rep. 97; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 654, 655, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709, and cases cited. Now, the only possible support to the claim that a Federal question on the subject under consideration was raised below was the general statement in the answer to which we have already adverted, that "this proceeding is in violation of the Constitution of the United States." Nowhere does it appear that at any time was any specification made as to the particular clause of the Constitution relied upon to establish that the granting of relief by quo warranto would be repugnant to that Constitution; nor is there anything in the record which could give rise even to a remote inference that the mind of the state court was directed to or considered this question. On the contrary, it is apparent from the record that such a contention was not raised in the state court. Thus, although at the request of the defendant below, the plaintiff in error here, the state court certified as the existence of the Federal questions which had been called to its attention and which it had decided, no reference was made in the certificate to the claim of Federal right we are now considering.

The foregoing considerations are equally applicable to the proposition that the obligations of the contract engendered by *the[249] charter were impaired by the appointment by the court of liquidating trustees. Indeed, though the appointment of such trustees was expressly prayed in the petition,

the record does not even suggest that a constitutional question in respect to such appointment was raised or called to the attention of the court below.

Judgment affirmed.

BENJAMIN D. GREENE, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, *Appts.*,

v.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

(See S. C. Reporter's ed. 249-262.)

Criminal law—removal of defendant to another district—finding of probable cause—necessity of indictment—technical defects in indictment—decision granting removal as adjudication of sufficiency of indictment—review of decision by habeas corpus—trial without indictment.

1. A statement in the opinion of a district judge, rendered on granting an application for the removal, under U. S. Rev. Stat. § 1014, to another district for trial, of persons there charged with an offense against the United

States, that upon the evidence before him it is a proper case to be submitted to the jury for trial, is equivalent to a finding that probable cause exists for believing defendants guilty of the crime charged, although he also states that he expresses no opinion upon the merits.

2. The existence of an indictment is not a condition precedent to proceedings, under U. S. Rev. Stat. § 1014, to remove to another district for trial persons there charged with an offense against the United States.

3. The finding of an indictment does not preclude the government, on proceedings taken under U. S. Rev. Stat. § 1014, to remove to another district for trial persons there charged with an offense against the United States, from giving evidence of a certain and definite character concerning the commission of the offense by the defendants in regard to acts, times, and circumstances which are stated in the indictment itself with less minuteness and detail.

4. The existence of technical defects in an indictment with respect to the averments of time, place, or circumstances will not prevent the removal, under U. S. Rev. Stat. § 1014, to another district for trial, of persons there charged with an offense against the United States, if evidence be given upon the hearing which supplies such defects and shows probable cause to believe the defendants guilty of the commission of the offense defectively stated in the indictment.

NOTE.—On the jurisdiction of the United States Courts on habeas corpus—see *Re Reinhitz* (C. C. S. D. N. Y.) 4 L. R. A. 236, and note.

See also notes to *State ex rel. Cochran v. Winters* (Kan.) 10 L. R. A. 616; *Re Huse*, 25 C. C. A. 4, and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

On the province and office of the writ of habeas corpus—see *Bion's Appeal* (Conn.) 11 L. R. A. 694, and note. And see notes to *Ex parte Carll*, 27 L. ed. U. S. 288; *Cortes v. Jacobus*, 34 L. ed. U. S. 464; *Pearce v. Texas*, 39 L. ed. U. S. 164, and *Tinsley v. Anderson*, 43 L. ed. U. S. 92.

Removal to another Federal district for trial of persons there charged with an offense against the United States.

I. In general.

II. Offense against the United States.

III. Probable cause.

IV. Preliminary proceedings.

V. Validity of removal warrants.

VI. Right to discharge on denial of removal warrant.

I. In general.

U. S. Rev. Stat. § 1014, which is a substantial re-enactment of § 33 of the judiciary act of 1789 (1 Stat. at L. 91, chap. 20), provides that "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into 183 U. S. U. S., Book 46.

the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

Under the earlier statute it was held that a person charged with an offense against the United States, committed in an organized territory, may be arrested in any other district and removed to the territory for trial before a court thereof, if such court has jurisdiction of the offense charged. *United States v. Haskins*, 3 Sawy. 262, Fed. Cas. No. 15,322.

To the contrary is *United States v. Burr*, 2 Burr's Trials, 455, Fed. Cas. No. 14,694a, in which Chief Justice Marshall, sitting as committing magistrate, decided that he had no power to commit for trial in a territory.

For any offense committed in the District of Columbia against the laws of the United States the offender found elsewhere can, under U. S. Rev. Stat. § 1014, be removed there for trial. *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102.

From the correspondence between Mr. Justice Miller and Judge Love, reported in *Woolw.* 422, it appears that the former was of the opinion that the power to order removal rested alone on the judge of the district court. Judge Love seemed rather to doubt this, and suggested that for this purpose the circuit judge might be regarded as a district judge.

A person cannot be removed, under U. S. Rev. Stat. § 1014, to another district for any other purpose than for trial. *Re Christian*, 82 Fed. 888. In this case a person had been brought to Arkansas from Michigan under a conviction in a Federal court for the Indian territory, and had been discharged on habeas corpus because the sentence pronounced was void. He was then rearrested, and held to await the sentence of the court upon such verdict, and a motion for a warrant of removal was made. He there-

5. A decision granting a removal, under U. S. Rev. Stat. § 1014, to another district for trial, of persons there charged with an offense against the United States, where an indictment has been found, is not an adjudication of the sufficiency of the indictment in law as against any objection which may subsequently be made by the defendants.
6. The question whether a judge who had jurisdiction to make an order for the removal, under U. S. Rev. Stat. § 1014, to another district for trial, of persons there charged with an offense against the United States, ought to have made such order upon the merits, is not one which can be reviewed by habeas corpus.
7. A magistrate acting pursuant to U. S. Rev. Stat. § 1014, providing for the removal to another district for trial of persons there charged with an offense against the United States, is justified in treating a properly certified copy of an indictment valid on its face, and purporting to have been found by a grand jury acting in fact as such at a regular term of the district court of the United States, presided over by one of its judges and hearing testimony in the ordinary way, as an indictment found by a competent grand jury irrespective of any irregularities in drawing and organizing the grand jury which found the indictment.
8. Whether defendants, sought to be removed, under U. S. Rev. Stat. § 1014, to another district, for trial for an offense against the United States, for which they have there been indicted, have waived, or can waive, the right to question the validity and regularity of the grand jury which found the indictment, can only be raised before, and decided in the first instance by, the court in which they are to be tried.
9. Persons are not held to answer for an infamous crime without presentment by a grand jury, by an order removing them, under U. S.

upon sued out a second writ of habeas corpus, and was discharged for the reason that, having been already tried and convicted, he was not being removed for trial. The court disapproved the decision of the attorney general in *Re Oaksmith*, 11 Ops. Atty. Gen. 127, to the effect that a person might be removed to another district to answer the further demands of the court for that district before which he had already been convicted.

So, in *Re Graves*, 29 Fed. 60, the court held that the removal must be for the purpose of placing the defendant on trial in order to ascertain whether he is guilty of the offense against the United States with which he is charged, and therefore denied an application for removal because such removal was sought in order that the offender might be arrested and imprisoned until he obeyed an order made in a civil cause directing him to pay into court a sum of money found and adjudged to be held in trust by him. The court distinguished *Re Ellerbe*, 4 McCrary, 449, 13 Fed. 530, and *Fanshawe v. Tracy*, 4 Blss. 490, Fed. Cas. No. 4,643, *infra*, II., on the ground that both courts had under consideration a case in which the removal was sought in order that the offender might be put upon trial and be punished for his contempt.

The rule that a state court which has acquired jurisdiction has a right to hold it, to the exclusion of the Federal court, until its jurisdiction is exhausted, was applied in *Re James*, 18 Fed. 853, with the result of denying an application for the removal of a defendant who at the time of his arrest was in the custody of his bondsmen, who were bound to produce him before a state court to answer an indictment found therein, although the court was of the opinion that if the application were granted the bondsmen could successfully defend in the suit on the bond by showing that their principal was wrested from them by Federal authority.

And in *United States v. Burr*, 2 Burr's Trials, 455, Fed. Cas. No. 14,694, Chief Justice Marshall held that the court had no authority to send one who was in the custody of the marshal and bound to answer an indictment for a misdemeanor to another district for trial for treason.

So, in *United States v. Corrie*, Brunner, Col. Cas. 686, Fed. Cas. No. 14,869, the court said that one of its reasons for refusing a warrant of removal which had previously been requested was that it was without precedent to ask the court having before it a criminal accused of a capital offense, and whose case the grand jury were waiting to consider, to send him to another tribunal for trial for a minor offense.

Nor will the court use the power with which it is vested to remove to a Federal court in another state a criminal charged with a minor offense for the purpose of trying him for a capital offense. *Ibid.*

Nor will a removal be granted where defendant cannot be constitutionally tried in the court to which removal is sought. *Re Dana*, 7 Ben. 1, Fed. Cas. No. 3,554. In this case an application for a warrant to remove defendant to the District of Columbia for trial on an information filed in a police court of that district charging him with the publication of a libel therein was denied on the ground that defendant, if removed to that district, would be tried under the act of June 17, 1870, without a jury, which was forbidden by the United States Constitution; and this objection was held not to be removed by the fact that this statute gives to the defendant after judgment, if he deems himself aggrieved thereby, the right to appeal to another court where the information must be tried by a jury.

So, a removal to the police court of the District of Columbia was refused in *Re Cross*, 20 Fed. 824, where it was doubtful whether defendant could constitutionally be tried in that court for the offense charged, and the commissioner was directed to accept bail for defendant's appearance before the supreme court of the District of Columbia where he could constitutionally be tried, and in default of bail to commit him to answer in that court. The court refused to decide whether the police court could constitutionally try any person for the offense charged, but thought that the fact that the accused had to be brought back from another jurisdiction to be tried was almost conclusive that the offense was not of that petty nature to which the constitutional right of trial by jury has been held not to apply.

II. Offense against the United States.

To justify a removal under this statute it must appear that defendant is charged with an offense against the United States. What is such an offense within the meaning of this statute has not often been questioned. It has, however, been necessary to decide that a wilful contempt of a court of the United States in refusing to obey a subpoena of that court issued in a civil suit is an offense against the United States for which a removal may be granted. *United States v. Jacobi*, 1 Filipp. 108, Fed. Cas. No. 15,460; *Re Ellerbe*, 4 McCrary, 449, 13 Fed. 530.

So, in *Fanshawe v. Tracy*, 4 Blss. 490, Fed. Cas. No. 4,643, the court said that contempt

Rev. Stat. § 1014, on a sworn complaint and upon evidence under oath which has been adjudged to amount to probable cause, to a court in which they have been indicted for an offense against the United States, and where all the defenses of the parties may be presented and judgment obtained thereon, on the theory that, by reason of illegality in drawing and organizing the grand jury, such indictment is void.

[No. 365.]

Argued November 26, 27, 1901. Decided January 6, 1902.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order denying an application for a writ of habeas corpus. *Affirmed.*

of a court of the United States partakes of the nature and character of a crime, and that if a person imprisoned for such contempt breaks jail and escapes into another state he can there be arrested and returned to his imprisonment. See also *Re Graves*, 29 Fed. 60, *supra*, 1.

But libel in the District of Columbia is not an offense against the United States for which a warrant of removal will issue. *Re Dana*, 68 Fed. 886. See also *Re Dana*, 7 Ben. 1, Fed. Cas. No. 3,554, *supra*, 1.

The court may look into the indictment, where one has been found, to ascertain whether defendant is charged with an offense against the United States, and whether the court to which removal is sought has jurisdiction of the offense charged; and if the indictment fails in either particular it is the duty of the district judge to refuse to grant the warrant. *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102; *Re Doig*, 4 Fed. 193; *United States v. Horner*, 44 Fed. 677; *Re Corning*, 51 Fed. 205; *Re Greene*, 52 Fed. 106; *United States v. Lee*, 84 Fed. 626; *Re Belknap*, 96 Fed. 614.

It was argued in *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102, *supra*, that the question of the sufficiency of the indictment was for the court in which it was found, and not for the district judge on such an application. But Judge Dillon said that he could not agree to this proposition in the breadth claimed for it in that case. "This provision," he said, "devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is no light matter to arrest a supposed offender, and on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such a removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to protect the liberty of the citizen."

Doubts should not, however, be solved against the indictment in such cases. *Re Belknap*, 96 Fed. 614.

In a number of cases a warrant of removal has been denied where the indictment showed that the offense was not committed within the jurisdiction of the court in which the indictment was found. *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102; *Re Doig*, 4 Fed. 197; *United States v. Lee*, 84 Fed. 626; *Re Belknap*, 96 Fed. 614.

Statement by Mr. Justice Peckham:

*This case is brought here by the appeal [250] lants for the purpose of obtaining a review of the order of the circuit court of the United States for the southern district of New York denying their application for a writ of habeas corpus. The proceeding which led up to the application for the writ was commenced under § 1014 of the Revised Statutes, which reads as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against of-

States v. Lee, 84 Fed. 626; *Re Belknap*, 96 Fed. 614.

So, where the indictment discloses that the offense charged is one over which the trial court has no jurisdiction, or is one for which for any reason the prisoner is not amenable to criminal prosecution in another district, the district judge may properly refuse to order his removal. *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84.

But an indictment must be regarded as sufficient to authorize removal as against an objection that it does not aver that an offense against the United States has been committed in the district to which removal is sought, unless it is so defective in material averments that it would be the manifest duty of the court before which it was presented by the grand jury to decline to act upon it. *Re Clark*, 2 Ben. 540, Fed. Cas. No. 2,797.

The district judge, in exercising his jurisdiction to issue a warrant for the removal of an offender to the district where he is to be tried, has a right to determine whether the offense is within the jurisdiction of the district court of the United States for that district. *Horner v. United States*, 143 U. S. 207, 36 L. ed 120, 12 Sup. Ct. Rep. 407.

Thus, a person held in Pennsylvania to await removal to a Federal district court in Missouri for trial of an offense against the Interstate Commerce Law was, in *United States v. Fowkes*, 49 Fed. 50, on applications for habeas corpus and for a warrant of removal, permitted to introduce evidence that the offense, if any, was begun and completed in Pennsylvania, and that therefore no offense had been committed of which the court to which he was to be removed had cognizance; and, upon the failure of the government to produce evidence in support of the trial other than the indictment itself, a warrant of removal was denied, and the prisoner discharged. On appeal this action of the district court was held to be a proper exercise of its discretion. 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 13. The court said: "We do not doubt that a district court may, in its discretion and in a proper case, order a warrant of removal upon the indictment alone, but it would be going much further and much too far, as we think, to hold that in all cases, and especially in such a case as this record discloses, the judge is precluded from hearing any other evidence whatever, and must, upon mere inspection of the indictment, order the removal of the accused person to a considerable distance for trial, although evidence be offered which, if received, would conclusively establish that

fenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

The appellants were at the time of the commencement of the proceeding nonresidents of the state of Georgia, one of them

being a resident of the state of Connecticut, two residing in the state of New York and one in the state of Massachusetts. The proceeding was inaugurated in the southern district of New York, where one of the assistants of the United States district attorney for that district, on December 13, 1899, *made a sworn complaint in writing [251] before United States Commissioner Shields, residing in that district, which complaint in substance charged upon information and belief the commission by the defendants, in the southern district of Georgia, of the crime of conspiracy to defraud the United States of divers large sums of money, by means of a fraudulent scheme devised by the defendants together with one Oberlin M. Carter, a captain of the corps of engineers, United States army; that the scheme was first devised and put in operation in the southern district of

the court to which it is asked that he shall be remanded is without jurisdiction to try him."

And the judge, in passing upon the want of jurisdiction in the court of the district to which removal is sought, either of the person, the subject-matter, or the place where the crime was committed on the application for removal, either when the motion for the writ is pending and on such motion, or by writ of habeas corpus, may go behind the indictment. *United States v. Rogers*, 23 Fed. 658.

Since, however, the objection that a writ of removal should not be issued because the government's testimony offered before the examining commissioner shows that the defendant, if involved in the commission of the offense at all, was only an accomplice or accessory before the fact, and that whatever he did was done in the district from which removal was sought, for which he was answerable there, and there only, is in the nature of a plea in abatement to the jurisdiction of the court to which removal is sought to be supported by proof *aliunde* the record, the case should present peculiar features of urgency to warrant the judge of one court in interrupting the progress of a case pending in another court by hearing and sustaining a plea which ordinarily should be heard by the judge of the court where the case is pending. *United States v. White*, 25 Fed. 716.

If the indictment contains allegations sufficient to show that a crime has been committed by the party charged, it has been said to be the practice of the Federal judges to take the same as a *prima facie* showing that the crime has been committed at the place alleged, and, if nothing else appears, to order a removal of the party charged. *Re Wolf*, 27 Fed. 606. See also cases cited *infra*, III., IV.

Where the only probable cause relied on is an indictment which fails to charge the commission of an offense against the United States the warrant of removal must be denied. *Re Corning*, 51 Fed. 205; *Re Terrell*, 51 Fed. 213; *Re Greene*, 52 Fed. 104.

Where the indictment is had in substance no removal will be granted. *Re Huntington*, 68 Fed. 882.

And a warrant of removal will be denied where the indictment misrecites the offense. *Re Richter*, 100 Fed. 295. See also cases cited *infra*, IV.

And an order of removal will not be granted on an indictment which does not state facts constituting a crime against the United States, even though the prisoner does not resist the removal, but consents thereto. *United States v. Connors*, 111 Fed. 734.

But the fact that the indictments found in

the district to which the prisoner is sought to be removed do not sufficiently or correctly as to matters of form allege the offense does not make the order of removal an unwarranted or erroneous exercise of the judicial power of the district judge, as this question may properly be left to the disposition of the court by which the offender is to be tried. *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84.

And if there is any defect in an indictment because one count charges defendant with the forcible breaking into a postoffice with intent to commit larceny, and also charges larceny of postage stamps thus obtained, constituting separate offenses, but which relate to and are part of the same transaction, such defect is one of form and procedure rather than of essence, and is not available on application to remove prisoners to the proper district for trial. *United States v. Yennie*, 74 Fed. 221.

So, any defects of form in an indictment, or objections that might be raised on special demurrer, cannot be considered on an application to remove the accused for trial to the district in which the indictment was found. *United States v. Horner*, 44 Fed. 677.

And irregularities in the drawing and organization of the grand jury will not prevent the removal of the accused for trial to the district where such indictment is found, where the question whether the indictment is thereby rendered invalid is a new one of statutory construction which has never been adjudicated, but the accused will be left to raise the question on the trial, where the decision can be reviewed in regular course of appeal. *United States v. Greene*, 108 Fed. 816.

The requirement that an offense against the United States must be shown to justify removal is sufficiently met by the prisoner's written confession detailing the commission of the crime against the United States. *United States v. Bloomgart*, 2 Ben. 356, Fed. Cas. No. 14,612.

III. Probable cause.

See also cases cited *infra*, IV.

The issuing of a warrant of removal under U. S. Rev. Stat. § 1014, is not a mere ministerial act, but the statute contemplates that the district judge shall determine, in the exercise of judicial discretion, whether the prisoner shall be taken to another jurisdiction for trial, and that he may refuse the warrant if, in his judgment, the removal should not be made. *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84; *Re Wolf*, 27 Fed. 606; *United States v. Brawner*, 7 Fed. 88.

Georgia in or about the year 1891, and had been continuously in process of execution there by the defendants from that time until October 1, 1899. The complaint also recites, with some detail, certain acts of the defendants by which the conspiracy was effectuated and accomplished, and it also stated that complainant's belief in regard to the charge made by him was based upon information contained in an indictment found by the grand jury of the United States district court for the southern district of Georgia, on December 8, 1899, and he alleged that bench warrants had been issued for the arrest of the defendants from the clerk's office of that court on December 9, 1899, and he was informed and believed that the defendants were then in the southern district of New York. A certified copy of the indictment was attached and made a part of

the complaint before the commissioner, who thereupon issued a warrant reciting the substance of the complaint, and directing the arrest of the defendants and their production before him to be dealt with according to law.

The defendants upon being notified of the issuing of the warrants at once appeared before the commissioner and asked for an examination, pending which they were enlarged upon bail. In the course of the examination, and in addition to the complaint already made, the assistant United States attorney for the southern district of New York on January 13, 1900, filed a deposition detailing certain acts of one or more of the defendants performed by them in order to effect and further the conspiracy set forth in the indictment referred to in his original complaint.

The statute contemplates a preliminary examination by the committing magistrate (see *infra*, IV.), and while the action of such committing magistrate is, doubtless, *prima facie* sufficient for the basis of a warrant of removal, it is not conclusive; and where a case is presented to the district judge which gives him jurisdiction to entertain an application for removal he may, before issuing the warrant, receive further evidence to prove the probable guilt of the prisoner, or the pendency of an indictment for the offense in a court having jurisdiction thereof. *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84.

And it has been said to be the duty of the district court to enter into such an investigation before ordering removal as is necessary to enable him to determine whether the defendant should be sent out of the district to answer the charge against him. *Re Ellerbe*, 4 McCrary, 449, 13 Fed. 530. The court was, however, of the opinion that the cases in which an inquiry may properly extend to an examination into the question of probable guilt are those where there has neither been a preliminary examination, nor an indictment in the district where the offense was committed, nor an order for the arrest of the prisoner by a court of the United States of competent jurisdiction sitting in that district.

On an application for a warrant for the removal of a defendant to another district for trial the district judge has authority to probe the grounds of the charge and ascertain the existence of probable cause; and the duty so to do is manifest before entering an order to send a defendant to such a distant district for trial as the district of Alaska. *Re Richter*, 100 Fed. 295.

The prisoner is entitled to notice, and, if he desires a hearing, to be brought personally before the judge with the application for removal, for the purpose of presenting any objections that he may have. *Re Beshears*, 79 Fed. 70.

The finding of a commissioner that probable cause existed for believing that an offense against the United States has been committed by defendant cannot be reviewed, however, on application for removal if there was any legal evidence before him upon which he might have found that there was reasonable cause to believe that the crime had been committed. *United States v. Greene*, 108 Fed. 816.

So, on habeas corpus to inquire into the legality of the detention of the person for whose removal a warrant has been issued, the finding of the commissioner as to probable cause will not be disturbed because of the weakness of the testimony, where such testimony does tend

to show the commission of the offense charged. *Re Price*, 83 Fed. 830.

And removal will be ordered if there was competent evidence before the commissioner of the crime alleged, and also evidence tending to show the probable guilt of the prisoners. *United States v. Lantry*, 30 Fed. 232.

Conversely, the action of a commissioner in refusing, after a full and complete hearing, to commit an accused for removal to another district for trial upon an indictment found therein, should be regarded as final unless such action has been arbitrary and in manifest disregard of his duty,—especially where the testimony upon which such decision is based is that upon which the indictment is found. *Re Wood*, 95 Fed. 288.

The judge, in determining whether he will order a removal of the accused to the district where the alleged offense was committed, is not required to decide absolutely the question of guilt or innocence; nor is he authorized to discharge him if there is some doubt of guilt; although, where it is clearly proved that the accused has not committed the offense charged, it would be the duty of the judge to order his discharge. *Re Burkhardt*, 33 Fed. 25.

And the question of the guilt or innocence of a person arrested upon a warrant issued by a court of competent jurisdiction in contempt proceedings cannot be inquired into by the district judge before ordering his removal to that district for trial. *Re Ellerbe*, 4 McCrary, 449, 13 Fed. 530.

If identity is shown, and a case of probable guilt is made, it is incumbent upon the judge to issue a warrant for the removal of the prisoner to the proper district, where a jury may determine from all the evidence the question of guilt or innocence. *Re Burkhardt*, 33 Fed. 25. See also cases cited *infra*, IV.

The question how far an indictment, where one has been found, is conclusive as to existence of probable cause, either on the preliminary hearing (see cases cited *infra*, IV.) or on the application for removal, has not been given entirely uniform answers by the courts. Judge Love, in a letter to Mr. Justice Miller, reported in *Woolw.* 422, said that his practice was in cases in which an indictment has been found to have the accused brought before him for identification, and upon that to issue his warrant for removal without further examination. For he says: "I hardly suppose we could go behind the indictment."

And it has been said to be the plain duty of the judge to grant the order of removal where the indictment on its face charges the commission of an offense against the United States

[252] Upon the examination, the defendants offered evidence tending to show a want of probable cause for believing them guilty of the charge made by the assistant district attorney. All evidence of this nature was objected to by counsel for the government and was excluded by the commissioner, who held that the indictment found in the district court in Georgia was conclusive evidence of probable cause, and that the only further evidence necessary was proof identifying the defendants as being the parties mentioned in the indictment, and this proof being given, the commissioner committed them to the custody of the marshal of the southern district of New York until a warrant for their removal to the southern district of Georgia should issue by the United States district judge for the southern district of New York, or until they should otherwise be dealt with according to law.

within the jurisdiction of the court in which the indictment is pending. *Re Belknap*, 96 Fed. 616. See also *Re Wolf*, 27 Fed. 606, *supra*, II.

A certified copy of an indictment has been regarded as sufficient, when uncontradicted, to justify a removal to the district where the indictment was found. *Re Alexander*, 1 Low. Dec. 530, Fed. Cas. No. 162. See also cases cited *infra*, IV.

But while an indictment is presumptive evidence of probable cause on an application for removal of the accused for trial to the district where the indictment is pending, if an offense within the statute is clearly stated, it is not conclusive, and if doubt is raised in any material aspect of the charge, the indictment must be supported by proof *aliunde*. *Re Richter*, 100 Fed. 295.

So, it has been held that a certified copy of the indictment, though made evidence in an application for removal in Oregon by the provision of U. S. Rev. Stat. § 1014, that the procedure on such application must conform to the usual mode of process against offenders in the state, is not conclusive evidence of the existence of probable cause to warrant a removal, and that where, from the testimony of the witnesses upon which the indictment was found, it does not appear that the crime charged has been committed by the defendant, there can be no order for removal. *Re Wood*, 95 Fed. 288.

And in New York an indictment charging a conspiracy to defraud the United States, which contains no evidential fact from which any fraud or conspiracy can be judicially inferred, is not such probable cause as will justify a removal when an examination has been demanded by the accused and its sufficiency challenged. *United States v. Greene*, 100 Fed. 941. The court said that, in the absence of some act of Congress expressly dispensing with any other evidence than the indictment itself, it was impossible that in a proceeding under U. S. Rev. Stat. § 1014, which makes applicable the state laws, the rights of citizens expressly guarded by the state laws could be set aside by a mere indictment in a distant jurisdiction, so that without a word in their own defense citizens could be thereupon transported for trial hundreds, or even thousands, of miles away from their homes in contravention of the act of Congress and the laws of the state which it recognizes and adopts.

A complaint sufficiently charging an offense against the United States, with evidence tending to show such offense, and an indictment showing that the prisoner was wanted for the of-

Application was thereupon made by the district attorney to the United States district judge for the southern district of New York for an order for the removal of the defendants under § 1014 of the Revised Statutes. At the hearing upon such application the defendants maintained that the commissioner should have received the evidence of want of probable cause, which they offered, and thereupon the district judge made an order that, "after hearing on exceptions and on application for order of removal, ordered that the matter be referred back to the commissioner for taking further competent testimony as offered by either party in accordance with the opinion filed herein."

In the opinion which he filed the district judge held that the defendants were not concluded by the indictment, but were entitled to introduce evidence before the com-

fense charged in the complaint, is such probable cause as warrants his removal. *Re Price*, 83 Fed. 830.

And a prisoner's written confession detailing the commission of the crime is sufficient probable cause to warrant his commitment and removal, although no other evidence of the *corpus delicti* is offered. *United States v. Bloomgart*, 2 Ben. 356, Fed. Cas. No. 14,612.

But there can be no removal of a defendant upon a mere affidavit charging him with the commission of a crime as the basis of a proceeding or prosecution against him. *United States v. Karlin*, 85 Fed. 963.

So, a warrant of removal was refused in *United States v. Newcomer*, 12 Pittsb. L. J. 140, Fed. Cas. No. 15,869, because the only proof offered was a *capias* issued from the district court to which removal was sought, directing the marshal to arrest the accused to answer an indictment found in that court, and an affidavit of a deputy marshal that said indictment was still pending. The court said that before a warrant of removal can be granted some proof must be offered showing that the defendant committed the crime charged, or, in lieu thereof, the information or the affidavit on which the warrant issued, or copies of the same certified by the magistrate issuing the warrant, or a copy of the indictment with the certificate of the clerk of the court in which the indictment is found of its genuineness, and that the same is still pending, must be produced.

IV. Preliminary proceedings.

The statute contemplates a preliminary examination by the committing magistrate as a prerequisite to removal. *United States v. Haskins*, 3 Sawy. 362, Fed. Cas. No. 15,322; *Re Burkhardt*, 33 Fed. 25.

There should be a preliminary examination to establish the identity of the prisoner and his probable guilt before the warrant for his removal is issued by the judge. *Re Burkhardt*, 33 Fed. 25.

There is some correspondence of Mr. Justice Miller and Judge Love, of the Iowa district, bearing upon this question reported in Woolw. 422. To the former had been presented a request for an order directing the removal to another district for trial of a person against whom no indictment had been found. After ascertaining the views of Judge Love on this question, Mr. Justice Miller denied the order because no preliminary examination had been had in the district where defendant was found. The statute "does not in express terms," he

missioner to show want of probable cause for believing them guilty of the offense charged.

[253] Pursuant to the order of the district judge, the defendants again appeared before the commissioner, and a large amount of testimony *pro* and *con* was then taken by him on the question as to probable cause for believing the defendants guilty of the commission of the offense charged, as well as testimony concerning certain alleged irregularities in the drawing and organization of the grand jury which found the indictment upon which *the removal of the defendants is sought. The irregularities consisted of alleged violations of the statute in relation to the drawing of jurors for the courts of the United States (§ 2 of the act of June 30, 1879, 21 Stat. at L. 43, chap. 52), and were, as the defendants claimed, of such character as to render the organization

of the grand jury illegal, and to prevent such illegal body from finding any valid indictment. After all the testimony was in that either party desired to produce, the commissioner on March 21, 1901, again committed the defendants to the custody of the marshal by an order, in which he stated that, "after full and fair examination touching the charge in the annexed warrant named, it appears from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained." Application was then made to the district judge for an order of removal, which application was opposed by the defendants on the ground that the evidence showed that there was no probable cause for believing them guilty of the charge, and also because the indictment spoken of was wholly void on the grounds mentioned. After argument the judge decided that as to the objections

said, "say that a person, charged with an offense against the laws of the United States must have an examination in the district where he is arrested, though the offense be committed in another state. It does not, in so many words, say that he shall undergo any examination at all. The language is, that he may be arrested and imprisoned, or bailed. But this is to be done according to the usual mode of process against such offenders in the state where he is arrested. It would be a waste of time to attempt to show that an imprisonment or order for bail is never made in any state without a previous examination into the probable guilt of the prisoner, unless he voluntarily waives such examination. Nor would any well-informed lawyer hesitate to hold that the act of Congress in question was not intended to authorize imprisonment without such preliminary examination by the committing magistrate as should satisfy him that there was enough evidence of the prisoner's guilt to justify a reference of the case to the grand jury of the proper district."

And it has been held to be error to arrest in one district and immediately remove to another without opportunity for the accused to confront the charge at the place of his arrest. *United States v. Shepard*, 1 Abb. (U. S.) 431, Fed. Cas. No. 16,273.

The statute is said clearly to require that it should appear that defendant has been committed in the district where the application is made to answer the charge preferred against him in the district to which removal is sought. *United States v. Lee*, 84 Fed. 626; *Re Graves*, 29 Fed. 60.

And a warrant for removal was denied in *United States v. Jacobi*, 1 Filipp. 108, Fed. Cas. No. 15,460, because the accused had not been arrested and imprisoned.

And a warrant of removal was, in *United States v. Shepard*, 1 Abb. (U. S.) 431, Fed. Cas. No. 16,273, said to have been wholly without authority of law because the offender had not been first arrested and committed. The court said: "The statute does not seem to contemplate or warrant removing a person from one district to another in the summary way pursued in this case. He is first to be taken before the proper officer who is to examine as to the crime alleged against the accused. If there is not probable cause of his guilt he is entitled to be discharged; whereas if there be found reasonable cause for holding the accused to answer upon tendering sufficient bail he is entitled to his discharge from arrest. Only on

183 U. S.

failure to give bail in a bailable case can he be committed."

So, in *United States v. Brawner*, 7 Fed. 88, application for a removal warrant was denied with an intimation that a second application would be successful if bail as reduced by the court on such application should not be furnished.

In seeming conflict is the statement in *United States ex rel. Hendricks v. Harris*, Fed. Cas. No. 15,313, that a prisoner need not first be committed before a warrant of removal may be issued under § 33 of the judiciary act of 1789; but a warrant for the arrest and transportation of the offender directly to the district wherein the offense was committed may be issued without the formality of previous commitment. The court says, however, that when the person is arrested "he may demand it, as a right, to be forthwith taken before the district judge that the fact of his identity may be inquired into, and also bailed, if a bailable offense. He is entitled to an examination before he is removed to a distant state."

It usually appears in proceedings for removal under this statute, that criminal proceedings in some form have been instituted against the offender within the district to which removal is sought. And it has been said that in exercising the authority given by the statute, the officers named have generally wisely insisted that it should be made to appear that criminal proceedings have been instituted against the offender within the district where the offense is triable, and usually that an indictment has been found against him. *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84.

And it has been said not to be proper to remove a prisoner for trial to a distant district, except upon the production at the time the application for removal is made, if not before, of a copy of the indictment or information showing that criminal proceedings are pending, and that he was wanted for trial in the district to which his removal is sought, and also that such proceedings are for the same offense for which he has been committed by the commissioner. *United States v. Price*, 84 Fed. 636. In this case, therefore, defendant being charged before the commissioner with having feloniously stolen certain United States notes and coins, and the indictment charging the theft of United States silver certificates, removal was refused on the production alone of this indictment.

So, in *United States v. White*, 25 Fed. 716, the court said that it was its practice not to entertain applications for removal until after

of illegality in the drawing of the grand jury, they could be heard before the trial court, and its decision thereon, if erroneous, could be corrected in the regular course of appeal. Upon the subject of the evidence regarding probable cause the judge in the course of his opinion stated as follows:

"The commitment by the commissioner and his finding of probable cause have been made after an extremely full hearing of all the evidence offered on both sides. No evidence reasonably pertinent has been rejected. Objection is made that irrelevant and incompetent evidence offered by the government was received by him; but, as stated in the former decision, the evidence receivable in such preliminary examinations is not to be strictly limited by the technical rules applicable upon the final trial; and upon a charge of fraud, or of conspiracy to defraud,

a somewhat wide latitude in the testimony is always allowed even on the final hearing, for the purpose of showing the intent. The proof of the charges in this case does not consist of any direct and certain testimony of the commission of the *offenses[254] charged, but rests upon many facts and circumstances in a long course of dealing, from which it is claimed that the inference of an unlawful intent to defraud the government must reasonably be inferred; and the bills alleged to be fraudulent in the last counts of the indictment are claimed to be fraudulent, not so much because they were not according to contract, as because the contracts themselves were fraudulent, and procured through a fraudulent conspiracy with Captain Carter, an employee of the government. Considering the nature of the case, therefore, I find no such objections to

indictment found, and to require a copy of the indictment to accompany the application.

But commitment and removal may, in proper cases, be made without any prior indictment. *United States v. Greene*, 100 Fed. 941; *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84.

And certified copies of the proceedings had in a United States court, in a case of wilful contempt for disobeying a subpoena of that court issued in a civil suit, and of the writ of attachment therein, are the equivalent in proceedings for removal to the certified copy of an indictment in other crimes. *United States v. Jacobi*, 1 Filpp. 108, Fed. Cas. No. 15,460.

In *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84, *supra*, the court said: "It is to be observed that the statute does not in terms require that an indictment shall have been found against the offender, or that criminal proceedings in any form shall have been instituted against him in the district where he has committed an offense against the laws of the United States. The authority to arrest and remove is conferred in broad terms. Cases may arise where the immediate apprehension of an offender who is a fugitive from justice is necessary to prevent his escape from the country, and where, although his guilt is clear, proof cannot be presented in time to procure an indictment before he can find refuge in a foreign land. That it is within the constitutional power of Congress to authorize the arrest of an offender against the laws of the United States at any place within the United States and his removal to the place where the offense is triable cannot be doubted." And the court referred to *United States v. Burr*, 2 Burr's Trials, 455, Fed. Cas. No. 14,694, in which Chief Justice Marshall, sitting as a committing magistrate in Virginia, committed Burr and Blennerhassett for trial in Ohio where the crime was charged to have been completed, although no proceedings had been instituted and no indictment found in the latter state.

A certified copy of the indictment has been held sufficient, when uncontradicted, to justify commitment for the purpose of removal to the district where the crime charged was committed. *United States v. Haskins*, 3 Sawy. 262, Fed. Cas. No. 15,322.

So, although a certified copy of an indictment is, under the Massachusetts practice, only a piece of evidence which may be met and controlled, it has been held to be sufficient evidence, if uncontradicted, to authorize a committing magistrate in that state to commit the accused to be bailed for trial in the district

where the indictment is pending. *Re Alexander*, 1 Low. Dec. 530, Fed. Cas. No. 162.

But a certified copy of an indictment, though evidence against the defendant in an examination before a committing magistrate, is insufficient to warrant him in holding defendant for removal, where its averments are so repugnant and inconsistent as to charge an impossible offense. *United States v. Pope*, 24 Int. Rev. Rec. 29, Fed. Cas. No. 16,069.

So, an indictment which, if taken as a whole, is contradictory on material points, is insufficient as a foundation for removal proceedings. *Re Dana*, 68 Fed. 886. See also cases cited *supra*, II.

And when the conclusiveness of the indictment as evidence of probable cause is challenged, the requirements of the 4th Amendment of the United States Constitution, that "no warrant shall issue but upon probable cause supported by oath or affirmation," and of the practice in New York made applicable by U. S. Rev. Stat. § 1014, entitle the accused to have the facts and circumstances tending to show criminality shown upon oath, and to have the complainant's witnesses recalled for examination, and to produce witnesses in his own behalf, and to have the magistrate himself find in the facts thus shown sufficient probable cause, independent of the belief of other persons. *Re Dana*, 68 Fed. 886.

A warrant of removal was denied in *United States v. Greene*, 100 Fed. 941, by the district judge for the southern district of New York, where the commissioner, in committing defendants to await removal, had regarded the indictment as conclusive evidence of probable guilt, and had refused to permit defendants to introduce evidence to show want of probable cause for believing them guilty of the offense charged. The court said that in states where the accused has no right to examine witnesses in his own behalf before a committing magistrate he cannot do so in a proceeding under U. S. Rev. Stat. § 1014, but in other states, as in New York, where this right does exist it cannot be lawfully denied him; and that in such proceedings the commissioner must receive all the evidence touching probable cause of guilt that a committing magistrate would be bound to take without reference to any subsequent trial upon indictment. To the objection that this would be trying the issue, the court said: "There is no 'issue' as respects the indictment until the defendants are committed, removed, and arraigned, and plead not guilty. The inquiry before the commissioner is for the very purpose of ascertaining whether there is sufficient ground to commit and remove the accused and

the testimony admitted by the commissioner as to vitiate his findings or require reconsideration by him.

"As respects the finding of probable cause, I have carefully considered the very extended briefs and arguments of counsel, and have examined the voluminous evidence with a view to ascertain whether there was competent evidence before the commissioner sufficient in itself to sustain his finding of probable cause. Under the rule above stated it is not for the judge, on an application for removal, to compare different parts of the testimony in order to determine their relative weight, or to substitute his own judgment for that of the commissioner, even though it might on the whole evidence be different. By this, however, I do not mean to be understood as expressing any opinion whatsoever on the merits of the case. The

oblige him to plead and stand trial; and to enable him under the state statute to arrest the proceedings *in limine*, if he can, by proving that there is no probable cause for the accusation. That was the only 'issue' before the commissioner on this hearing."

The refusal of a committing magistrate to recognize an indictment as sufficient evidence of itself upon which to issue a warrant of commitment does not violate U. S. Rev. Stat. § 905, as respects the faith and credit to be given to "records and judicial proceedings of the courts of other states," as that statute does not apply, for the reasons, (1) that a grand jury is not a court; (2) that if it were, its proceedings, being *ex parte* and without notice to the defendant, are in no way binding upon him elsewhere; and (3) that the indictment as a record even in the court where found is not evidence of anything more than the finding of the grand jury. *Re Dana*, 68 Fed. 886. "The warrant against the defendant in that jurisdiction," said Judge Brown, "is, indeed, based upon the action and the finding of the grand jury, of which the indictment is evidence, because they are each parts of one constitutional proceeding for bringing the accused to trial; but on the trial there the averments of the indictment are not the least evidence against the accused; nor are they primary legal evidence in any independent proceedings elsewhere."

Evidence receivable on a hearing before a commissioner in proceedings for the removal of persons charged with crime to another district for trial is not to be strictly limited by the technical rules applicable upon the final trial. *United States v. Greene*, 108 Fed. 816; *Re Dana*, 68 Fed. 886.

And the same precision and formality that are required in indictments are not required in the complaint before the commissioner. Hence, an averment that the city of Washington, where the offense is stated to have been committed, is within the exclusive jurisdiction of the United States need not be made in the preliminary proceeding for the purpose of binding the prisoner over for trial previous to his removal to Washington for trial. *United States v. Price*, 84 Fed. 636.

The provision of the statute that the proceedings shall be "agreeable to the usual mode of process against offenders in such state" embraces in New York the preliminary examination usual in the state, including the taking of evidence, depositions, and the examination of witnesses, and the duty of the magistrate in finding probable cause; because, aside from this clause, there is no rule on those subjects; and it cannot have been intended that the proceed-

defendants have given a great deal of evidence tending to show that their contracts were fairly obtained, their work well and honestly done, and that the government has not been defrauded of a dollar.

"The government, on the other hand, has given evidence tending to a contrary conclusion, and it has shown beyond question that Captain Carter, the employee of the government and the engineer in immediate charge of the work on the government's behalf, had for several years immediately preceding the contracts referred to in the indictment received from the contractors continuously, through his father-in-law, in many divisions of profits, one third of the final net proceeds of each contract remaining for division among the chief contractors; and that this one third amounted in the aggregate to over \$700,000. *This, it is claimed, gives signifi-[255]

ings should be conducted arbitrarily, and without any rule at all. *Re Dana*, 68 Fed. 886. "In making this provision for an observance of the practice in use in the state where the arrest is made, it may be reasonably presumed," says Judge Brown in this case, "that the intention of the judiciary act was to prevent the hateful appearance of employing summary and arbitrary methods of removal, and to avoid creating prejudice against the new government which would be likely to be engendered through courses of procedure to which the people of the several states were not accustomed, and against which they had just successfully fought."

The question of the identity of an offender is a question of fact which a United States commissioner has full jurisdiction to decide for the purpose of removal. *Horne v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

As has already been noted (see *supra*, III.), only probable cause, and not certainty of guilt, is required to justify removal. It was doubtless for this reason that Chief Justice Marshall on an application to commit for trial, where the offense was said to have been completed, a person charged with treason in levying war against a nation with which the United States was at peace, refused to pass upon the defense that either the United States was actually at war with the foreign nation, or that the military expedition was dependent on war, and in the event of peace was to be converted into a settlement; and held that this was a question for the exclusive consideration of the jury. *United States v. Burr*, 2 Burr's Trials, 455, Fed. Cas. No. 14,694.

And in the same case Chief Justice Marshall refused on such application to determine the question raised by a preliminary defense made in the nature of a plea of *autrefois acquit* because of the doubt in his mind whether the plea was good or not, but said that were it clear that such plea should prevail it would certainly be improper for him to grant the application. *United States v. Burr*, 2 Burr's Trials, 455, Fed. Cas. No. 14,694.

V. Validity of removal warrants.

A warrant of removal is not invalid because it directs the prisoner to be held and delivered over for trial for the larceny of a part only of the property for whose larceny he was committed by the commissioner. *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84.

A warrant of removal which directs the marshal to remove the offender to another district, to be tried in said district upon such counts in

cance and meaning to many other facts in evidence showing a fraudulent and illegal combination between the defendants and Captain Carter to benefit themselves at the expense of the government, and to procure the allowance and payment of excessive and fraudulent bills by means of contracts fraudulently procured.

"A case presenting such circumstances is especially one that should be submitted to a jury trial. Nor need there be any apprehension that an impartial court and jury will not reach essential justice, or that, while guarding jealously the honor and interests of the government, they will not also appreciate the legitimate rights of the defendants, the peculiar difficulties, risks, and hazards of such contract work, the excellence and merit of that which is well done, and the rights of the defendants by legitimate business methods to lessen competition and to secure as favorable contracts as they can; and determine fairly whether the contracts in question were fraudulent, or obtained by illegal methods, or by a conspiracy with the engineer in charge to abuse the opportunities of his position in order to despoil the government and obtain exorbitant prices for their common benefit.

"Having found in the previous decision that the ninth and tenth counts of the indictment are good, whatever may be held as to the counts preceding them, the defendants should be ordered to be removed for trial, or to give bail for their due appearance." [108 Fed. §19.]

An order was thereupon made and the warrant signed by the judge on May 28, 1901, for the removal of the defendants to the southern district of Georgia. On June 8, 1901, the defendants were surrendered by their bail to the custody of the marshal, and on that day they presented their petition to the circuit court of the United States for the southern district of New York for a writ of habeas corpus, setting out the foregoing facts and the order for removal, which they alleged to be illegal and in violation of their constitutional rights. They also alleged in their petition that they were not in the state of Georgia at the time of the filing of the indictment, nor had they been since that time, and that while they were in New

York, and during *the pendency of the proceedings before the commissioner to obtain their removal to the state of Georgia, and while they were under bail in such proceedings in the southern district of New York, the United States district attorney of Georgia on March 5, 1900, in a letter written at Macon, Georgia, notified the attorneys of the defendants that the case would be called in the United States district court at Savannah on March 12, 1900, in order that the defendants in the indictment might appear and present and interpose any objections which they might desire to urge as to the impaneling of the grand jury which returned a true bill of indictment in their case, and such other objections as they might make to the validity of the indictment. The petition then proceeded as follows:

"That your petitioners are informed and believe, that he now claims and insists that because of your petitioners' failure to appear as above required, that they are barred and estopped in that court from questioning the illegality and validity of said alleged grand jury. If this contention be sustained, then, unless this court hears and passes on the said questions, these petitioners will be tried on the alleged indictment in said court in Georgia, although the fact is that such indictment was never found by any legally organized grand jury, but was presented and filed in court by a body of men purporting to be a grand jury in whose selection and drawing every statute of the United States relating thereto was disregarded and set at naught."

It was also stated in the petition that the petitioners were held for trial for an infamous crime, without the indictment of a grand jury and in violation of the rights secured to them by the Constitution of the United States; that notwithstanding the invalidity of the indictment and the other facts stated in the petition, the United States marshal for the southern district of New York detained the petitioners, and were about to remove them to the eastern division of the southern district of Georgia for trial upon the pretended indictment, and in pursuance of the proceedings had before the commissioner, and the warrant of removal issued thereupon by the district judge; that

the indictment now pending in said district as he can be legally tried upon, is not void for indefiniteness where there is at least one count in the indictment which is sufficiently specific. *Horner v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

VI. Right to discharge on denial of removal warrant.

In a number of cases the prisoner has been discharged on the denial of an application for a warrant of removal without invoking the writ of habeas corpus. *Re Corning*, 51 Fed. 205; *United States v. Lee*, 84 Fed. 626; *United States v. Karlin*, 85 Fed. 963; *Re Wood*, 95 Fed. 288.

And in *Re Wolf*, 27 Fed. 606, the court said that on an application for a warrant of removal the prisoners, if they should not be so removed, are entitled to a discharge, either by habeas corpus or without it.

The power of the district judge to order a discharge upon denying an application for a warrant of removal to another district for trial is said to be a necessary implication from the statute. *United States v. Lee*, 84 Fed. 626; *United States v. Brawner*, 7 Fed. 88.

And the only order that can be made on an application for removal of a person held under commitment for removal, where a proper case for removal is not made out, is one for the prisoner's discharge. *Re Wood*, 95 Fed. 288.

And it is proper for the district judge to determine, without invoking the writ of habeas corpus, the question whether the warrant for removal should issue, or the defendant be released and turned over to the custody of persons on his bond to answer an indictment in the state court so as to enable them to have him before the state court at the proper time. *Re James*, 18 Fed. 853.

the detention of the petitioners and their removal in pursuance of said proceedings and warrant were without authority of law, and *that they were restrained of their liberty in violation of the Constitution of the United States, and that any further proceedings in pursuance thereof, or the further detention or imprisonment of the petitioners, would be unlawful. They therefore asked for a writ of habeas corpus to inquire into the lawfulness of their imprisonment. After a hearing upon the petition, the circuit court denied the application and from the order denying the writ the defendants appealed to this court, which appeal was allowed and the defendant admitted to bail pending its decision.

Mr. David B. Hill argued the cause, and, with *Messrs. L. Laflin Kellogg, Abram J. Rose, and Alfred C. Petté*, filed a brief for appellants:

It is always open to the prisoner to show that no offense against the United States has been committed, or that the indictment is bad in form, or that the offense charged cannot be legally tried in the district of which removal is sought, or that it is outlawed, or equally triable where the offender resides and is found.

Re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; *Re Terrell*, 51 Fed. 213; *Re Doig*, 4 Fed. 193; *United States v. Brawner*, 7 Fed. 86; *United States v. Lee*, 84 Fed. 626.

It was also the right and the duty of the circuit court, by habeas corpus, to inquire into the question of jurisdiction of the district court of Georgia, and to discharge the appellants, if the proceedings taken against them in that court were without authority.

Horner v. United States, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

The courts of the United States have the right to interpose by writ of habeas corpus and discharge a prisoner when the proceedings taken against him have violated, or would infringe upon, his constitutional rights.

Ex parte Lange, 85 U. S. 163, 21 L. ed. 872; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781; *Ex parte Sawyer*, 124 U. S. 205, 31 L. ed. 403, 8 Sup. Ct. Rep. 482; *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *Ex parte Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672.

If any constitutional immunity of the appellants was violated in the removal proceedings, or will be violated by their removal to the state of Georgia for trial, the application for the writ was improperly denied, and the order denying the same is reviewable by direct appeal to this court.

See Act 1891, March 3, 26 Stat. at L. 826, chap. 517; *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713.

The offense with which these appellants are charged is an infamous crime.

Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Mackin v. United States*, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781.

Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Mackin v. United States*, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781.

In the prosecution of infamous crimes this court has vigorously upheld the provisions of the Constitution respecting the necessity of a presentment or indictment by a grand jury as an absolute prerequisite to the jurisdiction of the court to put the accused upon his trial.

Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Mackin v. United States*, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781.

The question of the legality of the grand jury should be decided by this court in this proceeding, and not left to be decided by the district court of Georgia upon the trial.

Re Terrell, 51 Fed. 213; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

The prisoner will be discharged upon habeas corpus before trial where it is made to appear that he cannot lawfully be tried for the offense with which he is charged.

Re Loney, 134 U. S. 372, *sub nom. Thomas v. Loney*, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; *Re Neagle*, 135 U. S. 1, *sub nom. Cunningham v. Neagle*, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Boske v. Comingore*, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Re Greene*, 52 Fed. 104.

In proceedings for removal, under U. S. Rev. Stat. § 1014, this court has held that it is the duty of the court, on habeas corpus, not only to inquire into the question of jurisdiction, but also into the sufficiency of the indictment.

Horner v. United States, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407. See also *Re Greene*, 52 Fed. 104.

Messrs. Marion Erwin and Solicitor General Richards argued the cause and filed a brief for appellee:

A certified copy of the indictment from the district court in Georgia was properly introduced in evidence.

United States v. McKee, 4 Dill. 5, Fed. Cas. No. 15,687; *United States v. Percheman*, 7 Pet. 85, 8 L. ed. 616.

A duly certified copy of an indictment is not only admissible, but has been held at least prima facie evidence of the facts alleged.

United States v. Haskins, 3 Sawy. 262, Fed. Cas. No. 15,322; *Re Alexander*, 1 Low. Dec. 530, Fed. Cas. No. 162; *United States v. Shepard*, 1 Abb. (U. S.) 431, Fed. Cas. No. 16,273.

Such certified copy is not inadmissible because it was signed in the name of the clerk by his deputy, and not by the clerk in person.

Garneau v. Dozier, 100 U. S. 7, 25 L. ed. 536; *Confiscation Cases*, 20 Wall. 111, *sub nom. United States v. Clarke*, 22 L. ed. 324. See also 7 Bacon, Abr. p. 316 L.

Nor because there is no certificate of the judge that such certificate is in due form as required by U. S. Rev. Stat. § 905, where records are certified from state courts for

use in evidence in other states, as it is obvious that this statute does not apply to records from the courts of the United States when presented to the United States courts, and it is not intended so to apply.

Embry v. Palmer, 107 U. S. 9, 27 L. ed. 348, 2 Sup. Ct. Rep. 25.

The judge of the district court of the United States for the southern district of New York is as competent to determine whether the certificate to an indictment from the district court of the United States for the southern district of Georgia is in due form as would be the judge of the latter district.

Mewster v. Spalding, 6 McLean, 24, Fed. Cas. No. 9,513.

A certified copy of the indictment with evidence of its identity is sufficient for removal.

Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Re Belknap*, 96 Fed. 614; *United States v. Haskins*, 3 Sawy. 262, Fed. Cas. No. 15,322; *Ex parte Alexander*, 1 Low. Dec. 530; *United States v. Shepard*, 1 Abh. (U. S.) 431, Fed. Cas. No. 16,273.

[257] *Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court:

It will be noted that the proceeding leading up to the warrant for the removal of the defendants to Georgia for trial was inaugurated in the southern district of New York by the sworn deposition of an assistant of the United States district attorney for the southern district of New York, in which deposition it was alleged that an indictment had been found against the defendants in the United States district court in Georgia, a certified copy of which indictment was attached to and made a part of the deposition. Upon the written charge thus made, the United States commissioner in New York issued his warrant for the arrest of the defendants, who upon being notified immediately appeared before him and an examination was proceeded with. Upon this examination the commissioner refused to receive evidence offered by the defendants tending to show a want of probable cause, and held that the certified copy of the indictment found in the district court of Georgia was conclusive evidence of probable cause, and accordingly made an order committing the defendants to the custody of the marshal until a warrant for their removal should issue by the United States district judge for

[258] the southern district of *New York. Upon application to the district judge for such warrant he held that the indictment was not conclusive evidence of probable cause, and sent the case back to the commissioner (*United States v. Greene*, 100 Fed. 941) to hear evidence on that subject. On subsequent hearings before the commissioner evidence *pro* and *con* as to probable cause was given and also as to the drawing of the grand jury, and that officer decided that "after full and fair examination touching the charges in the annexed warrant named, it appears

from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained." And he thereupon for the second time committed the defendants to the marshal's custody to await a warrant of removal to be signed by the district judge. When the application for the warrant of removal was made to that judge he held that a proper case was made out, and signed the order for removal.

From these facts it is apparent that the question is not before us whether the finding of an indictment is in a proceeding under § 1014 of the Revised Statutes conclusive evidence of the existence of probable cause for believing the defendant in the indictment guilty of the charge therein set forth. The district judge in this case held that it was not, and sent the case back to the commissioner, before whom evidence was thereafter taken upon the subject, and a decision arrived at after considering all the evidence in the case. We are not, therefore, called upon to express an opinion upon the question. Upon all the evidence taken before the commissioner he has found that probable cause existed. We think that a fair interpretation of the language used by the district judge in granting the application for the warrant of removal shows beyond question that, from the evidence taken before the commissioner, the judge was of opinion that there existed probable cause, and that the defendants should therefore be removed for trial before the court in which the indictment was found.

When the judge refers to the testimony taken before the commissioner, although he does in terms say that he expresses no opinion upon the merits, yet he states that, upon the evidence before him, it is a proper case to be submitted to a jury for *trial. [259] That is in effect a finding of probable cause, which is not necessarily a finding that the persons charged are guilty. The meaning to be gathered from the language of the judge is that while there is evidence on the part of the government tending to show the guilt of the accused, there is also evidence on the part of the defendants tending to show their innocence, and that the determination of the question in such a complicated case should properly be left to a jury. He says that he has carefully considered the very extended briefs and arguments of counsel, and has examined the voluminous evidence, with a view of ascertaining whether there was competent evidence before the commissioner sufficient in itself to sustain his finding of probable cause, and he, in substance, finds there was, and grants a warrant for the removal of the defendants. This is perfectly consistent with the further statement made by him that he did not express any opinion whatsoever on the merits of the case. That is, he did not express an opinion whether upon all the evidence the defendants ought to be convicted or acquitted of the charge. He was not called upon to do so. It was sufficient, if all the evidence being taken into account, there existed such

probable cause for believing the defendants guilty as to warrant their removal for trial of the offense charged. This is not expressing an opinion upon the merits, although the language of the judge is sufficient as expressing the existence of probable cause against the defendants.

The evidence which was taken before the commissioner, and which was before the district judge upon the question of the existence of probable cause, was not annexed to the petition, and forms no part of the proceeding before the circuit court upon the application for the writ of habeas corpus. Whether that evidence was or was not sufficient for the commissioner to base his action upon, or for the district judge to approve, was not a question before the circuit judge, and is not before this court. We must assume, in the absence of the evidence taken before the commissioner and approved by the district judge, that their finding of probable cause was sustained by competent evidence, bearing in mind also that on this [260] proceeding the court *would not in any event look into the weight of evidence on that question.

It is urged, however, that the offense charged, and upon which defendants are to be removed, is that which is contained in the indictment only, and if the indictment be insufficient for any reason, that then there is no offense charged for the trial of which the defendants can properly be removed to another district.

It is not a condition precedent to taking action under § 1014 of the Revised Statutes that an indictment for the offense should have been found. *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84; circuit court of appeals, second circuit, June, 1898. In this case there was a sworn charge prima facie showing the commission of an offense against the United States, cognizable by the district court of the United States for the southern district of Georgia. To substantiate the charge a certified copy of an indictment found in the Georgia court was produced, and in addition evidence was given before the commissioner which, as he found, showed probable cause for believing that the defendants were guilty of the offense charged in his warrant. If there were any uncertainty or ambiguity in the indictment, the evidence given upon the hearing before the commissioner may have cleared it up. We cannot assume that it did not, and, on the contrary, if such uncertainty in the indictment did exist, we must assume that the evidence did clear up such uncertainty, or otherwise the commissioner would not have granted his warrant for removal, nor would his decision have been approved by the district judge.

The finding of an indictment does not preclude the government under § 1014 from giving evidence of a certain and definite character concerning the commission of the offense by the defendants in regard to acts, times, and circumstances which are stated in the indictment itself with less minuteness and detail, and the mere fact that in the in-

dictment there may be lacking some technical averment of time or place or circumstance in order to render the indictment free from even technical defects, will not prevent the removal under that section, if evidence be given upon the hearing which supplies such defects and *shows probable cause [261] to believe the defendants guilty of the commission of the offense defectively stated in the indictment. It follows, also, that a decision granting a removal under the section named, where an indictment has been found, is not to be regarded as adjudging the sufficiency of the indictment in law as against any objection thereto which may subsequently be made by the defendants. That is matter for the tribunal authorized to deal with the subject in the other district. We do not, however, hold that when an indictment charges no offense against the laws of the United States, and the evidence given fails to show any, or if it appear that the offense charged was not committed or triable in the district to which the removal is sought, that the court would be justified in ordering the removal, and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. In that case there would be no jurisdiction to commit nor any to order the removal of the prisoner.

Upon this writ the point to be decided is, whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question whether, upon the merits, he ought to have made it is not one which can be reviewed by means of the writ of habeas corpus.

Jurisdiction upon that writ in such a proceeding as this does not extend to an examination of the evidence upon the merits. The matter for adjudication is similar to that which obtains in cases of international extradition. In such case, if there is competent legal evidence on which the commissioner might base his decision, it is enough, and the decision cannot be reviewed in this way. *Bryant v. United States*, 167 U. S. 104, *sub nom. Ex parte Bryant*, 42 L. ed. 94, 17 Sup. Ct. Rep. 744. There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged.

We do not think that under this statute the commissioner would be warranted in taking evidence in regard to the organization of the grand jury which found the indictment, as claimed by the defendants. The indictment is valid on its face; *purports to [262] have been found by a grand jury acting in fact as such at a regular term of a district court of the United States, presided over by one of its judges and hearing testimony in the ordinary way. In our opinion, such an indictment is prima facie good, and when a copy of it is certified by the proper officer, a magistrate, acting pursuant to § 1014 of the Revised Statutes, is justified in treating the instrument as an indictment found by

a competent grand jury, and is not compelled or authorized to go into evidence which may show or tend to show violations of the United States statutes in the drawing of the jurors composing the grand jury which found the indictment.

We agree with the district judge, that matters of that nature are to be dealt with in the court where the indictment is found, and we intimate no opinion upon the merits of those questions. Whether the defendants have waived the right to raise them, or whether they could waive the same, are also questions that are not before us. They must be raised before and decided by the United States court sitting in the southern district of Georgia, in the first instance, and we express no opinion as to their validity.

We do not think that by this order of removal the constitutional rights of the defendants are in anywise taken from them. The provision that no person may be held to answer for an infamous crime unless upon the presentment or indictment of a grand jury is not violated or infringed. If this so-called indictment be void for the reasons alleged, the place to set up its invalidity is the court in which it was found. The provision is certainly not violated when, under a proceeding such as this, upon a sworn complaint and upon evidence under oath which both magistrates have found to amount to probable cause, an order has been made for removing the defendants to the court within whose jurisdiction the offense is charged to have been committed and where all the defenses of the parties may be set forth in due and orderly manner and the judgment of the court obtained thereon.

The order denying the application for the writ is affirmed.

[263]

*THE KENSINGTON.

(See S. C. Reporter's ed. 263-277.)

Carriers—steamship ticket—stipulations against public policy—conflict of laws.

1. Restrictions of the liability of a steamship company for its own negligence or failure of duty toward a passenger, being against the public policy enforced by the courts of the United States, will not be upheld, though the ticket was issued and accepted in a foreign country and contained a condition making it subject to the law thereof, which sustains such stipulations.
2. A stipulation in a steamship passenger's

NOTE.—On limitation of liability by carriers for injuries to passengers or their personal baggage—see note to *Clark v. Geer*, 32 C. C. A. 301.

As to the validity of contracts exempting carriers from liability for their own negligence or that of their servants—see note to *Chicago, M. & St. P. R. Co. v. Solan*, 42 L. ed. U. S. 688. And see *Ballou v. Earle* (R. I.) 14 L. R. A. 433, and note.

On the right to limit common-law liability of carrier by contract in the absence of negligence—see note to *Little Rock & Ft. S. R. Co. v. Cravens* (Ark.) 18 L. R. A. 527.

190

ticket, which compels him to value his baggage at a certain sum, far less than it is worth, or, in order to have a higher value put upon it, to subject it to the provisions of the Harter act, by which the carrier would be exempted from all liability therefor from errors in navigation or management of the vessel or other negligence, is unreasonable and in conflict with public policy.

3. An arbitrary limitation of 250 francs for the baggage of any steamship passenger, unaccompanied by any right to increase the amount by adequate and reasonable proportional payment, is void as against public policy.

[No. 15.]

Argued January 17, 1901. Decided January 6, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree affirming a decision sustaining a limitation of the liability of a steamship company for a passenger's baggage. *Reversed.*

See same case below, 36 C. C. A. 533, 94 Fed. 885.

Statement by Mr. Justice White:

*The libel by which this action was commenced sought to recover the value of passengers' baggage which it was alleged the ship had wrongfully failed to deliver. The facts essential to be borne in mind, in order to approach the questions arising for decision, are as follows:

The International Navigation Company, a New Jersey corporation, on December 6, 1897, at the office of its Paris agency, issued to Mrs. and Miss Bleecker, the wife and daughter of an officer of the United States Navy, a steamer ticket for a voyage from Antwerp to New York on the Kensington, a steamer in the control of the company, advertised to sail from Antwerp on December the 11th. The ticket was delivered to Mrs. Bleecker, who at the time made part payment of the passage money. The baggage of the two passengers was shipped by rail to Antwerp, to the care of the agent of the company there. Mrs. Bleecker, at Antwerp, on the 10th of December, paid the remainder of the passage money, and it was entered on the ticket. The baggage having in the meanwhile been received, the charges which the agent at Antwerp had advanced were refunded and a receipt was issued. It was stated therein that the value of the baggage was unknown, and that it was shipped subject to the con-

On the validity of agreements to restrict carrier's liability—see notes to *Deming v. Merchants' Cotton-Press & Storage Co.* (Tenn.) 13 L. R. A. 518; *Missouri P. R. Co. v. Ivey* (Tex.) 1 L. R. A. 500; *Hartwell v. Northern Pacific Exp. Co.* (Dak.) 3 L. R. A. 342; *Richmond & D. R. Co. v. Payne* (Va.) 6 L. R. A. 849; *Adams Exp. Co. v. Harris* (Ind.) 7 L. R. A. 214; *Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 452; *Gulf, C. & S. F. R. Co. v. Gatewood* (Tex.) 10 L. R. A. 419, and *Pacific Exp. Co. v. Foley* (Kan.) 12 L. R. A. 799.

ditions contained in the company's steamer ticket and bill of lading. Mrs. Bleecker and her daughter embarked, and the steamer sailed on the 11th of December. The ticket was subsequently taken up by the purser.

The baggage was stowed in what was known as number 2, upper steerage deck. The voyage was an exceptionally rough one, the ship, encountering heavy seas and winds, rolled from 38 to 45 degrees on either side during the height of the gale, and was obliged to heave to for about fifteen hours. On arrival at New York the baggage was found to be totally destroyed. By constant shifting it had been reduced to an almost unrecognizable mass, was commingled with debris of broken china and straw, and covered with water. The first was occasioned by stowing crates of china in the same compartment. The presence of the water was explained by the fact that an exhaust pipe which passed through the compartment had [265] been *broken by the shifting of the contents of the compartment, and hence the exhaust escaped into the compartment.

There is no possible view which can be taken of the facts by which the loss of the baggage was brought about, by which the ship could be held responsible if the steamer ticket was in and of itself a complete contract, and all the conditions or exceptions legibly printed on the face thereof were lawful. The ticket was signed by the agent of the company at Paris, was countersigned by the agent at Antwerp, but was not signed by either Mrs. Bleecker or her daughter. One of the conditions printed on the ticket provided that there should be no liability to each passenger, "under any circumstances," beyond the sum of 250 francs, "at which such baggage is hereby valued," unless an increased value be declared and an additional sum paid as provided by the condition.

There was no proof tending to show that at the time the ticket was issued the attention of Mrs. Bleecker or her daughter was called to the fact that it embodied exceptional stipulations relieving the company from liability, or that such conditions were agreed to, except in so far as a meeting of minds on the subject may be inferred from the fact of the delivery of the ticket by the company, and its acceptance, and that it contained on its face, in small but legible type, among others, the stipulations which are relied upon. The testimony of Mrs. Bleecker and her daughter was that when the ticket was received it was put aside without reading it, and that it was not subsequently examined before it was delivered to the ship's officer. The district court held that the loss of the baggage was attributable to bad stowage; that the ticket and the conditions printed on it were a contract binding upon the parties, so far as the conditions were lawful. The conditions generally relieving from liability for negligence were held to be void, but the stipulation as to the value of the baggage was held valid; recovery was allowed only for the 183 U. S.

equivalent of 250 francs to each. 88 Fed. 331.

On appeal the circuit court of appeals for the second circuit affirmed the judgment. 36 C. C. A. 533, 94 Fed. 885.

The case by the allowance of a writ of certiorari is here for review.

Mr. Roger Foster argued the cause and filed a brief for petitioners:

Attempts to relieve the ship owner from liability for the negligence of his servants, against the public policy of this country, should be disregarded by our courts.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

It makes no difference that the contract provided that questions arising thereunder were to be settled according to the Belgian law.

Botany Worsted Mills v. Knott, 27 C. C. A. 326, 51 U. S. App. 467, 82 Fed. 471; *The Glenmavis*, 69 Fed. 472; *The Iowa*, 50 Fed. 561; *The Guildhall*, 58 Fed. 796; *The Brantford City*, 29 Fed. 373; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508; *Curtis v. Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 271; *Merchants' Bank v. Spalding*, 12 Barb. 302; *Dacey, Confl. L. Moore's notes*, 581; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106; *Bliss v. Brainard*, 41 N. H. 256; *Woodward v. Roane*, 23 Ark. 523; *Castleman v. Jeffries*, 60 Ala. 380; *Davis v. Bronson*, 6 Iowa, 410; *Ohio Ins. Co. v. Edmondson*, 5 La. 295.

Nor that the contract should be construed by the laws of Belgium; nor would it have made a difference if the negligence had occurred in Belgium.

The Trinacria, 42 Fed. 863; *Bactjer v. La Compagnie Générale Transatlantique*, 59 Fed. 789.

The attempted limitation of liability for baggage, to the sum of 250 francs, is unreasonable and ineffectual.

New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; *The Majestic*, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597; *Ecels v. St. Louis, K. & N. W. R. Co.* 52 Fed. 903; *Kellerman v. Kansas City, St. J. & C. B. R. Co.* 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *St. Louis, A. & T. R. Co. v. Robbins* (Tex. App.) 14 S. W. 1075; *Southern P. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. 815; *Alabama G. S. R. Co. v. Little*, 71 Ala. 611; *Moses v. Hamburg-American Packet Co.* 88 Fed. 329. See also *New York, N. H. & H. R. Co. v. Sayles*, 32 C. C. A. 485, 58 U. S. App. 18, 87 Fed. 444; *Schwarzchild v. National S. S. Co.* 74 Fed. 257; *McFadden v. Missouri P. R. Co.* 92 Mo. 343, 4 S. W. 689; *Glovinsky v. Cunard S. S. Co.* 4 Misc. 266, 24 N. Y. Supp. 136.

General language limiting the liability for loss or damage to goods shipped upon an agreed valuation does not apply to a case

where the goods were lost by the negligence of the carrier or his servants, unless such negligence was especially mentioned and excepted in the contract.

Savannah, F. & W. R. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219; *Georgia R. & Bkg. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287; *Orndorff v. Adams Exp. Co.* 3 Bush, 194; *Jacobson v. Adams Exp. Co.* 1 Ohio C. C. 381; *Weiller v. Pennsylvania R. Co.* 134 Pa. 310, 19 Atl. 702; *Rawson v. Pennsylvania R. Co.* 48 N. Y. 212, 8 Am. Rep. 543.

The Harter act (27 Stat. at L. 445, chap. 105) invalidates all the stipulations upon which the claimant relies.

Knott v. Botany Worsted Mills, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30; *The Carib Prince*, 170 U. S. 655, *sub nom. Wuppermann v. The Carib Prince*, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753.

If the receipt and ticket amount to a contract, they are bills of lading or shipping documents. If they do not constitute a contract, the stipulations recited in them are not binding upon the libellant.

Planters' Fertilizer Mfg. Co. v. Elder, 42 C. C. A. 130, 101 Fed. 1001; *Foster v. Colby*, 28 L. J. Exch. N. S. 81; Porter, Bills of Lading, § 1; *Cope v. Cardova*, 1 Rawle, 203; *Benedict. American Admiralty*, § 286.

Mr. Henry Galbraith Ward argued the cause, and Messrs. Robinson, Biddle, & Ward filed a brief for respondent:

The limitation of the amount of the carrier's liability must be regarded as a part of the contract, and therefore the question of its reasonableness, provided only it is not against public policy, does not arise.

The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597.

Such a limitation is not against public policy.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

[266] *Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The district court held, although the condition of the weather might account for the shifting of the baggage, that result could also have arisen from its bad stowage; and, in the absence of all proof by the ship that the baggage had been properly stowed, when such proof was peculiarly within its reach, the loss must be presumed to have arisen from the imperfect stowage. The circuit court of appeals, while in effect agreeing to this conclusion, in addition found that there was proof in the record tending to sustain the conclusion that the baggage had been improperly stowed, and that no proof even tending to rebut this testimony had been offered by the company. As in the argument at bar the conclusion of the court below on this subject was not seriously questioned, we content ourselves with saying that, as a matter of fact, we find them to be sustained, and therefore pass from their further consideration.

The loss of the baggage being, then, attributable to improper stowage, the ques-

tion is, Was the vessel relieved from the consequence of its fault by the exceptions contained in the passenger ticket? The district court decided "that a ticket of the character above described for a transatlantic passage is a unilateral contract, and, like a bill of lading, is binding upon the person who receives it, so far as its provisions are reasonable and valid." In other words, the court held, although there was no proof of the meeting of the minds of the parties upon the subject of exceptional limitations to be imposed upon the contract of carriage, the receipt and retention of the ticket implied a unilateral contract embracing the exceptions found in legible characters on the face of the ticket. And being thus a part of the express and written contract, the exceptions would be enforced, provided they were just and reasonable. The circuit court of appeals in effect approved these views of the district court.

*While, apparently, the question whether there was a unilateral contract necessarily arises first for consideration, such is not the case when the situation of the record is taken into view. For should we, in disposing of this question, determine that the rulings of the court below as to the unilateral contract were correct, we would not thereby be relieved from deciding whether the conditions embodied in the contract were valid. On the other hand, should we conclude that the conditions relied on were void, there will be no occasion to determine the question of contract. We hence invert the logical order of consideration, and first come to determine whether the conditions enumerated in the ticket relieved from the responsibility otherwise resulting from the bad stowage of the baggage. In doing so we shall, of course, assume, for the purpose of this branch of the case only, that the conditions relied upon were a part of a unilateral contract, and were binding as far as they were just and reasonable. It is apparent if the carrier, in transporting the baggage, was governed by the act of February 13, 1893, designated as the Harter act, any provision in the ticket exempting from liability for fault in loading or stowage was void because inhibited by the express provisions of the statute. 27 Stat. at L. 445, chap. 105. As, however, the view which we take of the conditions expressed in the ticket will be equally decisive, whether or not the Harter act concerns the carriage of passengers and their baggage, it becomes unnecessary to intimate any opinion as to whether the provisions of the act in question apply to such contracts. The exceptions found on the face of the ticket upon which the carrier depends are as follows:

"(c) The shipowner or agent are not under any circumstances liable for loss, death, injury, or delay to the passenger or his baggage arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the seas, rivers, or navigation, accidents to or of machinery, boilers, or

steam, collisions, strikes, arrest, or restraint of princes, courts of law, rulers, or people, or from any act, neglect, or default of the shipowner's servants, whether on board the steamer or not, or on board any other vessel belonging to the shipowner, either in mat-
 [268]ters aforesaid *or otherwise howsoever. Neither the shipowner nor the agent is under any circumstances, or for any cause whatever or however arising, liable to an amount exceeding 250 francs for death, injury, or delay of or to any passenger carried under this ticket. The shipowner will use all reasonable means to send the steamer to sea in a seaworthy state and well-found, but does not warrant her seaworthiness.

“(d) The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket, beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of 1 per cent, or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading, in use from the port of departure.”

It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 507, 44 L. ed. 560, 565, 20 Sup. Ct. Rep. 385, and *Knott v. Botany Worsted Mills*, 179 U. S. 69, 71, 45 L. ed. 90, 93, 21 Sup. Ct. Rep. 30, where the previously adjudged cases are referred to, and the principles by them expounded are restated.

True it is that by the act of February 13, 1893 (27 Stat. at L. 445, chap. 105), known as the Harter act, already adverted to, the general rule just above stated was modified so as to exempt vessels, when engaged in the classes of carriage coming within the terms of the statute, from liability for negligence in certain particulars. But while this statute changed the general rule in cases which the act embraced, it left such rule in all other cases unimpaired. Indeed, in view of the well-settled nature of the general rule at the time the statute was adopted, it
 [269]must result that legislative *approval was by clear implication given to the general rule as then existing in all cases where it was not changed.

Testing the exemptions found in the ticket by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel for all neglect in loading or
 183 U. S. U. S., Book 46.

stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or his servants. And seeking to accomplish these results, it is equally plain that the conditions were void if their legality be considered solely with reference to the modifications of the general rule created by the act of 1893. *Knott v. Botany Worsted Mills*, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30. As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that “all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made,” it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. Story, Conf. L. §§ 38, 244. While, as said in *Knott v. Botany Worsted Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, the question arose whether conditions exempting a *carrier from responsibility for
 [270]loss caused by the neglect of himself or his servants could be enforced in the courts of the United States, the bill of lading having been issued in New York by a British ship for goods consigned to England. Despite the fact that conditions exempting from responsibility for loss arising from negligence were valid by the laws of New York, and would have been upheld in the courts of that state, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the states of the Union. Nor is the suggestion that because there is no statute expressly prohib-

iting such contracts, and because it is assumed no offense against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion. The precise question has been carefully considered and decided in the district courts of the United States. In *The Guildhall*, 58 Fed. 796, it was held that a stipulation in a bill of lading issued at Rotterdam on goods destined to New York, exempting the carrier from liability for negligence, would not be enforced in the courts of the United States, although such a condition was valid under the law of Holland. In *The Glenmavis*, 69 Fed. 472, the same rule was applied to a bill of lading issued in Germany by a British ship, for goods consigned to Philadelphia. Indeed, by implication the question is controlled by statute. We have previously pointed out, under the assumption that the Harter act does not apply to the carriage of the baggage of a passenger, that such law in effect affirms the rule of public policy as previously existing in the cases, where no change was made. But that act expressly prohibits carriers engaged in the business which it regulates [271] from contracting, *even in a foreign country, for a shipment to the United States, to relieve themselves from negligence in cases where the statute does not do so. *Knott v. Botany Worsted Mills*, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30. The theory, then, by which alone the conditions relied on in this case can be enforced, despite the public policy which governs, in the courts of the United States, reduces itself to this: Carriers who transact a class of business where they are exempt by law, in many cases, from the consequences of the neglect of themselves or their servants, may not overthrow public policy by contracts made in a foreign country for a shipment to the United States; but carriers who are in no case exempt by the law from the consequence of their neglect may do so. But this amounts in last analyses to this: The lesser the immunity from negligence the greater the power to avoid the consequences of negligence.

The general exemptions from responsibility for negligence which the ticket embodies being controlled by the rule enforced in the courts of the United States, and being therefore void, because against public policy, we come to consider the particular provisions contained in the ticket with reference to the value of the baggage and the limit of recovery, if any, arising therefrom.

In *New York, C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 27, 25 L. ed. 531, 533, it was said:

"It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for

baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage *without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies."

In *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, the facts were as follows: A bill of lading was issued for a number of horses, and the instrument was signed, not only by the carrier, but also by the shipper. By the express provisions of the bill of lading the right to recover for each horse was limited to a specified sum. The horses were injured while in transit by the neglect of the employees of the company, and recovery was sought for a much larger amount than the value fixed in the bill of lading. The court in its opinion stated that it must be assumed that the rate of freight and the declared valuation had a due relation one to the other, and that if a greater value had been declared, a higher and not unreasonable charge for the carriage would have been made. It was conceded that the carrier was liable for the value of the horses as stated in the bill of lading, but the controversy was whether the limit affixed in the bill of lading should not be disregarded and a much larger sum, which it was asserted was the actual value of the horses, be awarded on the ground that the loss was begotten through the negligence of the carrier. The court, after reviewing the prior cases and explicitly reaffirming the doctrine that conditions were void, because against public policy, by which a carrier was relieved from the consequences of the negligence of himself or his servants, said (p. 340, L. ed. p. 721, Sup. Ct. Rep. p. 156):

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be *repugnant to the soundest principles of fair deal-

ing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

It was decided that the carrier was responsible, but his liability was limited to the value expressly agreed upon in the bill of lading. Did the conditions in the steamer ticket in the case at bar come within the principle announced in either of the foregoing cases?

One of the conditions reiterated in various forms in the bill of lading is as follows:

"The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket, beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of 1 per cent, or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading, in use from the port of departure."

The requirement, then, was that the baggage of the passenger must be valued at 250 francs, and no more than that sum could be recovered under any circumstances, unless any excess of amount be declared and a named percentage on the increased value be paid, and unless the passenger agreed to ship his baggage as cargo and take a bill of lading for it. Now the only theory upon which it can be assumed that the law of 1893, the Harter act, does not apply to the carriage of the baggage of a passenger, is that the statute in question only relates to merchandise shipped as cargo; and for which a bill of lading is taken. The requirement, therefore, if the passenger desired to value his baggage at a greater sum than 250 francs, was that he must ship it in such a manner as to bring it within the terms of the Harter act. This obvious meaning of the condition is stated and insisted on in the brief in behalf of the carrier, where it is said:

"The ticket in this case certainly does not fall within the words 'bill of lading or shipping document,' used in §§ 1, 2, and 4 of the Harter act. These are expressions perfectly well understood in commerce, and apply to bills of lading covering trade shipments, which are almost invariably insured. That Congress meant by the words 'bill of lading or shipping document' but one thing, namely, bill of lading, appears from the refusing to issue on demand 'the bill of lading herein provided for,' and does not mention the words 'shipping document' at all.

"On the other hand, for personal baggage accompanying the passenger no bill of lading or shipping document is, so far as we know, ever given. If the libellants had intended their personal baggage to fall within the provisions of the Harter act, they could have accomplished it, as provided in the ticket itself, by declaring the value of

the baggage over 250 francs, paying freight on the excess, and getting a bill of lading."

The passenger, then, was subjected to the inevitable alternative of having no recourse whatever for his baggage beyond the value of 250 francs, unless he agreed that he would subject it to the Harter act. But if that law was made applicable its provisions controlled, and therefore the carrier became entitled to all the benefits of the 3d section of the act, exempting from all loss or damage resulting from faults or errors in navigation or in the management of the vessel, and for other causes which are specified in the section in question. To make this exaction was consequently but in effect to demand that the passenger agree, as a prerequisite to any increased valuation of his baggage, to subject it to a risk of loss brought about by the negligence of the carrier, when otherwise the baggage would not have been submitted to risk arising from such neglect,—an obvious requirement exempting the carrier from the consequences of his own negligence. On the other hand, if the assumption be indulged in that the baggage of the passenger was within the purview of the Harter act, a stipulation embodied in another provision of the ticket, relieving the carrier under any and every circumstance from every conceivable neglect of his servants, "either in matters aforesaid or otherwise howsoever," was a plain violation of the prohibitions contained in the 2d section of the Harter act. It follows, if the Harter act *did not apply to the baggage of a pas-[275] senger, the stipulation which compelled the passenger, if he wished to value his baggage, to agree to subject it to that act, was an illegal effort on the part of the carrier to relieve himself from liability for his negligence. If this result is escaped by treating the baggage of the passenger as within the scope of the Harter act, then there are provisions found in the ticket which are void, because they contain stipulations for immunity from negligence which are in direct conflict with the prohibitions of that act. Indeed, the conditions contained in the ticket seem to have been devised—at all events, they lend themselves to the inference that they were devised—to so operate as to keep the baggage of the passenger outside of the scope of the Harter act, in order to avoid the provisions of that act forbidding the insertion of certain conditions as to negligence, and that when this result was obtained to immediately secure the bringing of the passenger's baggage within the influence of the act for the purpose of enabling the carrier to enjoy the immunity from negligence which that act accords in certain cases. We think the conditions were unjust and unreasonable and void because in conflict with public policy, and if the considerations which have led us to this conclusion be for a moment put aside, it is far from clear that other conditions contained in the ticket would not, from another point of view, lead to the same result. In addition to the exaction with which the right to state an excess of value over 250 francs

was burdened, the ticket contains a provision to the effect that, whatever be the value of the baggage, under no circumstances will the carrier be liable for the neglect of himself or his servants. Giving effect, then, to all the provisions of the ticket, it may be doubted whether it does not result from them that not only was the baggage, when valued at 250 francs, but also when valued at any increased amount, subjected to any and every risk arising from the negligence of the carrier or his servants.

It remains only to consider whether, although the conditions found in the ticket be void because against public policy, recovery for the baggage lost must be limited to the sum of 250 francs because of the statement [276] of that amount in one of the *provisions of the ticket. It is to be doubted whether in reason it can be said that the limit as fixed in the ticket can be separated from the context in which it is found, and be deemed to be an independent valuation fixed by the parties, irrespective of the right to name an increased sum stated in the same provision of the ticket which contains the valuation. But if it can be treated as a separate valuation, unaccompanied by the conditions attached to it, and from which it takes its origin, then the question is this: Is it just and reasonable for a transatlantic carrier to put an absolute limit of 250 francs, about the equivalent of \$50, as the value of the baggage of a cabin passenger, whether first or second class, and to refuse, except upon illegal conditions, to allow any greater sum to be carried as baggage? In *The Majestic*, 166 U. S. 378, 41 L. ed. 1040, 17 Sup. Ct. Rep. 597, the liability of the ship for baggage was under consideration. No contention was made that the ticket was not a contract, but the question was whether the conditions printed on the back were a part of the assumed contract, and, if so, were they valid. One of the conditions limited recovery to £10 for each passenger, unless a greater sum was declared and paid for. The right to declare the larger value was not burdened with the illegal condition found in the ticket now under consideration. Had it been otherwise, the requirement would not have had the same significance, as the ticket considered in *The Majestic* was issued prior to the adoption of the Harter act, and therefore, whether the baggage was carried as such or as cargo, it would have equally enjoyed an immunity from loss brought about by the negligence of the carrier or his servants. The ticket considered in *The Majestic*, as does the one now before us, allowed a capacity of "20 cubical feet of luggage for each person." The court in *The Majestic*, commenting on the restriction to £10 for each passenger, said it was a (p. 386, L. ed. p. 1043, Sup. Ct. Rep. p. 602) "limitation which, we must say, does not strike us as exactly reasonable, in view of the '20 cubical feet of luggage which the company had expressly contracted to carry.' . . ." It was decided in *The Majestic* that, even on the hypotheses of a contract evidenced by the ticket, the conditions on

the back were not binding. The present case does not require us to decide whether the sum of 250 francs *would be a reasonable [277] limit if the right to fix a larger amount was not encumbered with the illegal and arbitrary conditions which are here presented. We express no opinion on such question. Manifestly, what is a reasonable maximum amount when a larger value is allowed to be carried as baggage by paying an additional compensation is a different question from what is a reasonable amount where the right to declare and pay for a larger sum is refused, or, what is equivalent thereto, is permitted only upon condition that the passenger subjects himself to conditions which are void as against public policy. Indeed, the circuit court of appeals adverted, in its opinion in this case, to the suggestion made in *The Majestic*, and said that the limit of 250 francs was reasonable because of the right given the passenger to increase the amount by paying a larger but reasonable compensation. As we hold that no such right was allowed because its enjoyment was burdened with conditions which were void because against public policy, the only reason upon which the justness of the limit was sustained ceases to apply.

In view of the nature and duration of the voyage, of the circumstances which may be reasonably deemed to environ transatlantic cabin passengers, and the objects and purposes which it may also be justly assumed the persons who undertake such a voyage have in view, we think the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void. It is therefore unnecessary to decide whether the ticket delivered and received under circumstances disclosed by the record gave rise to a contract embracing the exceptions to the carrier's liability which were stated on the ticket. We intimate no opinion on the subject.

The decree below must be reversed, and the cause remanded to the District Court, with directions to ascertain the actual damage sustained by the libellants, and to enter a decree in their favor for the amount of such damages, with interest and costs.

And it is so ordered.

*ALEXANDER E. ORR and Others, *Plffs.* [278]
in *Err.*,
v.

THEODORE P. GILMAN, Comptroller of the State of New York, and Bird S. Coler, Comptroller of the City of New York.

(See S. C. Reporter's ed. 278-290.)

Constitutional law—transfer tax—error to state court—construction of state statute—impairing obligation of contract.

1. None of the provisions of U. S. Const. 14th Amend. are infringed by the provision of the

NOTE.—On succession and collateral inheritance taxes—see notes to *Re Romaine* (N. Y.)

New York transfer-tax law for taxation of the exercise of the power of appointment derived from the disposition of property, made either before or after the passage of that act, as though the property belonged absolutely to the donee of the power and had been bequeathed or devised by him by will, although construed by the highest court of the state to apply to the exercise by a son among his children of a power of appointment given him in the will of his father, who, under the law as it stood at the time of his death, had a legal right to transfer by will his property to such appointees, without any limitation then imposed upon the exercise of that right.

2. A determination by a state court that under the tax law of the state it is the execution of a power of appointment which subjects the grantees under it to the transfer tax is not reviewable in the Supreme Court of the United States.
3. A transfer or succession tax, not being a direct tax upon property, but a charge upon the privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt from taxation by statute, impair the obligation of a contract.
4. A transfer tax law which is construed as subjecting to taxation remainders created by a will before the precedent estates terminate and the remainders vest in possession is not in violation of U. S. Const. 14th Amend.

[No. 351.]

Argued November 25, 26, 1901. Decided January 6, 1902.

IN ERROR to the Surrogate's Court of the County of New York, State of New York, to review a judgment entered after the affirmance by the Court of Appeals of an order and judgment of the Appellate Division of the Supreme Court, which affirmed an order of the surrogate assessing a transfer tax. *Affirmed.*

Statement by Mr. Justice **Shiras**:

David Dows, Sr., a citizen and resident of the city and state of New York, died March 30, 1890, leaving a last will and testament, which was duly admitted to probate by the surrogate's court of New York county on April 14, 1890. The will provided that the legal title to the property mentioned and described in the 6th clause thereof should vest in the executors' names as trustees during the lifetime of testator's son, David Dows, Jr., with power to manage and control the same, and with the duty to pay the net income therefrom to said David Dows, Jr. The will further provided that upon the death of David Dows, Jr., the property should vest absolutely and at once in such of his children him surviving and

the issue of his deceased children as he should by his last will and *testament designate and appoint, and in such manner and upon such terms as he might legally impose. In and by the 8th clause or paragraph of his said will, David Dows, Sr., devised and bequeathed the legal title to his residuary estate to his executors as trustees, to hold and manage the same, one-eighth part in trust during the lifetime of testator's widow and one eighth in trust for each of testator's seven children—one of whom was the said David Dows, Jr. It was made the duty of the trustees to pay over the net income to the respective persons named during their respective lives, and it was provided that, upon the death of each of said persons, the said one-eighth part of the residuary estate, with any accumulations and profits, should vest absolutely and at once in such of his or her children, or the issue of such children, as he or she might by his or her last will and testament designate and appoint, and in such manner and upon such terms as he or she may legally impose. It was provided in both the 6th and 8th clauses that if the legatee for life shall die intestate, then the property should vest absolutely and at once in his or her children surviving, share and share alike.

David Dows, Jr., died January 13, 1899, leaving a last will and testament, which was duly admitted to probate by the surrogate's court of Westchester county, New York, by the 3d paragraph or clause whereof, in the exercise of the power of appointment given him in his father's will, he provided that the property mentioned and described in the said 6th and 8th clauses of the will of David Dows, Sr., should vest upon his death in his three children, David, Robert, and Kemeth, in a manner therein described.

On October 31, 1900, Bird S. Coler, comptroller of the city of New York, and Theodore P. Gilman, comptroller of the state of New York, filed a petition in the surrogate's court of New York county, in which, after reciting the foregoing facts, they alleged that the transfer of funds and property of which David Dows, Jr., had the life use, and over which he had exercised the power of appointment given him in his father's will, was taxable, and they therefore prayed for the appointment of a transfer-tax appraiser, in order that the transfer tax *might be duly assessed and imposed. Thereupon Charles K. Lexow was so appointed, and on January 31, 1901, after having given notice to the said comptrollers and to the executors and trustees of the last will of David Dows, Sr., and to the executors of the last will of David Dows, Jr., and to the guardians of the minor

12 L. R. A. 401, and Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

On the construction and effect of state laws and Constitutions and state decisions in regard to the same—see note to Elmendorf v. Taylor, 6 L. ed. U. S. 290.

On Federal jurisdiction over state courts; necessity of Federal question—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267, and Kipley v. Illinois ex rel. Akin, 42 L. ed. U. S. 998.

183 U. S.

As to what is a Federal question; when considered—see note to Re Buchanan, 39 L. ed. U. S. 884.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey (Vt.) 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna v. Citizens' Trust & Surety Co. 24 C. C. A. 20, and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. 35 C. C. A. 12.

children of David Dows, Jr., the appraiser filed in the surrogate's office a report of his valuation of the interests of the three sons of David Dows, Jr., under the respective wills of their father and grandfather. Certain exceptions to this report were filed on behalf of the executors and guardians, the nature of which will hereafter appear. Thereafter, on February 15, 1901, the surrogate, on the basis of the report of the said appraiser, assessed a transfer tax of upwards of \$7,000 against each of the respective interests of the three sons of David Dows, Jr. The exceptions to the appraiser's report and to the assessment were, on March 6, 1901, after argument by counsel, overruled; and the surrogate entered the following order and judgment:

"It is ordered, adjudged, and decreed that said report and order so appealed from be and they are hereby affirmed, and that the date when the transfers now taxed were effected was January 13, 1899, that date being fixed because it was the date of the death of David Dows, Jr., the donee of the power contained in the will of David Dows, Sr."

An appeal was taken from the order and decree of the surrogate to the appellate division of the supreme court of New York, and by that court, on March 22, 1901, the order of the surrogate was affirmed. On appeal duly taken, the court of appeals of the state of New York, on May 17, 1901, affirmed the order and judgment of the appellate division of the supreme court, and the judgment of the said court of appeals and the record of the proceedings were remitted into the surrogate's court of New York, to be enforced according to law, and the judgment of the court of appeals was on May 28, 1901, made the judgment and order of the surrogate's court. And on June 13, 1901, a writ of error to that judgment was allowed, and the cause was brought to this court.

Mr. Horace E. Deming argued the cause, and, with **Mr. Julius Henry Cohen**, filed a brief for plaintiffs in error:

Each grandchild at the instant of the grandfather's death had a vested future estate whose actual possession and enjoyment could be defeated only by their death before the death of the parent.

Campbell v. Stokes, 142 N. Y. 23, 36 N. E. 811.

The existence or exercise of a power of appointment does not change either the source or the time of the transfer of title. The property passes by the will or deed of the owner of it (the creator of the power), and necessarily at the date of that instrument.

Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368; *Com. v. Williams*, 13 Pa. 29; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; *Re Seaman*, 147 N. Y. 74, 41 N. E. 401.

The tax under the power of appointment is a tax upon property.

Re Vanderbilt, 163 N. Y. 597, 57 N. E.

1127; *Re Cope*, 191 Pa. 1, 45 L. R. A. 316, 43 Atl. 79; *Re Stanford*, 126 Cal. 112, 45 L. R. A. 788, 58 Pac. 462; *Hinds v. Wilcox*, 22 Mont. 4, 55 Pac. 355; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160.

All property which was real estate at the time of the transfer continues, as to the lineal descendants of the transferor, to be real estate though such descendants may not enter into possession and enjoyment of the property until years after the transfer and the character of the property has in the meantime been converted into cash or securities.

Re Sutton, 3 App. Div. 208, 38 N. Y. Supp. 277, Affirmed in 149 N. Y. 618, 44 N. E. 1128.

Mr. Jabish Holmes, Jr., argued the cause, and, with **Mr. Edgar J. Lévey**, filed a brief for defendants in error:

The court of appeals has construed this power of appointment amendment as imposing a tax on succession at the time it vests in actual possession, and not on property.

Re Vanderbilt, 163 N. Y. 597, 57 N. E. 1127, Affirming 50 App. Div. 246, 63 N. Y. Supp. 1079; *Re Dows*, 167 N. Y. 227, 52 L. R. A. 433, 60 N. E. 439.

The decisions of a state court upon the construction of its own statute are final, and are adopted by this court, without regard to this court's opinion upon its correctness.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. —, 22 Sup. Ct. Rep. 26; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863; *First Nat. Bank v. Ayres*, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; *State Railroad Tax Cases*, 92 U. S. 617, 23 L. ed. 674; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Columbus Southern R. Co. v. Wright*, 151 U. S. 475, 38 L. ed. 241, 14 Sup. Ct. Rep. 396; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 425, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114; *Forsyth v. Hammond*, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261.

The construction adopted by the court of appeals is in harmony with all of its previous decisions, which hold the tax to be one on succession, and not on property.

Re Hoffman, 143 N. Y. 329, 38 N. E. 311; *Re Swift*, 137 N. Y. 88, 18 L. R. A. 709, 32 N. E. 1096; *Re Harbeck*, 161 N. Y. 218, 55 N. E. 850; *Re Bronson*, 150 N. Y. 6, 34 L. R. A. 238, 42 N. E. 707; *Re Merriam*, 141 N. Y. 484, 37 N. E. 517.

The same construction that the tax is on succession, and not on property, has been adopted by this court.

Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774; *Murdock v. Ward*, 178 U. S. 139, 44 L. ed. 1009, 20 Sup.

Ct. Rep. 775; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The 14th Amendment does not give this court power to review an act simply because the appellants regard it as harsh.

Mobile County v. Kimball, 102 U. S. 703, 26 L. ed. 238; *King v. Mullins*, 171 U. S. 436, 43 L. ed. 226, 18 Sup. Ct. Rep. 925; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *Sinking Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 436.

In taxation "due process of law" is not violated, if the act provides for notice and an opportunity to object.

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 537, 40 L. ed. 251, 16 Sup. Ct. Rep. 83; *Palmer v. McMahon*, 133 U. S. 669, 33 L. ed. 776, 10 Sup. Ct. Rep. 324; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

The act does not abridge the privileges or immunities of citizens of the United States. This provision of the 14th Amendment has no relation to taxation, but relates only to rights conferred by the national government.

Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929.

"Equal protection of the laws" does not prohibit classification for taxation, provided the classification is reasonable, and all within the same class are treated the same under like circumstances.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

A person has no vested right in a rule of the common law, and it can be changed without violating the 14th Amendment.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Cooley*, Const. Lim. 5th ed. p. 440; *State Railroad Tax Cases*, 92 U. S. 607, 23 L. ed. 671.

A fiction can be abrogated without violating the 14th Amendment; for example, that the "situs of a debt follows the domicile of the owner."

Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 27, 35 L. ed. 618, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The succession law can be made retroactive, if the law clearly shows that it was intended to apply to past successions.

Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127. See also *Wright v. Blakeslee*, 101 U. S. 174, 25 L. ed. 1048; *Wilcox v. Smith*, 26 L. J. Ch. N. S. 596; *Atty. Gen. v. Middleton*, 3 Hurlst. & N. 125.

Nontaxable securities can be appraised in determining the value of the succession created by the exercise of the power.

Plummer v. Coler, 178 U. S. 115, 44 L. 183 U. S.

ed. 998, 20 Sup. Ct. Rep. 774, Affirming 161 N. Y. 631, 57 N. E. 1122; *Murdock v. Ward*, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; *Re Sherman*, 153 N. Y. 1, 46 N. E. 1032; *Re Knoedler*, 140 N. Y. 380, 35 N. E. 601.

*Mr. Justice Shiras delivered the opinion [281] of the court:

This is the case of a so-called transfer tax imposed under the laws of the state of New York. The various contentions of the plaintiffs in error, attacking the validity of the tax, were overruled by the courts of the state, and the cause is now before us on the general proposition that by the proceedings the plaintiffs in error, or those whom they represent as trustees and guardians, have been deprived of the equal protection of the laws of the state of New York, their privileges and immunities as citizens of the United States have been abridged, and their property taken without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and likewise, as to a portion of the property affected, in violation of § 10 of article 1 of the Constitution of the United States.

The first question presented arises out of subdivision 5 of § 220 of the tax law of the state of New York, which reads as follows:

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable, under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though [282] the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." [Laws of 1897, chap. 284.]

This enactment became a law on April 16, 1897. David Dows, Sr., died March 30, 1890, leaving a will containing a power of appointment to his son, David Dows, Jr., which will was duly admitted to probate by the surrogate's court on April 14, 1890. David Dows, Jr., died on January 13, 1899, leaving a will in which he exercised the power of appointment given him in the will of his father, and apportioned the property which was the subject of the power among his three sons, who are represented in this litigation by the plaintiff in error.

It is claimed that under the law of the state of New York as it stood at the time of

his death, in 1890, David Dows, Sr., had a legal right to transfer, by will, his property, or any interest therein, to his grandchildren, without any diminution or impairment then imposed by the law of the state upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred; and that the subsequent law, whose terms have been above transcribed, operates to diminish and impair those vested rights. In other words, it is claimed that it is not competent for the state, by a subsequent enactment, to exact a price or charge for a privilege lawfully exercised in 1890, and to thus take from the grandchildren a portion of the very property the full right to which had vested in them many years before.

We here meet, in the first place, the question of the construction of the will of David Dows, Sr. Under and by virtue of that will did the property whose transfer is taxed pass to and become vested in the grandchildren, or did the property not become vested in them until and by virtue of the will of David Dows, Jr., exercising the power of appointment? The answer to be given to this question must, of course, be that furnished us by the court of appeals in this case (*Re Dows*, 167 N. Y. 227, 52 L. R. A. 433, 60 N. E. 439):

[283] "Whatever be the technical source of title of a grantee under a *power of appointment, it cannot be denied that, in reality and substance, it is the execution of the power that gives to the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the state, which it may tax or charge for, it follows that the rights of a testator to make a will or testamentary instrument is equally a privilege, and equally subject to the taxing power of the state. When David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself; that is, for the privilege of succeeding to property under a will."

It will be perceived that in putting this construction upon the will of David Dows, Sr., the court of appeals not merely construed the words of the will, but, by implication, applied to the case the provisions of the subdivision 5 of § 220 under which the transfer tax in question was imposed, and thus construed that tax law, and affirmed its validity.

While it is settled law that this court will follow the construction put by the state courts upon wills devising property situated within the state, and while it is also true that we adopt the construction of its own statutes by the state courts, a question

may remain whether the statute, as so construed, imports a violation of any of the rights secured by applicable provisions of the Constitution of the United States. And such is the contention here.

This court has no authority to revise the statutes of New York upon any grounds of justice, policy, or consistency to its own Constitution. Such questions are concluded by the decision of the legislative and judicial authorities of the state.

In *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127, the question arose as to the validity, in its Federal aspect, of a law of the state of Pennsylvania imposing an inheritance tax on personal *property which [284] had passed into the possession of an executor before the passage of the act, and which was held by him for the purpose of distribution among the legatees, who were collateral relatives to the decedent. The act was held valid by the supreme court of the state, and was brought up to this court by a writ of error, where it was contended that such an act was in its nature an *ex post facto* law, which took the property of an individual to the use of the state, because of a fact which had occurred prior to the passage of the law; and also that the law, in its retroactive effect, impaired the obligation of a contract, in that it was alleged to absolve the executor from his contract, implied in law, to pay over the legacies to those entitled to them, just to the extent that the law required him to pay to the state. The opinion of the court, delivered by Mr. Justice Campbell, was in part as follows:

"The validity of the act as affecting successions to open after its enactment is not contested; nor is the authority of the state to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is that the application of the act of 1826 by that of 1850 to a succession already in the course of settlement, and which had been appropriated by the last will of decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of that amount for the uses of the state; that the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were nonresidents, and the property taxed was also beyond the state; and that the state has employed its power over the executor and the property within its borders to accomplish a measure of wrong and injustice; that the act contains the imposition of a forfeiture or penalty, and is *ex post facto*.

"It is in some sense true that the rights of donees under a will are vested at the death of the testator, and that the acts of administration which follow are conservatory means directed by the state to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism, and perhaps censure. *But, until the period for dis-[285]

tribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities, and administrative control prescribed by the state in the interests of public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If the state, during this period of administration and control by its tribunals and their appointees, think fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it. *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472. . . .

"The act of 1850, in enlarging the operation of the act of 1826 and by extending the language of that act beyond its legal import, is retrospective in its form; but its practical agency is to subject to assessment property liable to taxation, to answer an existing exigency of the state, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And, as the supreme court [of Pennsylvania] has well said, 'in establishing its peculiar interpretation, it (the legislature) has only done indirectly what it was competent to do directly.' But if the act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fiscal imposition, this court could not pronounce it to be an *ex post facto* law within the 10th section of the 1st article of the Constitution. The debates in the Federal convention upon the Constitution show that the terms '*ex post facto* laws' were understood in a restricted sense relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Madison Papers, 1399, 1450, 1579. This signification was adopted in this court shortly after its organization, [286] in opinions *carefully prepared, and has been repeatedly announced since that time. *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162, 8 Pet. 88, 8 L. ed. 876, 11 Pet. 421, 9 L. ed. 774."

It is true that this case was decided before the adoption of the 14th Amendment, but we think it correctly defines the limits of jurisdiction between the state and Federal governments, in respect to the control of the estates of decedents, both as they were regarded before, and have been regarded since, the adoption of the 14th Amendment. It has never been held that it was the purpose or function of that amendment to change the systems and policies of the states
183 U. S.

in regard to the devolution of estates, or to the extent of the taxing power over them.

In *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930, it was stated by the present Chief Justice that—

"The 14th Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states; and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394."

It was said in *De Vaughn v. Hutchinson* (165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461) that "it is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances."

In *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873, the proposition was again announced as one requiring only to be stated, that the law of a *state [287] in which land is situated controls and governs its transmission by will, or its passage in case of intestacy; and that in this court the local law of a state is the law of that state, as announced by its court of last resort.

In *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 17 Sup. Ct. Rep. 594, the validity of a law of the state of Illinois imposing a legacy and inheritance tax, the rate progressing by the amount of the beneficial interest acquired, was assailed in the courts of Illinois as being in violation of the Constitution of that state requiring equal and uniform taxation. The state court having decided that the progressive feature did not violate the Constitution of that state, the case came to this court upon the contention that the establishment of a progressive rate was a denial both of due process of law and of the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution. But these contentions were held by this court to be untenable.

See, likewise, *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774, wherein were considered the nature of inheritance-tax

laws and the extent of the powers of the states and of Congress in imposing and regulating them.

In the light of the principles thus established we are unable to see in this legislation of the state of New York, as construed by its highest court, any infringement of the salutary provisions of the 14th Amendment. There are involved no arbitrary or unequal regulations prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the state, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation.

But it is further urged that the tax law of the state of New York, § 221, expressly exempts from taxation or charge all real estate passing to lineal descendants by descent or devise, and all such descendants so taking title to real estate from ancestors; and it is said that under the interpretation of this law by the courts of the state of New York all property which *was real estate at the time of the death of the person owning it continues, as to the lineal descendants, to be real estate, and is therefore exempt from taxation, though such descendants may not enter into possession and enjoyment of the property until years after the death of the ancestor who owned it, and the property in the meantime has been converted into cash or securities.

It is true that the property described in the 6th paragraph of the will of David Dows, Sr., was real estate, but under the powers conferred in the will of David Dows, Sr., the trustees had converted the real estate, and held the proceeds as personal property, before the death of David Dows, Jr., and it was this personal property which became vested in the grandchildren under the exercise of the power of appointment. The court of appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. Nor are we able to perceive that thereby the plaintiffs in error were deprived of any rights under the Federal Constitution. The rule of law laid down by the New York courts is applicable to all alike, and even if the view of the court of appeals respecting the question was wrong, it was an error which we have no power to review.

Another objection made to the judgment of the court of appeals affirming the surrogate's order is that the tax imposed upon transfers made under a power of appointment is a tax upon property, and not on the right of succession; and that, as a portion of the fund was invested in incorporated companies liable to taxation on their own capital, and in certain bonds of the state of New York, and in bonds of the city of New

York exempt by statute from taxation, such exemption formed part of the contract under which said securities were purchased, and the tax imposed and the proceedings to enforce it were in violation of § 10 of article 1 of the Constitution of the United States forbidding the states to pass laws impairing the obligation of contracts.

The court of appeals overruled the proposition that the *transfer tax in question was a tax upon property, and not upon the right of succession, and held that when David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will, and that the charge is the same in character as if it had been laid on the inheritance of the estate of the son himself; that is, for the privilege of succeeding to property under a will.

In reaching this conclusion the court of appeals cited, not only various New York cases, but several decisions of this court, the principles of which were thought to be applicable. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Murdock v. Ward*, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775.

We think it unnecessary to enter upon another discussion of a subject so recently considered in the cases just cited and that it is sufficient to say that, in our opinion, the court of appeals did not err when it held that a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States.

A further contention is made that the legatees or devisees of the remainders created by the will of David Dows, Jr., are not legally subject to taxation until the precedent estates terminate and the remainders vest in possession.

The court of appeals held that the doctrine invoked had no application to the remainders given to the sons of David Dows, Jr.; that they are absolute, and not subject to be divested, or to fail in any contingency whatever; that by statute they are alienable, devisable, descendible, and if the property were real estate, they could be sold on execution against their owners; that by the aid of the table of annuities, upon the faith of which large sums are constantly distributed by the courts, the present value of these remainders is capable of ready computation; and that therefore they are subject to present taxation.

These views of the court of appeals must be accepted by us as accurate statements of the law of the state; and though it is claimed in the brief of counsel for the plaintiffs in error that such a construction of the

transfer-tax law brings it into conflict with the 14th Amendment of the Constitution of the United States, we are unable to approve such a contention. The subject dealt with is one of state law expounded by state courts. The laws and the construction put upon them apply equally to all persons in a like situation, and cannot be regarded as conflicting with the provisions of the Federal Constitution. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

Other contentions made in the brief of counsel for the plaintiffs in error seem, so far as our jurisdiction is concerned, to be phases of those heretofore considered, and thereby disposed of.

The judgment of the Court of Appeals of the state of New York affirming the judgment of the Surrogate's Court of New York County is affirmed.

Mr. Justice **Harlan** concurs in the result.

JOHN SCHRIMPSCHER *et al.*, *Plffs. in Err.*,
v.

JOHN S. STOCKTON *et al.*

(See S. C. Reporter's ed. 290-299.)

Ejectment—limitation of actions—land patented to incompetent Indian—color of title.

1. The heirs of a Wyandotte Indian to whom, as an incompetent, was allotted a tract of land, under the treaty of January 31, 1855, between the United States and the Wyandotte Indians, are bound to institute ejectment against those claiming to hold such land adversely under a grant from such incompetent within the period specified by the statute of limitations, after the date of ratification of the treaty of February 23, 1867, removing all restrictions upon sales of lands patented to incompetent Wyandottes which should thereafter be made.
2. Conceding that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statute, they lose such immunity when their relations with their tribe are dissolved by accepting allotments of land in severalty under a treaty which provides that the organization and relation of such Indians with the United States as an Indian tribe shall be dissolved and terminated on the ratification of such treaty, and that such Indians shall be deemed to be citizens of the United States, and entitled to all rights, privileges, and immunities as such.
3. A deed executed by an Indian patentee under the treaty of January 31, 1855, between the United States and the Wyandotte Indians, valid upon its face, in which the grantor covenanted that he was seised in fee simple, had good right to sell the same, that it was free

from encumbrance, and that he would warrant and defend the title unto the grantees against the claims of all persons,—constitutes color of title in the grantees, who paid value therefor and had no notice of any defect in the title of their grantor, although the patentee was classed as an incompetent under such treaty, and took under a patent which provided that the land should never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior.

4. The failure of the Secretary of the Interior to confirm or avoid a sale of land by an incompetent Indian in violation of the treaty of January 31, 1855, between the United States and the Wyandotte Indians, does not prevent the statute of limitations from beginning to run against the right of his heirs to maintain ejectment against his grantees at the date of ratification of the treaty of February 23, 1867, removing all restrictions upon sales of land patented to incompetent Wyandottes which should thereafter be made, and authorizing the Secretary of the Interior to investigate and confirm or avoid such sales theretofore made.

[No. 19.]

Argued November 22, 1901. Decided January 6, 1902.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment affirming a judgment for plaintiff in an action of ejectment in the Court of Common Pleas of Wyandotte County, Kansas. *Affirmed.*

See same case below, 58 Kan. 758, 51 Pac. 276.

Statement by Mr. Justice **Brown**:

*This was an action of ejectment brought [291] in the court of common pleas of Wyandotte county, Kansas, by John Schrimpscher and about forty others, heirs of one Carey Rodgers, deceased, a Wyandotte Indian, against John S. Stockton and ten others, to recover a tract of land which had been allotted to certain Wyandotte Indians under the treaty of 1855.

Answers were filed by three of the defendants, containing general denials of the allegations of the petition, and pleas both of a three-year and a fifteen-year state statute of limitations.

To these answers plaintiffs filed a reply to the effect that the ancestor of the plaintiffs, from whom they derived title by descent, was an incompetent Indian, and classed as such under the treaty between the United States and the Wyandotte tribe of Indians, concluded January 31, 1855, and, as such incompetent, was prohibited from alienating any of the lands in controversy, except only the power to lease the same for the term of two years; that defendants and those under whom they claim were bound by the same prohibition, and could have acquired nothing further than such leasehold interest in the land; that defendants occupied such lands in subordination to the rights of plaintiffs' ancestor, and that no notice had ever been brought home to plaintiffs of an adverse claim by defendants.

NOTE.—As to what title or interest will support an action of ejectment—see *Hancock v. McAvoy* (Pa.) 18 L. R. A. 781, and note.

On titles derived from Indian sources—see *Briggs v. Sample* (C. C. D. Kan.) 10 L. R. A. 132, and note.

A jury having been waived and the case submitted to the court, judgment was rendered for the defendants. An appeal was taken to the supreme court of the state, which affirmed the judgment of the lower court. 58 Kan. 758, 51 Pac. 276. Whereupon plaintiffs sued out a writ of error from this court.

Mr. William M. Springer argued the cause, and, with *Messrs. James M. Mason* and *Charles H. Nearing*, filed a brief for plaintiffs in error:

Plaintiff being an Indian is not subject to the statute of limitations.

McGannon v. Straightledge, 32 Kan. 524, 4 Pac. 1042; *Sheldon v. Donohoe*, 40 Kan. 346, 19 Pac. 901; *O'Brien v. Bugbec*, 46 Kan. 1, 26 Pac. 428; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *The Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket v. Johnson*, 18 L. ed. 667; *Smith v. Stevens*, 10 Wall. 321, 19 L. ed. 933.

The deed under which defendants hold does not constitute sufficient color of title to enable them to claim adverse possession.

Gibson v. Chouteau, 13 Wall. 99, 20 L. ed. 536; *Irvine v. Marshall*, 20 How. 558, 15 L. ed. 994; *Gibbs v. Consolidated Gas Co.* 130 U. S. 412, 32 L. ed. 985, 9 Sup. Ct. Rep. 553; *Livingston v. Peru Iron Co.* 9 Wend. 511; *Taylor v. Brown*, 5 Dak. 343, 40 N. W. 525; *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979; *Libby v. Clark*, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045; *Smythe v. Henry*, 41 Fed. 705; *Deffeback v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

No title by prescription or limitation under any state statute could be acquired as against the right of the Secretary of the Interior to investigate and modify or declare void the conveyance in question; hence the statute of limitation could not begin to run, if at all, until after such action by the Secretary of the Interior.

Gibson v. Chouteau, 13 Wall. 99, 20 L. ed. 536.

The delay of the government in acting on the property in question is a matter for which plaintiffs are not responsible.

Ibid.

No brief was filed for defendants in error.

[292] ***Mr. Justice Brown** delivered the opinion of the court:

This case turns upon the proper construction of article XV. of a treaty with a number of tribes of Indians, including "certain Wyandottes," concluded February 23, 1867, and proclaimed October 14, 1868. 15 Stat. at L. 513, 517.

The facts of the case are substantially as follows:

On January 31, 1855 (10 Stat. at L. 1159), the United States entered into a treaty with the Wyandotte Indians, by the second article of which they ceded to the United States certain lands purchased by them of the Delawares, the object of which cession was that "the said lands shall be

subdivided, assigned, and reconveyed by a patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation, in severalty." By the third article provision was made for a survey of the lands, the appointment of commissioners to divide the lands among the individuals of the tribe, and to make up lists of all the individuals and members of the tribe, "which lists shall exhibit, separately, first those families, the heads of which the commissioners, after due inquiry and consideration, shall be satisfied are sufficiently intelligent, competent, and prudent to control and manage their affairs and interests, and also all persons without families; second, those families, the heads of which are not competent and proper persons to be intrusted with their shares of the money payable under this agreement; and, third, those who are orphans, idiots, or insane." Article four provided for the issue of unconditional patents in fee simple to those reported by the commissioners to be competent to be intrusted with the control and management of their affairs and interests; "but to those not so competent the patents shall contain an express condition that the lands are not to be sold or alienated for a period of five years; and not then, without the express consent of the President of the United States first being obtained," etc.

*Margaret C. Cherloe was a Wyandotte Indian of the competent class, and as such she was given, under the treaty of 1855, allotment No. 42, to 64 acres of the land originally sued for, and received a patent therefor in fee simple, without restriction as to conveyance. This patent was dated June 1, 1859.

After the issue of such patent, and prior to August 31, 1863, Margaret C. Cherloe died intestate, leaving her grandson, Carey Rodgers, as her only heir at law; and on August 31, 1863, the said Carey Rodgers made a deed in fee simple of the land so inherited to Jesse Cooper and Mary E. Stockton.

Carey Rodgers, being himself a Wyandotte Indian, belonging to the incompetent class by reason of being an orphan, was given allotment No. 278, containing 57 acres, and on September 1, 1859, received a patent for said lands containing the following condition: "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being, and with the further and express condition, as specified in the 4th article of the treaty with the Wyandottes of the 31st of January, 1855, that the lands are not to be sold or alienated for a period of five years."

On November 15, 1864, the said Carey Rodgers executed a deed in fee simple of this last-mentioned land to Jesse Cooper and Mary E. Stockton, covenanting that he was seised in fee simple, and had good right to sell the same.

On February 25, 1869, by a partition of that date by Jesse Cooper and his wife and Mary E. Stockton and her husband, there

was conveyed to Mary E. Stockton the lands sued for in this action and described in the petition. Defendants took title from her.

The said Carey Rodgers died intestate in December, 1867, at the age of twenty-one.

[294]

Immediately after the execution of the deeds from Carey Rodgers to Jesse Cooper and Mary E. Stockton, the grantees took possession of all the land described in said deeds under claim of title and ownership by virtue of said deeds, made permanent improvements thereon, and they and their grantees have *had and held open, undisturbed, and adverse possession of all of said lands, claiming title thereto, paid all taxes, cleared the land of timber, and cultivated the same as tenants.

In the years 1891 and 1892 there was a kind of occupancy of part of the land by persons claiming under the plaintiffs, but that does not seem to have been treated as material.

Carey Rodgers thus became possessed of two tracts of land, one of 64 acres as the heir at law of his grandmother Margaret C. Cherloe, and the other of 57 acres as a personal allotment to himself. As plaintiffs state that a settlement of the case has been made so far as relates to the Cherloe tract, we shall dismiss that tract from our opinion. The deed of Carey Rodgers's own allotment of November 15, 1864, was clearly void, since as to this contract, at least, he was incompetent, and took under a patent which provided that the land should never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior. If the case stood upon defendants' rights under this deed alone, there could be no doubt whatever that Rodgers's heirs were entitled to the land.

But on February 23, 1867, another treaty was concluded (proclaimed October 14, 1868) with several tribes of Indians, among which were "certain Wyandottes" (15 Stat. at L. 513), the 15th article of which was as follows:

"Art. 15. All restrictions upon the sale of lands assigned and patented to 'incompetent Wyandottes under the fourth article of the treaty of one thousand eight hundred and fifty-five shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetents shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution, or order, or for taxes, until voluntarily sold by the patentee or his or her heirs, with the approval of the Secretary of the Interior; and whereas many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of one thousand eight hundred and fifty-five, it is agreed that a thorough examination and report shall be made under direction of the Secretary of the Interior, in order to

[295]

ascertain the facts relating *to all such cases; and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be

183 U. S.

paid, or declare such sales entirely void, as the very right of the several cases may require."

This article makes the following distinct provisions:

1. It removes all restrictions upon the sales of lands patented to incompetent Wyandottes, which should thereafter be made.

2. It provides that no sales of lands theretofore assigned to incompetents shall be made under any legal proceedings, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of the Interior.

3. That as to lands theretofore sold by incompetents in violation of the treaty of 1855 a thorough examination and report shall be made under the directions of the Secretary of the Interior, in order to ascertain the facts relating to such cases; and upon examination of such report and a hearing of the parties the Secretary may confirm such sales, require an additional amount to be paid, or declare the sales void.

No action was ever taken under the 3d clause to procure a confirmation by the Secretary of the Interior of the deed by Rodgers of November 15, 1864, so that, at the time the treaty of 1868 was ratified, the possession of the lands was in the defendants or their grantors holding adversely to the heirs of Rodgers, but the title still remained in such heirs by reason of the fact that his deed to Cooper and Stockton was void, and no proceeding had been taken under the 3d clause of article XV. to confirm or validate it. But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee or his heirs, the treaty of 1868, which took effect after his death, removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee Rodgers or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers and his heirs. *McGannon v. Straightlege*, 32 Kan. 524, 4 Pac. 1042; *Sheldon v. Donohoe*, 40 Kan. 346, 19 Pac. 901.

*Their disability terminated with the [296] ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unencumbered title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute (whether the limitation be three or fifteen years), since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years.

Plaintiffs, however, seek to avoid the effect of the statute by insisting, first, that

statutes of limitations do not run against Indians; second, that defendants were not in possession under color of title, and therefore the statute is not available to them; third, that no title by limitation could be acquired as against the right of the Secretary of the Interior to investigate and declare the conveyance in question to be void, and hence the statute would not begin to run until after such action by the Secretary.

1. Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix v. Patrick*, 145 U. S. 317, 330, 36 L. ed. 719, 725, 12 Sup. Ct. Rep. 862, 36 Fed. 457, 461; *Swartzel v. Rogers*, 3 Kan. 374; *Blue-Jacket v. Johnson County*, 3 Kan. 299; *Wiley v. Keokuk*, 6 Kan. 94; *Ingraham v. Ward*, 56 Kan. 550, 44 Pac. 14, they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty. Now, the very first article of the treaty of 1855 provides: "Art. 1. The Wyandotte Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated that their organization and their relations with the United States, as an Indian tribe, shall be dissolved and terminated on the ratification of this agreement; except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification, the [297] said *Wyandotte Indians, and each and every of them, except as hereinafter provided, shall be deemed and are hereby declared to be citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges, and immunities of such citizens; and shall in all respects be subject to the laws of the United States and of the territory of Kansas, in the same manner as other citizens of said territory; and the jurisdiction of the United States and of said territory shall be extended over the Wyandotte country in the same manner as over other parts of said territory." There was an immaterial exception not necessary to be noticed here.

It seems, however, that this provision did not prove entirely satisfactory to some of the Indians, who regretted their emancipation and the loss of the protection of the government; and in the treaty of 1868 there was incorporated in the preamble a recital that "a portion of the Wyandottes, parties to the treaty of 1855, although taking lands in severalty, have sold said lands, and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization, while others who did become citizens are unfitted for the responsibilities of citizenship; and . . . have just claims against the government, which will enable the portion of their people herein referred to to begin anew a tribal existence;" therefore it was agreed by article thirteen that the United

States would set apart for the Wyandottes certain land ceded by the Senecas, in order to provide for these Indians, and would make a register of all who declared their desire to be and remain Indians in a tribal condition, who should thereafter constitute the tribe.

It is sufficient to say of this that it could not apply to Carey Rodgers personally, since he died before the treaty was ratified; and there is no evidence that his heirs ever elected to resume their tribal relations and to become again members of the incompetent class. As article XV. removed all restrictions upon the sale of lands by incompetents if the heirs of Carey Rodgers took the position that the article did not apply to them, they assumed the burden of proving that fact.

2. Plaintiffs' assertion that defendants were not in possession *under color of title is [298] untenable. They had taken possession under a deed executed by Rodgers November 14, 1864, which was valid upon its face, made by one having title to the land, and in which the grantor covenanted that he was seised in fee simple, had good right to sell the same; that it was free from encumbrance, and that he would warrant and defend the title unto the grantees against the claims of all persons. The court finds that the defendants and their grantors acted in good faith in making the purchase of said lands and in taking this deed, by which we understand that they paid a valuable consideration, and had no actual notice of any defect in the title of their grantor. It is true that if the grantees had examined the Rodgers patent they would have discovered the restraint upon his alienation of the land, but it is too much to say that a deed valid upon its face, and taken in good faith for a valuable consideration, without actual notice of the facts, does not give color of title. Color of title was defined by this court in *Wright v. Mattison*, 18 How. 50, 56, 15 L. ed. 280, 283, "to be that which in appearance is title, but which in reality is no title." Said Mr. Justice Daniel: "The courts . . . have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith." See also *Beaver v. Taylor*, 1 Wall. 637, 17 L. ed. 601; *Cameron v. United States*, 148 U. S. 301, 307, 37 L. ed. 459, 461, 13 Sup. Ct. Rep. 595. There was no evidence in this case, except from the patent, that the grantees even knew that Rodgers was an Indian, as was the case in *Taylor v. Brown*, 5 Dak. 344, 40 N. W. 525, much less that he belonged to the incompetent class; and they apparently received the deed, as many people do, without a careful examination of the grantor's title. In Kansas possession without paper title seems to be sufficient. *Gilmore v. Norton*, 10 Kan. 491; *Anderson v. Burnham*, 52 Kan. 454, 34 Pac. 1056.

The cases cited by the plaintiffs in support of their proposition that the deed from Rodgers did not constitute color of title are those wherein there was an element of fraud, or want of good faith, which are expressly [299] negated by the finding of the court in this case. *Livingston v. Peru Iron Co.* 9 Wend. 511.

3. That no title could be acquired against the right of the Secretary to declare the deed void, and hence the statute would not begin to run until after such action by the Secretary of the Interior. The case of *Gibson v. Chouteau*, 13 Wall. 92, 99, 20 L. ed. 534, 536, is relied upon to sustain this proposition. In that case it was held that the occupation of lands derived from the United States under a new Madrid certificate, before the issue of a patent, for the period prescribed by the state statute of limitations, was not a bar to an action in ejectment for the possession of such lands, founded upon the legal title subsequently conveyed by the patent; nor did such occupation constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed. Obviously this case has no application to the one under consideration. Here the United States had issued a patent to Rodgers "and to his heirs and assigns forever," subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make.

We have considered all the points taken by the plaintiffs, and are of the opinion that they are not sustained; that the *judgment of the Supreme Court of Kansas was right, and it is therefore affirmed.*

Mr. Justice **White** and Mr. Justice **McKenna** dissented.

[300] *EDWARD P. GALLUP, Executor of William P. Gallup, Deceased, *Plff. in Err.*,
v.

WILLIAM H. SCHMIDT, Treasurer of Marion County, Indiana.

(See S. C. Reporter's ed. 300-307.)

Constitutional law—assessment for taxation of omitted property—notice to nonresident.

Δ nonresident executor is not denied any rights or privileges secured to him by the Consti-

tution of the United States because Ind. Rev. Stat. § 8560, under which omitted property belonging to the estate was added to the tax duplicate by the county auditor, contains no provision for notice to any person not a resident of the county in which such omitted property is proposed to be assessed, where he not only had an opportunity to appear and set up any defense that he had, but actually did appear, and, after his demurrers and motion to dismiss had been overruled, answered and was fully heard in the trial court, and his objections to the findings and rulings of that court have been heard and considered by the supreme court of the state.

[No. 100.]

Argued October 31, November 1, 1901. Decided January 6, 1902.

IN ERROR to the Circuit Court of Marion County, State of Indiana, to review a judgment in favor of the county treasurer in proceedings to assess omitted property for taxation, entered in pursuance of a final judgment of the Supreme Court of Indiana. *Affirmed.*

Statement by Mr. Justice **Shiras**:

This is a writ of error to a judgment of the circuit court of Marion county, state of Indiana, entered in pursuance of a final judgment of the supreme court of that state, in a case wherein Edward P. Gallup, executor of William P. Gallup, deceased, was plaintiff in error, and William H. Schmidt, treasurer of said Marion county, was defendant in error.

The main facts in the case were thus stated in the opinion of the supreme court (154 Ind. 196, 56 N. E. 443):

"William P. Gallup, having for thirty-one years been a resident therein, died, testate, in the city of Indianapolis, Marion county, in December, 1893, the owner and in possession of a large personal estate in said county. His will was duly admitted to probate in the Marion circuit court, and Edward P. Gallup, a resident of the state of New Hampshire, the principal and residuary legatee, was qualified as executor in January, 1894, and March 5, 1894, filed an inventory showing a personal estate of \$492,628.26. Subsequently, in the spring of 1894, said *executor listed to the assessor for tax- [301] tion for the year 1894 personal property of the estate aggregating \$383,906.46. January 15, 1895, Taggart, then auditor of Marion county, discovered, on what he believed to be credible information, that a large amount of personal property belonging to and in possession of said decedent had not been listed for taxation for the years 1881 to 1893 both inclusive; and upon that day, acting under § 8560, Burns's Rev. Stat. 1894, caused to be served by the sheriff upon Edward P. Gallup, as executor, who was at the time in Indianapolis, engaged in the settlement of said estate, notice in writing

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655 and note; *Re Gannon* (R. I.) 5 L. R. A. 183 U. S.

359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes

of his intention to add such omitted property to the tax duplicate, and requiring such executor to appear before him within five days to show cause, if any, why such property should not be so added. The notice specified the property to be added as county, township, town, and other bonds, notes, mortgages, claims, dues, demands, and other credits, money on hand and on deposit.

"January 19, 1895, the executor appeared before the auditor, and filed written objections to the authority of the auditor to proceed further, which were overruled. The executor then filed an answer to the notice, and on the 21st day of January, 1895, the auditor issued a subpoena for the executor, requiring him to appear forthwith before him, and to bring with him all notes, mortgages, and bonds in his possession, as such executor, to testify in said proceeding. The executor appeared on the 24th day of January, 1895, and filed further objections to the jurisdiction of the auditor, which were overruled; and thereupon he was examined under oath.

[302] "Upon consideration of the evidence the auditor found that William P. Gallup, in addition to the property returned by him for taxation, was the owner and in possession of other taxable personal property not listed and not taxed during the several years from 1881 to 1893 specifically stated for each year, and January 25, 1895, placed the same upon the tax duplicates, and computed and extended taxes thereon for the whole of said period, including statutory penalties and interest, the sum of \$61,233.59. After the same was placed upon the duplicate in the treasurer's hands he made demand upon the executor *to pay said additional taxes, but he refused to pay all or any part thereof.

"The executor on the 4th day of January, 1895, filed in the circuit court his final settlement report, and gave notice that the same would be finally heard on the 26th day of January, 1895; and upon the day set for the hearing of the report, the same being the next day after the additional assessments had been placed upon his duplicate, Holt, as treasurer of Marion county, filed in said court, under § 8587, Burns's Rev. Stat. 1894, in the term thereof that was then running, his petition for an order upon the executor to show cause why he should not pay the taxes assessed by the auditor. The order was granted, and on February 9, 1895, the executor appeared and filed his motion to dismiss the said proceedings for the reason that the court had no jurisdiction to proceed to hear the cause, for the reason that the county treasurer was not authorized, under the law, to present said

claim to the court at the January term, 1895.

"More than two years afterwards, to wit, December 18, 1897, the court overruled appellant's [the executor's] motion to dismiss; and on June 18, 1898, appellant [the executor] filed his answer in eight paragraphs. A demurrer to each, the third, fourth, fifth, and sixth was sustained. A trial was had before the court upon the issues joined upon the petition, answers of general denial, payment and set-off, and, upon a special finding of facts and conclusions of law favorable to appellee [the treasurer] judgment was rendered against appellant [the executor] that he pay to appellee [the treasurer] on account of said omitted taxes the sum of \$46,-996.69."

Appeals were taken by both parties from the decree of the circuit court of Marion county to the supreme court of the state. That court was of opinion that the executor, as appellant, was not entitled to a reversal, but that, for error of the circuit court in allowing the executor a certain credit of \$5,-750 upon the amount recovered, the judgment must be reversed with instructions to restate conclusions of law in accordance with the opinion of the supreme court, and render judgment thereon in favor of the treasurer for the sum of \$52,746.69, with interest from October 31, 1898; and final judgment for said amount was accordingly so entered by the circuit court of *Marion [303] county, to which judgment a writ of error was allowed, and the cause brought to this court.

Messrs. W. H. H. Miller and Wayne MacVeagh argued the cause, and, with *Messrs. John B. Elam, James W. Fesler, and Samuel D. Miller*, filed a brief for plaintiff in error:

The statute is in conflict with the 14th Amendment to the Constitution, because it provides for a change in the assessment of property as made under the general law, without providing any notice to the property owner.

This statute provides for no such notice. *Buck v. Miller*, 147 Ind. 597, 37 L. R. A. 384, 45 N. E. 647, 47 N. E. 8.

The manner of assessment must be prescribed by the statute.

State Tax Comrs. v. Holliday, 150 Ind. 216, 42 L. R. A. 826, 49 N. E. 14; *Scars v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Charles v. Marion*, 98 Fed. 166; *Cooley, Taxn.* 244.

The notice must be prescribed by law, and notice not prescribed by law is no notice.

Kuntz v. Sumption, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Stuart v. Palmer*, 74

to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption* (Ind.) 2 L. R. A. 657; *Chauvin v. Vallton* (Mont.) 3 L. R. A. 194, and *Ulman v. Baltimore* (Md.) 11 L. R. A. 225.

As to the validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note, and *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

N. Y. 183; *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Walsh v. State ex rel. Soules*, 142 Ind. 363, 33 L. R. A. 392, 41 N. E. 65; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Seudder v. Jones*, 134 Ind. 547, 32 N. E. 221; *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 441, 24 N. E. 83; *Norvell v. Porter*, 62 Mo. 309; *Osborne v. Schutt*, 67 Mo. 712; *Harmon v. Birchard*, 8 Blackf. 418; *Eaton v. Union County Nat. Bank*, 141 Ind. 159, 40 N. E. 693; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158; *Hood River Lumbering Co. v. Wasco County*, 35 Or. 498, 57 Pac. 1017; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 258; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

No tax can be upheld if not within the letter of the statute, although it is within the spirit thereof.

American Nat. & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *Parker v. Overman*, 18 How. 137, 15 L. ed. 318; *M'Clung v. Ross*, 5 Wheat. 116, 5 L. ed. 46; *Commercial Bank v. Sandford*, 103 Fed. 98; *Williams v. Peyton*, 4 Wheat. 77, 4 L. ed. 518; *Davis v. St. Louis County*, 65 Minn. 310, 33 L. R. A. 432, 67 N. W. 997; *Hagner v. Hall*, 10 App. Div. 581, 42 N. Y. Supp. 63; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 157, 41 L. ed. 388, 17 Sup. Ct. Rep. 56; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Savannah, F. & W. R. Co. v. Savannah*, 96 Ga. 680, 23 S. E. 847.

Even the killing of a dog for police purposes cannot be justified except upon notice.

People ex rel. Shand v. Tighe, 9 Misc. 607, 30 N. Y. Supp. 368; *Loesch v. Koehler*, 144 Ind. 278, 35 L. R. A. 682, 41 N. E. 326.

In all cases where an assessment without notice has been upheld, it has been by reason of the fact that the collector or treasurer was compelled to collect by a suit in court where the taxpayer could have an opportunity to be heard.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *State v. Weyerhauser*, 72 Minn. 519, 75 N. W. 718, 68 Minn. 353, 71 N. W. 265; *Redwood County v. Winona & St. P. Land Co.* 40 Minn. 515, 42 N. W. 473; *Winona & St. P. R. Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83.

But in the case at bar the provision for collection by suit in court is merely cumulative. The statute expressly provides that the collection may be by distress and sale at the option of the treasurer. In such case the law is invalid, since it gives a hearing only by the favor of the treasurer, not as of right.

Scott v. Toledo, 1 L. R. A. 688, 36 Fed. 385; *Meyers v. Shields*, 61 Fed. 713.

Plaintiff in error was aggrieved because
183 U. S. U. S., Book 46.

he was called before the auditor for a hearing without any valid provision of law therefor. The law providing for no notice to him, he had no notice. It cannot be held that because he had notice in fact, was subpoenaed, and appeared and testified under protest, he was not aggrieved.

Kuntz v. Sumption, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Eaton v. Union County Nat. Bank*, 141 Ind. 159, 40 N. E. 693.

An executor is not in court for the purpose of meeting claims against the estate, and is not bound to answer unless he has been brought in in due form of law and after the lapse of the time prescribed, and until then the court has no jurisdiction over him.

Scott v. Dailey, 89 Ind. 477.

The statute denies to citizens of other states owning property in Indiana a privilege and immunity granted to a citizen of the state resident in the county, that is, notice.

State ex rel. Hoadley v. Insurance Comrs. 37 Fla. 564, 33 L. R. A. 288, 20 So. 772; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Sprague v. Fletcher*, 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239; *O'Connell v. Menominee Bay Shore Lumber Co.* 113 Mich. 124, 71 N. W. 449; *Corfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3,230; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

Statutes in relation to guardians show that "official residence" would lead to inextricable difficulties.

Burns's Rev. Stat. (Ind.) § 8421, pars. 5-7; *Wright v. Wright*, 72 Ind. 149.

It is the residence of the man, and not the place of appointment of the officer, that gives jurisdiction.

Amory v. Amory, 95 U. S. 186, 24 L. ed. 428; *Rice v. Houston*, 13 Wall. 66, 20 L. ed. 484; *Davies v. Lathrop*, 20 Blatchf. 397, 12 Fed. 353.

Where the suit is by the obligee of a bond who is a mere naked trustee, as a marshal's or sheriff's bond, the citizenship of the beneficiaries, the real parties in interest, is the test.

Susquehanna & W. Valley R. & Coal Co. v. Blatchford, 11 Wall. 172, 20 L. ed. 179; *McNutt v. Bland*, 2 How. 9, 11 L. ed. 159; *Browne v. Strode*, 5 Cranch, 303, 3 L. ed. 108.

In case of an executor or administrator, on the other hand, he has the title to the property, and no one else can sue, and his personal residence determines jurisdiction.

Dodd v. Ghiselin, 27 Fed. 405; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; *Harper v. Norfolk & W. R. Co.* 36 Fed. 103; *Goff v. Norfolk & W. R. Co.* 36 Fed. 299; *Semmes v. Whitney*, 50 Fed. 666; *New Orleans v. Gaines*, 138 U. S. 595, sub nom. *New Orleans v. Whitney*, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428.

The legislature of Indiana has recognized that residence is not affected by court appointment to a trusteeship by attempting to forbid such appointment.

Shirk v. LaFayette, 52 Fed. 857.

The same doctrine that the residence of the person is the test prevails everywhere.

Wade v. Sewell, 56 Fed. 129; *Latrobe v. Baltimore*, 19 Md. 13; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307; *Dewey v. Des Moines*, 173 U. S. 201, 43 L. ed. 667, 19 Sup. Ct. Rep. 379.

The supreme court of Indiana has recognized that appointment as executor by an Indiana court does not change the fact of appointee's nonresidence.

Ewing v. Ewing, 38 Ind. 390.

Nor should it, since nonresidence is not a disqualification for appointment as executor or administrator, nor was even alienage at common law.

11 Am. & Eng. Enc. Law, 2d ed. p. 753; *Cutler v. Howard*, 9 Wis. 309; *Re Connor*, 16 Mont. 465, 41 Pac. 271; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913; *Re Brown*, 80 Cal. 381, 22 Pac. 233.

The same rule is illustrated and enforced as to security for costs required of nonresidents. It is the residence of the person, not of the officer, executor, receiver, or other fiduciary, that controls.

19 Am. & Eng. Enc. Law, p. 350; *King's Estate*, 9 W. N. C. 207; *Buck v. James*, 2 Chester Co. Rep. 401; *Davis v. You*, 43 Ala. 691; *Ex parte Louisville & N. R. Co.* 124 Ala. 547, 27 So. 239; *Chevalier v. Finnis*, 1 Brod. & B. 277; *Cathcart v. Hewson*, Hayes, 173, and notes; *Chamberlain v. Chamberlain*, 1 Dowl. P. C. 366; *Podmore v. Seamen's Bank for Savings*, 27 Misc. 317, 57 N. Y. Supp. 829; *Tracy v. Dolan*, 31 App. Div. 24, 52 N. Y. Supp. 351; *C. E. Sherin Special Agency v. Seaman*, 49 App. Div. 33, 63 N. Y. Supp. 407.

Messrs. **William L. Taylor** argued the cause, and, with Messrs. *Martin M. Hugg*, *Frederick A. Joss*, *Merrill Moores*, and *Cassius C. Hadley*, filed a brief for defendant in error:

Administrators and executors become parties to claims filed against estates by operation of law, and are bound to take notice of the filing of such claims without summons or other notice.

Taggart v. Tevanny, 1 Ind. App. 339, 27 N. E. 511; *Sanders v. Hartge*, 17 Ind. App. 243, 46 N. E. 604; *Bowman v. Citizens' Nat. Bank*, 25 Ind. App. 38, 56 N. E. 39; *Stapp v. Messeke*, 94 Ind. 423.

If the filing of the claim was not notice, yet a general appearance by the executor or administrator waives all irregularities and gives the court full jurisdiction of the claim.

Sanders v. Hartge, 17 Ind. App. 243, 46 N. E. 604; *Stapp v. Messeke*, 94 Ind. 424; *Frazier v. Boss*, 66 Ind. 1; *Morrison v. Kramer*, 58 Ind. 38; *Nesbit v. Long*, 37 Ind. 300; *Deniston v. Terry*, 141 Ind. 677, 41 N. E. 143; *Bowman v. Citizens' Nat. Bank*, 25 Ind. App. 38, 56 N. E. 39.

Heirs, devisees, and legatees prove their claims to the surplus only, if there is any, when final settlement account has been filed after the end of the year, and after all

claims, including claims for taxes, have been paid.

Glessner v. Clark, 140 Ind. 427, 39 N. E. 544; *Schmidt v. Failey*, 148 Ind. 150, 37 L. R. A. 442, 47 N. E. 326.

It is not necessary to notify nonresidents of proposed assessment of personal property for omitted taxes.

Buck v. Miller, 147 Ind. 586, 37 L. R. A. 384, 387, 45 N. E. 647, 47 N. E. 8; *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443; *Chicago & E. R. Co. v. John*, 150 Ind. 113, 48 N. E. 640; *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756.

It is the duty of every executor to pay all taxes due from the decedent's estate, and if he fails so to do, then it becomes the duty of the treasurer to file a claim against said executor in the circuit court, upon which claim issues are made and trial had as in a civil action.

Wilson v. White, 133 Ind. 614, 19 L. R. A. 581, 33 N. E. 361.

Administrators and executors, no matter where they may reside, are officers of the court and within its jurisdiction, and must, without notice, appear to such claim for taxes.

Schmidt v. Failey, 148 Ind. 150, 37 L. R. A. 442, 47 N. E. 326; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756; *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443.

Executors and administrators may contest assessment of omitted taxes in the circuit court when the treasurer files claim therefor, and this affords due process of law, even though no appearance was entered or service had when the assessment was made by the auditor.

Reynolds v. Bowen, 138 Ind. 434, 36 N. E. 756; *Deniston v. Terry*, 141 Ind. 677, 41 N. E. 143; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663.

Due process of law is process according to the law of the land, and this process in the states is regulated by the laws of the states.

Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *State Railroad Tax Cases*, 92 U. S. 618, 23 L. ed. 675.

Due process of law is afforded a litigant if he has an opportunity to question the validity or the amount of an assessment or claim or charge before the amount is determined, or at any subsequent proceedings for its collection, or at any time before final judgment is entered.

Winona & St. P. Land Co. v. Minnesota, 183 U. S.

159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Kentucky Railroad Tax Cases*, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443; *Murdock v. Cincinnati*, 44 Fed. 726; *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826; *Johnson v. Lewis*, 115 Ind. 490, 18 N. E. 7; *Kizer v. Winchester*, 141 Ind. 694, 40 N. E. 265.

A revenue law of a state may be in harmony with the 14th Amendment, although such law does not furnish an opportunity to be present when the tax is assessed, nor that the tax shall be collected by suit. If the taxpayer has a right to enjoin collection this is due process of law.

McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

But the estate of William P. Gallup is not a nonresident estate. It is a resident estate, hence nonresidence of the executor is of no possible moment where the court has control of the property.

Gallup v. Schmidt, 154 Ind. 196, 56 N. E. 443; *Schmidt v. Failey*, 148 Ind. 150, 37 L. R. A. 442, 47 N. E. 326.

Laws are to be construed liberally in aid of the taxing power, and all taxes are presumed to be valid until the contrary is affirmatively shown, and no irregularities will invalidate them that do not affect the merits of the case.

Hunter Stone Co. v. Woodard, 152 Ind. 474, 53 N. E. 947; *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756; *Saint v. Welsh*, 141 Ind. 382, 40 N. E. 903; *Buck v. Miller*, 147 Ind. 586, 37 L. R. A. 384, 45 N. E. 647, 47 N. E. 8.

A statute that directs a tax officer to seize for taxes personal property in the hands of the court is unconstitutional and void.

Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785.

Mr. William A. Ketcham also argued the cause and filed a brief for defendant in error:

In general terms "due process of law" is synonymous with "law of the land."

Cooley, Const. Lim. chap. 11, p. 430; 2 Hare, Am. Const. Law, p. 836; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372.

"Due process of law" is an investigation by judicial machinery; a judicial investiga-

tion under the form and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of the matter in controversy.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 457, 33 L. ed. 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Pennoyer v. Neff*, 95 U. S. 733, 24 L. ed. 572.

The notice, assessment, and levy of taxes and delivery of duplicate to the collecting officer, and a regular demand and sale, after the notice prescribed by law, fulfil all requirements of "due process of law" or "the law of the land."

French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253; *Keely v. Sanders*, 99 U. S. 441, 25 L. ed. 327; *De Treville v. Smalls*, 98 U. S. 517, 25 L. ed. 174; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372.

The legislature may prescribe the kind of notice and the mode in which it shall be given.

Kuntz v. Sumption, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289.

*Mr. Justice **Shiras** delivered the opinion[303] of the court:

To answer the questions presented to us in this record requires an examination of two sections of the Indiana Revised Statutes, which read as follows:

"Sec. 8560. Whenever the county auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has, from any cause, been omitted, in whole or in part in the assessment of any year or number of years, from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate, and add such property thereto, with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon, to enable him to do which he is invested with all the powers of assessor under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof, resides in the county and is not present, he shall give such person notice, in writing, of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office at a specified time, within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment *shall not be made, the same[304] shall be made, and the county auditor shall in all cases file in his office a statement of the facts or evidence on which he made such

correction; but he shall in no case reduce the amount returned by the assessor, without the written consent of the auditor of state, given on the statement of facts submitted by the county auditor."

"Sec. 8587. It shall be the duty of every administrator, executor, guardian, receiver, trustee, or person having the property of any decedent, infant, idiot, or insane person in charge, to pay the taxes due upon the property of such decedent, ward, or party, and, in case of his neglecting to pay any instalment of taxes when due, when there is money enough on hand to pay the same, the county treasurer shall present to the circuit or other proper court of the county, at its next term thereafter, a brief statement in writing, signed by him as such county treasurer, setting forth the fact and amount of such delinquency, and such court shall at once issue an order directed to such delinquent, commanding him to show cause within five days thereafter why such tax and penalty and costs should not be paid, and, upon his failing to show good and sufficient cause for such nonpayment, the court shall order him to pay such tax out of the assets in his hands belonging to the estate of said decedent, ward, or other person; and such delinquent shall not be entitled to any credit, in any settlement of said trust, for the penalty, interest, and cost occasioned by such delinquency, or by the order to show cause, but the same shall be a personal charge against him, and he shall be liable, on his official bond, for such penalty, interest, and costs."

[305] Having alleged that he was and during all of his life had been a citizen of the United States, and that at no time during the year 1894 or since has he resided in Marion county, Indiana, but that during said year and ever since he has continually been and still was a resident and citizen of Lebanon, in the state of New Hampshire, Edward P. Gallup claimed, in the courts below, that in § 8560, providing for the assessment of omitted property by the county auditor, no provision whatever is made for notice to any person not a resident of the county in which said omitted property is proposed to be assessed, *but that the sole provision for such notice is to person or persons resident of such county, and that by reason of the premises said statute is in violation of the 14th Amendment to the Constitution of the United States, in that said statute deprived him of his property without due process of law; denied to him the equal protection of the laws; also denies to him, as a citizen of New Hampshire, the privileges and immunities enjoyed by a citizen of Marion county, Indiana, contrary to the 2d section of article 4 of the Constitution of the United States; and that said statute is further invalid in that it grants to a class of citizens, namely, residents of the particular county in which the property sought to be assessed is situate, privileges and immunities which, upon the same terms, do not equally belong to all citizens.

This arraignment of the statute is based

on the fact that Edward P. Gallup, though acting as executor of William P. Gallup, deceased, in the county of Marion, Indiana, was, at the time he was served with the auditor's notice, not a resident of that county, but was a resident of the state of New Hampshire; and the contention is that, though he received such a notice, yet he was not within the letter of the statute because not a resident of the county in which the property was situated, and therefore the notice actually given him was not a notice in point of law, and the auditor, in proceeding with the duties of his office, acted without jurisdiction, and that consequently the plaintiff in error has been deprived of his property without due process of law.

The Supreme Court of Indiana disposed of this contention by holding "that appellant [Edward P. Gallup] was an official resident of Marion county at the time the proceeding by the auditor was commenced, and therefore within the express terms of the section."

This construction of the section is criticized by the learned counsel of the plaintiff in error as novel, and unsupported by authority. However this may be, it is a construction or application of the statute to the case in hand, and is binding upon us.

It is strongly urged that whether the view of the Indiana supreme court be sound or not, in interpreting the section to *cover the [306] case of an official residence, the result is to deprive the plaintiff in error of rights and privileges secured to him by the Constitution of the United States; and numerous cases are cited to the effect that assessments and special burdens upon taxpayers are void unless the law provides for notice, and that notice in fact is not equivalent to notice in law. It is claimed that the plaintiff in error has been afforded no opportunity to be heard, and that because the section provides for notice to residents of the county, and for no notice whatever to nonresidents of the state and county, a case of discriminative legislation is created whereby nonresidents are denied the equal protection of the laws.

To these suggestions the supreme court of Indiana replied by saying:

"He [Gallup] was in a situation to avail himself of all the rights and privileges he asserts are unjustly denied to nonresidents, and, while himself not aggrieved, he will not be permitted to assail a revenue statute on behalf of others who are making no complaint. The courts are open to those only who are injured. . . . Conceding all that appellant affirms concerning his residence and the absence of any provision in § 8560 for service of notice on nonresidents, still he is not in a situation to complain that he has had no day in court. The assessment by the auditor, right or wrong, was not a final judgment. It was only prima facie correct. The courts were open to appellant, even though a nonresident, to challenge it by injunction. Failing thus to seek relief against it, the treasurer appealed to the circuit court for an order against

him to show cause why he did not pay the taxes. The jurisdiction of the circuit court over its executor will not be controverted, even though his personal residence is in New Hampshire. He was ordered by the court to show cause, if he had any, why he did not pay the taxes. In response to the order any defense he had or ever had was open to him.

[307] "It is no longer an open question in this state that if a party against whose property an assessment has been made is, at any time in the course of the proceeding before a conclusive judgment, *afforded by law an opportunity to contest its correctness, he is accorded due process of law."

It has frequently been held by this court, when asked to review tax proceedings in state courts, that due process of law is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Allen v. Georgia*, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Orr v. Gilman*, 183 U. S. 278, *post*, 196, 22 Sup. Ct. Rep. 213.

In the present case the plaintiff in error not only had an opportunity to appear and to set up any defense that he may have had, but actually did appear, and, after his demurrers and motion to dismiss had been overruled, answered, and was fully heard in the trial court. His objections to the findings and rulings of that court have been heard and considered by the supreme court of the state.

The method followed by the auditor in assessing the additional taxes was perhaps open to criticism, but was approved by the circuit and supreme courts, and presents no question over which we have jurisdiction.

Failing to see that any rights or privileges secured to the plaintiff in error by the Constitution of the United States have been denied him, we are of opinion that *the judgment of the Supreme Court of Indiana must be affirmed.*

[308] *NORTHERN ASSURANCE COMPANY
OF LONDON, *Petitioner*,

v.

GRAND VIEW BUILDING ASSOCIATION.

(See S. C. Reporter's ed. 308-365.)

Insurance—waiver of condition against concurrent insurance—knowledge of agent.

An insurance company cannot be deemed to have waived a condition in a policy of fire insur-

ance rendering it void in case other insurance had been or should be made upon the property unless by agreement indorsed thereon or attached thereto, because its agent had notice or knowledge of the existence of other insurance in another company at the time he delivered the policy and received the premium, where such policy also provided that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions or conditions no officer, agent, or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

[No. 60.]

Argued October 28, 1901. Decided January 6, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision which affirmed a judgment of the Circuit Court for the District of Nebraska in favor of plaintiff in an action on a policy of fire insurance. *Reversed.*

See same case below, 41 C. C. A. 207, 101 Fed. 77.

Statement by Mr. Justice Shiras:

*In September, 1898, the Grand View [309] Building Association, a corporation organized under the laws of Nebraska, in the district court of Lancaster county of that state, brought an action against the Northern Assurance Company of London, incorporated under the laws of the Kingdom of Great Britain and Ireland, seeking to recover the sum of \$2,500 as due under the terms of a policy of insurance that had been issued by the assurance company to the plaintiff company on December 31, 1896, on certain property situated in said Lancaster county, and which, on June 1, 1898, had been destroyed by fire.

Thereupon the defendant company filed in the said county court a petition and bond, in due form, and prayed for an order removing the cause to the circuit court of the United States for the district of Nebraska; and on September 29, 1898, the county court approved the bond, and entered an order granting the prayer of the petition for removal.

Subsequently the case was put at issue on the petition, answer, and reply in the circuit court of the United States, and was so proceeded in that, on October 20, 1898, a special verdict was found by the jury empaneled in the case, and on January 14, 1899, a final judgment was entered for the plaintiff and against the defendant company

NOTE.—On the effect of knowledge by insurer's agent of falsity of statements in application—see note to *Clemans v. Supreme Assembly R. S. of G. F. (N. Y.)* 16 L. R. A. 33.
183 U. S.

On waiver of terms and conditions in an insurance policy—see notes to *Lamberton v. Connecticut F. Ins. Co. (Minn.)* 1 L. R. A. 222; *McGurk v. Metropolitan L. Ins. Co. (Conn.)* 1

in the sum of \$2,500, with interest and costs. The cause was then taken to the United States circuit court of appeals for the eighth circuit, and that court, on March 26, 1900, affirmed the judgment of the circuit court. 41 C. C. A. 207, 101 Fed. 77. Thereafter, on petition of the defendant company, a writ of certiorari was allowed, in response to which the record and proceedings in the cause were brought to this court.

Messrs. **Ralph W. Breckenridge** and **Charles J. Greene** argued the cause and filed a brief for petitioner:

Mere parol notice of the existence of another policy of insurance was not of itself sufficient to comply with the requirements on the policies sued on.

Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044; *Union Nat. Bank v. German Ins. Co.* 34 U. S. App. 397, 18 C. C. A. 203, 71 Fed. 473; *United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406, 47 L. R. A. 455, 34 C. C. A. 240, 92 Fed. 127; *McMaster v. New York L. Ins. Co.* 40 C. C. A. 119, 99 Fed. 856; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63; *Commercial Union Assur. Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529; *Hartford F. Ins. Co. v. Small*, 14 C. C. A. 33, 30 U. S. App. 127, 66 Fed. 490; *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. 664, 21 L. ed. 246; *Hutchinson v. Western Ins. Co.* 21 Mo. 97, 64 Am. Dec. 218; *Rothschild v. American Cent. Ins. Co.* 62 Mo. 356; *Gardiner v. Piscataquis Mut. F. Ins. Co.* 38 Me. 439; *Batchelder v. Queen Ins. Co.* 135 Mass. 449; *Oakes v. Manufacturers' F. & M. Ins. Co.* 135 Mass. 248.

Where the parties have made certain terms and conditions on which their contract shall continue or terminate, courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.

Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Mack v. Rochester German Ins. Co.* 106 N. Y. 560, 13 N. E. 343; *Georgia Home Ins. Co. v. Rosenfield*, 37 C. C. A. 96, 95 Fed. 358; *Union Cent. L. Ins. Co. v. Berlin*, 41 C. C. A. 592, 101 Fed. 673; *Barrett v. Union Mut. Ins. Co.* 7 Cush. 175.

The authority of the agent who issued the policy in suit was limited and the insured was notified of the restrictions upon the agent's authority, and the measure of his power, and the manner in which only it could be exercised, by the policy.

Quinlan v. Providence Washington Ins. Co. 133 N. Y. 356, 31 N. E. 31; *Moore v. Hanover F. Ins. Co.* 141 N. Y. 219, 36 N. E. 191.

An agent to receive premiums and issue policies is not, independently of any evi-

dence showing that he has a much larger authority than this, empowered to waive conditions so important that parties have seen fit to incorporate them into their contract.

Kyte v. Commercial Union Assur. Co. 144 Mass. 43, 10 N. E. 518; *Ruthven Bros. v. American F. Ins. Co.* 92 Iowa, 316, 60 N. W. 663; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 15 Atl. 353; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 32 N. W. 660, 71 Mich. 414, 39 N. W. 571; *Merchants' Ins. Co. v. New Mexico Lumber Co.* 10 Colo. App. 223, 51 Pac. 174; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 329, 24 L. ed. 388; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 240, 24 L. ed. 691.

Nor even if the agent had the fullest authority, could the conditions of the policy be waived other than in the manner in which they provide for such waiver.

Kyte v. Commercial Union Assur. Co. 144 Mass. 43, 10 N. E. 518; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 15 Atl. 353; *Gladding v. California Farmers' Mut. F. Ins. Asso.* 66 Cal. 6, 4 Pac. 764; *Enos v. Sun Ins. Co.* 67 Cal. 621, 8 Pac. 379; *Northwestern Nat. Ins. Co. v. Mize* (Tex. Civ. App.) 34 S. W. 670; *Bourgeois v. Northwestern Nat. Ins. Co.* 86 Wis. 606, 57 N. W. 347.

There can be no waiver prior to or concurrently with the execution and delivery of a contract, of conditions thereof. A waiver, if any, must be subsequent thereto.

Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 329, 24 L. ed. 388; *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 253, 26 L. ed. 765; *Union Mut. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. ed. 674; *United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406; *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. 45; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* 36 C. C. A. 671, 95 Fed. 111.

The findings of fact leave the question of waiver to be inferred as a matter of law, and the judgment for plaintiff cannot be sustained.

Patterson v. United States, 2 Wheat. 221, 4 L. ed. 224; *Suydam v. Williamson*, 20 How. 427, 15 L. ed. 978; *Wesson v. Saline County*, 20 C. C. A. 227, 34 U. S. App. 680, 73 Fed. 917; *Sneed v. Sabinal Min. & Mill. Co.* 20 C. C. A. 230, 34 U. S. App. 688, 73 Fed. 925; *Daube v. Philadelphia & R. Coal & I. Co.* 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713; *United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406; *Merchants' Ins. Co. v. New Mexico Lumber Co.* 10 Colo. App. 223, 51 Pac. 174; *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. 45; *Hartford F. Ins. Co. v. Small*, 14 C. C. A. 33, 30 U. S. App. 127, 66 Fed. 490.

L. R. A. 563, and *German Ins. Co. v. Gray* (Kan.) 8 L. R. A. 70.

As to the effect of agent's filling in untrue answers in application for insurance without

knowledge of the insured—see note to *Union Mut. L. Ins. Co. v. Wilkinson*, 20 L. ed. U. S. 617.

Mr. Halleck F. Rose argued the cause, and, with Mr. Joseph R. Webster, filed a brief for respondent:

Where an insurance agent with authority to accept risks, receive premiums, and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the insured property, the company is estopped after loss to insist that the policy is void because consent to such concurrent insurance was not given in writing. Knowledge of the agent in such case will be imputed to the company, and that which the insurer knew when engaging in the venture it will be presumed to have assented to.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 232, 20 L. ed. 617; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Eames v. Home Ins. Co.* 94 U. S. 621, 24 L. ed. 298; *Hartford L. Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; *Putnam v. Commonwealth Ins. Co.* 18 Blatchf. 368, 4 Fed. 754; *Glover v. National F. Ins. Co.* 30 C. C. A. 95, 42 U. S. App. 728, 85 Fed. 125; *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71; *Northern Assur. Co. v. Grand View Bldg. Asso.* 41 C. C. A. 207, 101 Fed. 77; *London & L. F. Ins. Co. v. Fischer*, 34 C. C. A. 503, 92 Fed. 500; *McElroy v. British America Assur. Co.* 36 C. C. A. 615, 94 Fed. 990; *Palatine Ins. Co. v. McElroy*, 40 C. C. A. 441, 100 Fed. 391; *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6; *Pechner v. Phoenix Ins. Co.* 65 N. Y. 195; *Short v. Home Ins. Co.* 90 N. Y. 16; *Robbins v. Springfield F. & M. Ins. Co.* 149 N. Y. 484, 44 N. E. 159; *Wood v. American F. Ins. Co.* 149 N. Y. 385, 44 N. E. 80; *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Home Ins. Co. v. Wood*, 47 Kan. 521, 28 Pac. 167; *State Ins. Co. v. Gray*, 44 Kan. 731, 25 Pac. 197; *National Mut. F. Ins. Co. v. Barnes*, 41 Kan. 161, 21 Pac. 165; *Hamilton v. Home Ins. Co.* 94 Mo. 353, 7 S. W. 261; *McCullum v. Hartford F. Ins. Co.* 67 Mo. App. 76; *Farnum v. Phoenix Ins. Co.* 83 Cal. 249, 23 Pac. 869; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Bennett v. Council Bluffs Ins. Co.* 70 Iowa, 600, 31 N. W. 948; *Myers v. Council Bluffs Ins. Co.* 72 Iowa, 176, 33 N. W. 453; *Siltz v. Hawkeye Ins. Co.* 71 Iowa, 710, 29 N. W. 605; *Jordan v. State Ins. Co.* 64 Iowa, 216, 19 N. W. 917; *Boetcher v. Hawkeye Ins. Co.* 47 Iowa, 253; *Miller v. Mutual Ben. L. Ins. Co.* 31 Iowa, 216, 7 Am. Rep. 122; *Key v. Des Moines Ins. Co.* 77 Iowa, 174, 41 N. W. 614; *Steele v. German Ins. Co.* 93 Mich. 81, 18 L. R. A. 85, 53 N. W. 514; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514, 46 S. W. 95; *Liverpool & L. & G. Ins. Co. v. Endc.* 65 Tex. 118; *Morrison v. Insurance Co. of N. A.* 69 Tex. 353, 6 N. W. 605; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *Kalmutz v. Northern Mut. Ins. Co.* 186 Pa. 576, 40 Atl. 816; *Wood, Ins.* 2d ed. pp. 1162, 1163; *Elliot v. Lycoming County Mut. Ins. Co.* 66 Pa. 26; *Wilson v. Mutual F. Ins. Co.* 174 Pa. 557, 34 Atl. 122; *Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. 183 U. S.

Dec. 65; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. 342; *Light v. Countrymen's Mut. F. Ins. Co.* 169 Pa. 316, 32 Atl. 439; *Swain v. Macon F. Ins. Co.* 102 Ga. 96, 29 S. E. 147; *Hobkirk v. Phoenix Ins. Co.* 102 Wis. 13, 78 N. W. 160; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *North British & M. Ins. Co. v. Steiger*, 26 Ill. App. 228; *King County F. Ins. Co. v. Suigert*, 11 Ill. App. 590; *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *First Nat. Bank v. American Cent. Ins. Co.* 58 Minn. 492, 60 N. W. 345; *Brandup v. St. Paul F. & M. Ins. Co.* 27 Minn. 393, 7 N. W. 735; *Insurance Co. of N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. 471; *Collins v. Farmville Ins. & Bkg. Co.* 79 N. C. 279, 28 Am. Rep. 322; *Grubbs v. North Carolina Home Ins. Co.* 108 N. C. 472, 13 S. E. 236; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655; *Schroeder v. Springfield F. & M. Ins. Co.* 51 S. C. 180, 28 S. E. 371; *McBryde v. South Carolina Mut. Ins. Co.* 55 S. C. 589, 33 S. E. 729; *Phoenix Ins. Co. v. Covey*, 41 Neb. 724, 60 N. W. 12; *German-American Ins. Co. v. Covey*, 41 Neb. 728, 60 N. W. 13; *Home F. Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; 2 Wood, Ins. 2d ed. pp. 908-910; 2 May, Ins. 4th ed. § 497, p. 1182; May, Ins. § 499; 1 Joyce, Ins. § 515; *Ostrander, Fire Ins.* § 243, pp. 554, 555.

*Mr. Justice Shiras delivered the opinion [310] of the court:

In order that the questions discussed in this case and the grounds of our judgment therein may sufficiently appear, it seems proper to set out, with substantial fulness, the pleadings of the parties and the special verdict of the jury.

The plaintiff's petition, having alleged the making of the policy of insurance and the destruction of the property insured, then proceeded to allege in its fourth paragraph, apparently by way of meeting an expected defense, that "plaintiff, shortly prior to issuance of aforesaid policy by the defendant, had procured a policy of insurance from the Firemen's Fund Insurance Company, incorporated under the laws of California, insuring it against loss by fire of the same property in the sum of \$1,500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire; that the fact of said subsisting insurance in said company was, by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of said policy, and prior to payment by plaintiff of said premium therefor, and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf and accept and receive the premium therefor, and who in fact accepted said *risk and issued said pol-[311] icy, and accepted and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance, and with the intent knowingly to

waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance' on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting, and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof, and is bound by its said policy notwithstanding said condition; that plaintiff had no insurance on said property except as before stated."

Having stated that plaintiff had rendered and delivered a statement of loss, in compliance with the terms of the policy, the petition further alleged that "on the 26th day of July, 1898, the plaintiff demanded of defendant the payment of said insurance; and defendant, disregarding its undertaking in that behalf, denies liability on the sole ground that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance, the same provision which as aforesaid it had waived at the time of issuing its said policy."

The answer of defendant admitted the making of the policy, the destruction of the insured property by fire, and proof of loss, but denied specifically the allegations of the fourth paragraph of said petition, as follows:

"Further answering, this defendant alleges that the policy of insurance which it issued to the plaintiff on December 31, 1896, contained the following provision:

"[312] "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.' The defendant further says that its policy in question was issued to the plaintiff with the express statement therein made that it was issued in consideration of the 'stipulations' therein named and a certain amount of premium paid therefor. And [312] said policy, besides the provisions *above quoted, contains the following stipulation and condition: 'This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added thereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.' The defendant says that notwithstanding the stipulations, provisions, and agreements

above set forth and without the consent of the defendant indorsed upon said policy in writing, and without the knowledge of the defendant, the plaintiff obtained a policy of insurance, upon the property covered by the policy issued by this defendant, in the sum of \$1,500 in the Firemen's Fund Insurance Company.

"Defendant says that the property upon which it issued its policy in the sum of \$2,500 was represented by the plaintiff to the defendant to be of the value of \$3,500. The defendant alleges that by reason of the additional insurance upon said property, not consented to in writing indorsed upon the policy of defendant, and not in fact known to the defendant, the policy written by the defendant upon the plaintiff's property was, at the date of the fire which damaged or destroyed the plaintiff's property, wholly void, and was and has been void from the date of such additional assurance. Defendant further says that on the 5th day of August, 1898, the defendant tendered to the plaintiff in current fund the sum of \$33.75, the amount of the premium paid by the plaintiff upon the policy in question, and now brings into court and tenders to the plaintiff the said sum of \$33.75, with interest at the rate of 7 per cent from December 31, 1896."

The plaintiff company replied to the answer, denying that it *procured a policy of [313] insurance in the Firemen's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant and without the knowledge of defendant, and made the following allegations:

"The policy referred to in said answer of \$1,500 in the Firemen's Fund Insurance Company was, on the contrary, subsisting at and prior to the issuance by defendant to the plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy was personally well known to A. D. Borgelt, defendant's recording agent, who wrote said policy, and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to accept fire insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and insurance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt the fact of such subsisting insurance of \$1,500, and said Borgelt, as such agent, with full knowledge of said fact, accepted the risk, and wrote, executed, and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in defendant's answer; and in faith thereof and with the sole purpose to

procure such insurance to be concurrent with the subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received, the premium therefor. By all the aforesaid several acts the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by indorsement on the policy; and the defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy."

[314] In support of its side of the issues thus presented, the plaintiff *company called as witnesses H. J. Walsh, its president, and Bert Richards, the agent of the Firemen's Fund Insurance Company, who testified that Borgelt was informed by them and had knowledge of the subsisting insurance at and before the delivery of the policy in suit. The plaintiff likewise put in evidence the original policy sued on, and a letter from G. H. Lermitt, manager of the defendant company at Chicago, Illinois, and who had signed the policy in suit as such agent, in the terms following:

Chicago, Aug. 2, 1898.

To Grand View Building Association, H. J. Walsh, President, Lincoln, Nebraska.
Dear Sirs:—

We have your favor of the 26th ult., inclosing to us what purports to be proof of loss, making claim under our policy No. 310,024, of Lincoln, Nebraska, agency, and issued to you for \$2,500 on household furniture, etc., while contained in the three-story brick and stone building on lot F in Grand View Residence Park addition, on account of a fire which occurred on the 1st day of June, 1898, and beg to say in reply that your sworn statement therein advises us that you had other insurance on this same property to the amount of \$1,500. This additional insurance held by you was without the knowledge or consent of this company, and was not permitted by agreement as provided for in lines Nos. 11, 12, and 13 of the printed conditions of our policy, to which we beg to refer you. We therefore regret to have to advise you, and do hereby say to you, that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310,024 held by you, holding that said policy has been void from the date of its issuance by reason of the said provision in regard to other insurance above referred to.

Our agents at Lincoln have been instructed to return to you the full premium paid them by you, namely, \$33.75, at once.

The plaintiff further offered the original policy in evidence, containing, among other things, the following provisions:

[315] "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured *now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

183 U. S.

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, and conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or remission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

The defendant, to maintain the issues on its part, called as a witness A. D. Borgelt, who testified that he was a member of the firm of Borgelt & Beasley, insurance agents at Lincoln, Nebraska, which firm wrote the policy in the Northern Assurance Company on the Grand View Building Association; that at the time he wrote the policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in suit, and the first time he knew of any other insurance was after the fire; that while Walsh might have mentioned that there was an existing policy, he, the witness, had no recollection of having known anything about the other insurance until after the fire. He further testified that on August 4, 1898, the premium paid for the policy in suit was tendered to the plaintiff company, which declined to take it. The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted.

The jury, under the instructions of the court, found that the defendant company issued to the plaintiff company the policy described in the plaintiff's petition; that the property covered by said policy of insurance was burned on or about June 1, 1898: *that [316] the plaintiff, on or about July 26, 1898, furnished the defendant with proofs of the loss of said property by fire; that the policy contained the provision hereinbefore mentioned, providing that the policy should be void if the insured had or should thereafter make or procure any other contract of insurance on the property covered by the policy in suit, and that the policy was made subject to such condition, and that no officer, agent, or other representative of the company should have power to waive any provision or condition of the policy except such as by the terms of the policy had been indorsed thereon or added thereto, and that no officer, agent, or representative of the company should have power or be deemed or held to have waived such provision or condition unless such waiver was written upon or attached to the policy, and that no privilege or provision affecting the insurance under the policy should exist or be claimed by the insured, unless so written or attached; that there was at the time

of the issuance of the policy in suit other insurance upon the insured property in the sum of \$1,500, in the Firemen's Fund Insurance Company; that Borgelt was recording agent of the Northern Assurance Company, at Lincoln, Nebraska, with authority from the defendant company to countersign and issue its policies and accept fire insurance risks in its behalf, and to collect and receive premiums therefor, and that he had issued the policy sued on as such agent; that Borgelt knew, when the policy in the defendant company was issued and delivered to the plaintiff company, that there was then \$1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the insured property, issued prior to the date of the policy of the defendant company, and that such knowledge was communicated to said Borgelt by and on behalf of the assured; that the actual cash value of the property covered by the policy in suit and destroyed by fire June 1, 1898, was \$4,140; that no consent to concurrent insurance of \$1,500 was indorsed on the policy in suit; and that, on August 4, 1898, the amount of the premium paid for the policy was tendered to and refused by the plaintiff.

[317] Thereafter motions were respectively made by the plaintiff and defendant for judgment upon the findings and special verdict of the jury, and on January 14, 1899, the motion of the defendant was overruled, and exception was taken by the defendant, and the motion of the plaintiff was sustained, and judgment was entered in favor of the plaintiff and exception was taken by the defendant. A writ of error was prayed for by the defendant and allowed, and the cause was taken to the United States circuit court of appeals for the eighth circuit, where the judgment of the circuit court was affirmed, and the cause was then brought to this court by a writ of certiorari.

Over insurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies rendering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable.

In the present case, such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued.

It also was made to appear that no consent to such other insurance was ever indorsed on the policy or added thereto.

Accordingly it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the insured unless the company waived the condition. The question before us is therefore reduced to one of waiver. The policy itself provides the method whereby such a waiver should be made: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with

such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any provision or *permis-[318] sion affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Before proceeding to a direct consideration of the question before us, it may be well to inquire into the principles established by the authorities as applicable to such cases.

It is a fundamental rule, in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. This rule is thus expressed in *Greenleaf on Evidence*, 12th ed. § 275.

"When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."

The rule is thus expressed by Starkie, *Ev.* 9th Am. ed. 587:

"It is likewise a general and most inflexible rule, that wherever written instruments are appointed, either by the requirement of law, or by the compact of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy; of *principle*, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence; of *policy*, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence."

This rule has always been followed and applied by the English courts in the case of policies of insurance in writing.

Thus in *Weston v. Emes*, 1 Taunt. 115, it was held that parol evidence of what passed at the time of effecting a policy is not *ad-[319] missible to restrain the effect of the policy, Mansfield, Ch. J., observing that such "evidence could not be admitted, without abandoning in the case of policies, the rule of evidence which prevails in all other cases; and

that it would be of the worst effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected."

In *Robertson v. French*, 4 East, 130, it was held, per Lord Ellenborough, in a suit on a marine policy of insurance, that a parol agreement that the risk should begin at a place different from that inserted in the policy, cannot be received in evidence.

These cases are cited as establishing the rule in cases of insurance in *Marshall on Marine Insurance*, 278, and in 1 *Arnould on Insurance*, p. 277.

In *Flinn v. Tobin*, 1 Moody & M. 367, Lord Tenterden, Ch. J., said that "the contract between the parties is the policy which is in writing, and cannot be varied by parol. No defense, therefore, which turns on showing that the contract was different from that contained in the policy, can be admitted; and this is the effect of any defense turning on the mere fact of misrepresentation without fraud."

So, where, in assumpsit for use and occupation, upon a written memorandum of lease, at a certain rent, parol evidence was offered by the plaintiff of an agreement at the same time to pay a further sum, being the ground rent of the premises, to the ground landlord, it was rejected. *Preston v. Mercieu*, 2 W. Bl. 1249.

And where, in a written contract of sale of a ship, the ship was particularly described, it was held that parol evidence of a further descriptive representation, made prior to the time of sale, was not admissible to charge the vendor without proof of actual fraud: all previous conversations being merged in the written contract. *Pickering v. Douson*, 4 Taunt. 779. See also *Powell v. Edmunds*, 12 East, 6; *Smith v. Jeffries*, 15 Mees. & W. 561; *Gale v. Lewis*, 9 Q. B. 730; *Accy v. Fernie*, 7 Mees. & W. 151.

[320] The case of *Western Assur. Co. v. Doull*, 12 Can. S. C. 446, was one where a policy of insurance against loss by fire contained the following condition: "In case of subsequent assurance, . . . *notice thereof must also be given in writing at once, and such subsequent assurance indorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect."

The insured effected subsequent insurance and verbally notified the agent, but there was no indorsement made on the policy, nor any acknowledgment in writing by the company. A loss having occurred, the damage was adjusted by the inspector of the company, and neither he nor the agent made any objection to the loss on the ground of non-compliance with the above condition. In a suit to recover the amount of the policy the company pleaded breach of the condition, in reply to which the plaintiff set up a waiver of the condition and contended that by the act of the agent and inspector the company was estopped from setting it up. It was held by the supreme court of Canada that the insured not having complied with the

condition, the policy ceased and became of no effect on the subsequent insurance being effected, and that neither the agent nor the inspector had power to waive a compliance with its terms.

In discussing the question of the power of the agent to waive the condition, the court said: "It is not shown that it was within the scope of Greer's authority as a local agent to waive such a condition. The condition itself does not, either by express words or by implication, recognize such an authority, but the reason for requiring the notice obviously points to a directly contrary construction. Moreover, the English case already quoted [*Gale v. Lewis*, 9 Q. B. 730], which determines that the required notice is to be given to the company itself and not to the local agent, shows, a fortiori, that such an agent has, in the absence of express authority, no power to waive the condition. Direct authority is, however, not wanting. In the case of *Shannon v. Gore Dist. Mut. F. Ins. Co.* 2 Ont. App. Rep. 396, the facts were the same as in the present case, the subsequent assurance having been effected through the agent who also acted for the defendants in taking the original risk. It was contended that the successive insurances having been thus effected with the same person as the agent of the two companies, the company which granted the first policy had knowledge of the subsequent *insurance, and were there- [321] fore estopped from setting up a condition vitiating the policy for want of a written notice. But the court of appeal held otherwise, and determined that in such a case notice to the agent was not notice to the company, and that the agent neither had authority to waive the condition nor could by his conduct estop his principals, the first insurers. As regards any direct action of the appellants [insurance company] through their immediate agents, the directors or principal officers of the company conducting its affairs at the head office, there is no pretense for saying that there is in the present case the slightest evidence of conduct upon which either a defense of waiver of the condition, or by way of estoppel against insisting upon it, can be based, and this for the very plain reason that these directors and officers never had the fact of a subsequent assurance brought to their knowledge, and without proof of such knowledge neither waiver nor estoppel can be made out." "The condition in the policy is one which must be complied with or waived. The company, by signing a condition of that kind, reserves to itself the right to withdraw the policy in case of further insurance. That question is one which cannot be decided by a mere local agent. He may receive the notice for transmission, but he cannot act on it; it must be brought to the notice of some person authorized by the company to continue the insurance after notice has been given them. It has been decided in a number of cases in England that a local agent has not such authority, and a mere notice to him, even in a case where he is acting for another company

taking the further risk, has been held to be no notice to the company."

[322] Coming to the decisions of our state courts, we find that, while there is some contrariety of decisions, the decided weight of authority is to the effect that a policy of insurance in writing cannot be changed or altered by parol evidence of what was said prior or at the time the insurance was effected; that a condition contained in the policy cannot be waived by an agent, unless he has express authority so to do; and then only in the mode prescribed in the policy; and that mere knowledge by the agent of an existing policy of insurance will not affect the company *unless it is affirmatively shown that such knowledge was communicated to the company.

In *Worcester Bank v. Hartford F. Ins. Co.* 11 Cush. 265, 59 Am. Dec. 145, which was a case of additional insurance, and where one Smith testified that he was agent for the defendant company to issue policies, and was in the habit of receiving notices of additional insurance, which he indorsed on the policies, it was held by the supreme judicial court of Massachusetts that as it is provided in the policy on which this action is brought that if the assured or his assigns shall thereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have same indorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect, and as, after the making of this policy, the assured obtained other insurance on the same property, but did not have the same indorsed on the policy or otherwise acknowledged by the defendants in writing, the policy was void, notwithstanding there was parol evidence tending to show that notice had been given to Smith, the company's agent.

The same court held, in *Hale v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410, that a policy issued by a mutual fire insurance company, whose by-laws provided that any insurance subsequently obtained without the consent in writing of their president should avoid the policy, and that the by-laws should in no case be altered except by a vote of two thirds of the stockholders or directors, was avoided by a subsequent insurance obtained with the mere verbal consent of the president. It was said by Bigelow, J., giving the unanimous opinion of the court:

[323] "Such being the rights of the parties under the contract, it is clear, upon the facts in this case, that the policy was annulled under the 15th article of the by-laws, by reason of the subsequent insurance procured by Stone and Perry on the property, without the assent of the president of the corporation in writing; unless the waiver of such written assent by the president, and his verbal consent to such subsequent insurance as found by the jury, operate to set aside this provision in the by-laws as to *this particular policy, and render the contract valid, notwithstanding by its express terms, as well

as by the clause in the by-laws, it would be otherwise void. But the difficulty in maintaining the plaintiff's position on this part of the case is, not only that it attempts to substitute for the written agreement of the parties a verbal contract, but that there is an entire absence of any authority on the part of the president to make such waiver or give such verbal assent. He was an agent, with powers strictly limited and defined, and could not act so as to bind the defendants beyond the scope of his authority. *Story, Agency*, §§ 127, 133; *Salem Bank v. Gloucester Bank*, 17 Mass. 29, 9 Am. Dec. 111. By article 15 of the by-laws, his power to assent to subsequent insurance was expressly confined to giving such assent in writing. In order to guard against the danger of over insurance, the corporation might well require that any assent on their part to further insurance on property insured by them should be given by the deliberate and well-considered act of their president in writing, and not be left to the vagueness and uncertainty of parol proof. The whole extent and limit of the president's authority in this respect were set forth in the by-laws attached to the policy in the present case, and, as the evidence shows, were fully known to the assured. . . . If the argument of the plaintiff should be carried out to its legitimate result, it would give to the president the right, in any case, to suspend or change the by-laws by his verbal act and at his pleasure. This he clearly had no power to do. We are therefore of opinion that the finding of the jury does not render the policy valid; but that it was annulled by the subsequent insurance obtained by the assured without the written assent of the president."

In *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 15 Atl. 353, the supreme court of Vermont, in an elaborate opinion; in *Wilson v. Conway F. Ins. Co.* 4 R. I. 141, the supreme court of Rhode Island, and in *Clearer v. Traders' Ins. Co.* 65 Mich. 527, 32 N. W. 660, and same case in 71 Mich. 414, 39 N. W. 571, the supreme court of Michigan.—held that the fact that the company's agent had authority, in a certain way or manner, to consent to the taking of additional insurance, does not aid the plaintiff; that the agent did not consent, in the cases cited, within the line of his authority or *in the [324] manner prescribed by the policy, wherein the agent is expressly prohibited from waiving or modifying the written contract.

The same view of the law prevails in Connecticut. In *Sheldon v. Hartford F. Ins. Co.* 22 Conn. 235, 58 Am. Dec. 420, it was held that where the policy and survey constituted a contract between the parties, and there was no imperfection or ambiguity in the contract, evidence of parol representations made to the agent prior to the issuing of the policy could not be received to explain or qualify the contract. See also *Glendale Woolen Mfg. Co. v. Protection Ins. Co.* 21 Conn. 19, 37, 54 Am. Dec. 309; *Hough v. City F. Ins. Co.* 29 Conn. 10, 76 Am. Dec. 581.

New York Ins. Co. v. Thomas, 3 Johns.

Cas. 1, was an action upon a policy of insurance, and where parol evidence was offered to vary the terms of the instrument. The question was thus disposed of by Kent, J.:

"The next point is whether the parol proof be admissible to explain the contract, and, if it be, what is the effect, in the present case, of such proof.

"I know no rule better established than that parol evidence shall not be admitted to disannul or substantially vary or extend a written agreement. The admission of such testimony would be mischievous and inconvenient. Parol evidence is to be received in the case of an *ambiguitas latens*, to ascertain the identity of a person or thing, but before the parol evidence is to be received in such case, the latent ambiguity must be made out and shown to the court. In the present instance there is no ambiguity. The language of the contract, throughout, is consistent and explicit. This general rule of law has been particularly and emphatically applied to policies. Skinn. 54. And except in the special instance of explanations resulting from the usage of trade, they have never been allowed to be contradicted by parol agreements."

Jennings v. Chenango County Mut. Ins. Co. 2 Denio, 75, has long been a leading case. There it was held that conditions of insurance containing statements of the purpose for which the property insured is to be occupied, and of its situation as to other buildings, are warranties, and if untrue the policy [325] is void, *though the variance be not material to the risk; and that parol evidence that the insured truly informed the agent of the insurer who prepared the application as to these particulars is not admissible. In the opinion, the language of Parker, Ch. J., in *Higginson v. Dull*, 13 Mass. 96, is quoted, that policies, though not under seal, "have nevertheless ever been deemed instruments of a solemn nature and subject to most of the rules of evidence which govern in the case of specialties. The policy itself is considered to be the contract between the parties, and whatever proposals are made or conversations had between the parties prior to the subscription, they are to be considered as waived if not inserted in the policy, or contained in a memorandum annexed to it."

In *Fowler v. Metropolitan L. Ins. Co.* 116 N. Y. 339, 5 L. R. A. 805, 22 N. E. 567, it was said:

"A long line of authorities has settled the law to be that when it is expressly provided that the premium on a life insurance policy shall be paid on or before a certain day, and in default thereof the policy shall be void, that the nonpayment of the premium upon the day named works a forfeiture. . . . The claim that such provision, in a paid-up policy, is unconscionable and oppressive, and presents a case in which a court of equity should relieve from the forfeiture incurred by omission to make prompt payment of premiums, is not a new one. It has frequently been presented to the courts and has recently received very full consideration in this court in *Atty. Gen. v. North America L. Ins. Co.* 183 U. S.

82 N. Y. 172, and *People v. Knickerbocker L. Ins. Co.* 103 N. Y. 480, 485, 9 N. E. 35. It was decided in those cases that provisions in paid-up policies issued in lieu of other policies on which notes had been given for premiums, that they should be void in case the interest on such notes was not paid, is not unconscionable, oppressive, or usurious. In the first case cited, Judge Earl said: "There are doubtless some decided cases which hold that such forfeiture should not be enforced, but I think the better rule is to uphold and enforce such contracts when free from fraud or mistake, just as the parties have made them." And in *Douglas v. Knickerbocker L. Ins. Co.* 83 N. Y. 492, it was said: "It has generally been found most conducive to the general welfare to leave parties to make their own contracts, *and then enforce them [326] as made, unless, on the ground of fraud, accident, or mistake, ignorance, impossibility, or necessity, relief can be granted against them." . . . It would be impossible to sustain the claim that the statements and representations contained in the pamphlet issued by the company were to be regarded as affecting or modifying the strict terms of the policy without disregarding the established rule of law that a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and that the whole engagement of the parties and the extent and manner of their undertaking is embraced in the writing. This rule is the same in equity as at common law, and although a written agreement may be set aside or reformed, fraud or mistake must be shown to entitle a party to such relief. And it is never competent in an action upon a written contract to show that it was executed on the faith of a preceding parol stipulation not embraced in it."

In *Baumgartel v. Provident Washington Ins. Co.* 136 N. Y. 547, 32 N. E. 990, where defendant had issued to plaintiff a policy of fire insurance which contained a clause to the effect that, unless otherwise provided by agreement indorsed thereon, it should be void in case of other insurance on the property insured; and it also provided that no agent of the company should have power to waive any provision or condition of the policy except such as by its terms might be the subject of agreement indorsed thereon or added thereto, and, as to those, that he should have no such power nor be deemed to have waived them unless in writing so indorsed or attached; and where, in an action upon the policy, it appeared that, during its life, the plaintiff, without notice to the defendant and without its knowledge or consent, obtained other insurance upon the property, and that thereafter he informed the agent, who had issued the policy, of this fact, and that the agent had replied, "All right; I will attend to it;" but it did not appear that the plaintiff then had the policy in suit with him, or afterwards applied to said agent for written consent to the other insurance, it was held that knowledge of the agent of the subsequent insurance did not satisfy the condition of the policy, and that plaintiff having failed

[327] to comply *therewith, the policy was forfeited and void; and also *held* that the statements of defendant's agent did not amount to a waiver of the conditions or authorize the application of the doctrine of estoppel. It was said in the opinion:

"The stipulation with respect to further insurance is one of the conditions upon which, by the agreement of the parties, the liability of the defendant depended in case of a loss during the term of the insurance. The parties have also agreed upon the mode in which the condition could be complied with or waived, namely, by writing indorsed upon the policy in the form of a consent to the other insurance. The agent had power to give this consent only in the manner prescribed by the contract. But there is not in the case any proof, even of verbal consent by the agent that the plaintiff might procure further and additional insurance. . . . The effect of such stipulations in a contract of insurance, as well as the manner in which they may be modified or waived by agents of the company, have been so thoroughly discussed and so clearly pointed out that a reference to some of the more recent cases on the subject is all that is needful here. *Allen v. German American Ins. Co.* 123 N. Y. 6, 25 N. E. 309; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31; *Messelback v. Norman*, 122 N. Y. 583, 26 N. E. 34; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5."

It is doubtless true that in several later cases the New York court of appeals seems to have departed from the principles of the previous cases, and to have held that the restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums *with full knowledge of the actual situation*. To take the benefit of a contract *with full knowledge of all the facts*, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party. *Robbins v. Springfield F. & M. Ins. Co.* 149 N. Y. 484, 44 N. E. 159; *Wood v. American F. Ins. Co.* 149 N. Y. 385, 44 N. E. 80. But see *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 63, 20 Am. Rep. 451, *and *Owens v. Holland Purchase Ins. Co.* 56 N. Y. 565-570, which are irreconcilable.

[328] The fallacy of this view is disclosed in the phrases we have italicized. It was thereby assumed that the agent had full knowledge of all the facts, that such knowledge must be deemed to have been disclosed by the agent to his principal, and, that, consequently, it would operate as a fraud upon the assured to plead a breach of the conditions. This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provision that no waiver shall be made by the agent except in writing in-

dorsed on the policy. As we shall hereafter show when we come to consider the meaning and legal purport of the contract in suit, such express provision was intended to protect both parties from the dangers involved in disregarding the rule of evidence. The mischief is the same whether the condition turned upon facts existing at and before the time when the contract was made, or upon facts subsequently taking place.

In *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271, the facts were as follows: A policy described the property insured as "occupied as a dwelling and boarding house;" in fact, it was occupied as a country tavern, and there was kept for use a billiard table in a room back of the bar room. The property continued to be so used until the fire occurred. In the conditions of insurance, taverns were classified as extra hazardous, and billiard rooms were named as specially hazardous, each being subject to higher premiums than ordinarily hazardous rights. It was *held* by the New Jersey court of errors and appeals that evidence that the application for insurance was prepared by the agent of the insurer, and that he knew, at the time of the application, that the property was occupied as a tavern, and that a billiard table was kept in it for use, could not be received for the purpose of showing that, under the description of a dwelling and boarding house, the parties intended to insure the premises as they were then, in fact, being used; that a written contract of insurance cannot be altered or varied by parol evidence of what occurred between the insured and the agent of the insurer at the time of effecting the insurance: *and that [329] such evidence will not be received to raise an estoppel *in pais*, which shall conclude the insurer from setting up the defense that the policy was forfeited by a breach of the conditions of insurance.

In the opinion of the court, given by Judge Depue, there was a full examination of cases on the subject of the admissibility of parol evidence in actions on policies of insurance, and some of his observations are so weighty, and so applicable to the case before us, we shall quote from them at some length:

"The leading case in New York is *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75. This case held, in accordance with a series of cases, beginning with *Vandervoort v. Smith*, 2 Cai. 155, that parol evidence that the insured truly informed the agent of the insurer, who prepared the application, as to the situation of the premises, was not competent to vary a warranty on that subject, or save the insured from the consequences of a breach of the contract of insurance. This case was recognized as good law by the courts of that state until the decision of *Plumb v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 392, 72 Am. Dec. 52, where such evidence was held by a divided court to be admissible, not to change the contract, but to produce the same result under the guise of an equitable estoppel. *Plumb v. Cattaraugus County Mut. Ins. Co.* was followed in *Rowley v. Empire Ins. Co.* 36 N. Y. 550. It was

justly criticized and condemned as founded on erroneous views, by the Chief Justice in *Deweese v. Manhattan Ins. Co.* as reported in 35 N. J. L. 366, and with *Rowley v. Empire Ins. Co.* has been greatly shaken by subsequent decisions in the same court, if it was not practically overruled by *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47-63, 20 Am. Rep. 451. In *Maher v. Hibernia Ins. Co.* 67 N. Y. 283, reformation of the contract of insurance seems to have been regarded as the appropriate method of relief under such circumstances.

[330] "The condition of the law on this important subject in that state is such that it would not be advisable to adopt it, or prudent to endeavor to follow the decisions of its courts. The discordant and irreconcilable decisions which have grown out of the *departure from the law as held in *Jennings v. Chenango County Mut. Ins. Co.* are cited by Judge Folger in *Van Schoick v. Niagara F. Ins. Co.* 68 N. Y. 438. Some of the conditions of the policy may be controlled by evidence of the knowledge of the parties at the time the insurance was effected, and others not; but no rule or principle has been promulgated for ascertaining, in advance of the litigation, what stipulations in the contract belong to the one class or the other,—a condition of the law sure to result from the effort to deal with contracts of this kind in disregard of established rules of law and acknowledged legal principles. . . .

"It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere evasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with. Extrinsic evidence of the kind under consideration must entirely fail in its object, unless its purpose be to show that the contract expressed in the written policy was not, in reality, the contract as made. A defendant cannot be estopped from making the defense that the contract sued on is not his contract, or that his adversary has himself violated it in those particulars which are made conditions to his rights under it, on the ground of negotiations and transactions occurring at the time the contract was entered into, unless the plaintiff is permitted to show from such sources that the contract, as put in writing, does not truly express the intention of the parties. The difficulty lies at the very threshold. An estoppel cannot arise except upon proof of a contract different from that contained in the written policy, and an inflexible rule of evidence forbids the introduction of such proof by parol testimony, when offered to vary or affect the terms of the written instrument.

"The cases usually cited for the proposition that a contract of insurance is excepted out of the class of written contracts with re-

spect to the admissibility of parol evidence to vary or *control the written contract will [331] be found on examination to be, to a large extent, those in which the proof has been received with a view to the reformation of the policy in equity, or to meet the defense that the contract was induced by false and fraudulent representations not embodied in the contract, or are the decisions of courts in which the legal and equitable jurisdictions are so blended that the functions of a court of equity have been transferred to the jury box. . . . The powers of agents of every kind of principals, to act for and bind their principals, are determined by the unvarying rule of ascertaining what authority is delegated to them. How the contract was effected, whether directly with the insurer or by the intervention of agents, is of no consequence. The question of the admissibility of the testimony does not relate to the method by which the contract was made. It concerns the rule of evidence by which the contract, however made, shall be interpreted.

"Upon principle, it is impossible to perceive on what ground such testimony should be received. A policy of insurance is a contract in writing, of such a nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. If it be ambiguous in its terms, parol evidence, such as would be competent to remove an ambiguity in other written contracts, may be resorted to for the purpose of explaining its meaning. If it incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity. If strict compliance with the conditions of insurance, with respect to matters to be done by the insured after the contract has been concluded, has been waived, such waiver may, in general, be shown by extrinsic evidence, by parol. Further than this, it is not safe for a court of law to go. To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds. . . . A court of law can do nothing but enforce *the contract as the parties have made [332] it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without the risk of disastrous consequences to the rights of parties."

Deweese v. Manhattan Ins. Co. 35 N. J. L. 366, referred to in the case just cited, reports an opinion by Chief Justice Beasley, and from which we shall quote, as it contains, as we think, an able and sound statement of the law on this important subject:

"The contract between these litigants, on the point which I shall discuss, is clear and

unambiguous. The defendants agreed to insure a building occupied as a country store, and the stock of goods, consisting of the usual variety of a country store. This, by the plain meaning of the terms employed is a warranty on the part of the insured that the building was used, at the date of the agreement, for the purpose specified. It was a representation, on the face of the policy, touching the premises in question, and which affected the risk; and such a representation, according to all the authorities, amounts to a warranty. . . . The cases are numerous and decisive upon the subject—so much so, that it does not appear to me to be necessary to refer to them in detail, as, in my opinion, the character of a representation of this kind is apparent upon its face. It can be intended for no other purpose than to characterize the use of the building at the date of the insurance; for, unless this be done, there can be no restriction on the use of the property by the insured, during the running of the risk. Unless this description has the force thus attributed to it, the premises could have been used for any of the most hazardous purposes. A building described in a policy as a 'dwelling house' could, except for the rule above stated, be converted into a mill or a factory. I think it is uncontestedly clear that the description of the use of the premises in this case was meant to define the character of the risk to be assumed by the defendants.

[333] "But, besides this, it is plain that the written contract was 'violated, in a fatal particular, by the assured. By the express terms of one of the stipulations of the insurance, it is declared that, if the premises should be used 'for the purpose of carrying on therein any trade or vocation, or for storing or keeping therein any articles, goods, or merchandise denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to this policy, etc., from thenceforth, so long as the same shall be so used, etc., the policy shall be of no force or effect.' Among the extra hazardous risks, that of keeping a 'private stable' is enumerated, and it was shown on the trial, and was not denied, that, at the date of the policy, and at the time of the fire, a part of the building insured was applied by the plaintiff to this use.

"It cannot be denied, then, that if we take into view these conditions of the case alone, the plaintiff's action must fall to the ground. He did an act which, by force of his written agreement, had the effect to suspend, temporarily, his insurance. As this fact, having this destructive effect, could not be disputed, it became necessary, in order to save the plaintiff's action, to avoid the effect of the written contract; and this burden was assumed, on the argument, by the counsel of the plaintiff. The position taken with this view was, that the policy was obtained for the plaintiff by the agent of the defendants, and that he knew that the building in question was, in part, used as a stable.

"The plaintiff's claim appears to be a meritorious one, and on this account, and in the

hope that there might be found some legal ground on which to support this action, the case was allowed by me, at the circuit, to go to the jury, and the questions of law were reserved for this court. But the consideration which I have since given the matters involved has excluded the faintest idea that, upon legal principles, this suit can be successfully carried through. In my opinion, that end can be attained only by the sacrifice of legal rules which are settled, and are of the greatest importance. Let us look at the proposition to which we are asked to give our assent.

"The contract of these parties, as it has been committed to writing, is, that if the plaintiff shall keep a stable on the premises insured, for the time being, the policy shall be vacated. *But, it is said, the agent of the defendants who procured this contract was aware that the real contract designed to be made was, that the plaintiff might apply the premises to this use. This knowledge of the agent of the defendants, and which, it is conceded, will bind the defendants, is to have the effect to vary the obligations of the written contract. Upon what principle is this to be done? There is no pretense of any fraud in the procurement of this policy. The only ground that can be taken is, that the agent, knowing that the premises were to be, in part, used as a stable, should have so described the use in the policy. The assumption is, and must be, that the warranty, in its present form, was a mistake in the agent. But a mistake cannot be corrected, in conformity with our judicial system, in a court of law. No one can doubt that, in a proper case of this kind, an equitable remedy exists. 'There cannot, at the present day, says Mr. Justice Story, 'be any serious doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake; and a policy of insurance is just as much within the reach of the principle as any other written contract. *Andrews v. Essex F. & M. Ins. Co.* 3 Mason, 10, Fed. Cas. No. 374.

"It is possible, therefore, that in this case, in equity the present contract might be reformed, so as to contain a permission for the plaintiff to keep his stable in this building; but I think it has never before been supposed that this end could be reached in this state, by proof before the jury in a trial at the circuit. The principle would cover a wide field, for, if this mistake can be there corrected, so can every possible mistake. If the plaintiff can modify the stipulation with respect to the restricted use of the premises, on the plea of a mistake in such stipulation, on similar grounds it would be open to the company to modify the policy with respect to the amount insured. I am at a loss to see how, on the adoption of the principle claimed, we are to keep separate the functions of our legal and equitable tribunals. Nor do I think, if this court should sustain the present action, that it could be practicable to preserve, in any useful form, the great primary rule that written instruments

[335] are not to be varied or contradicted by parol evidence. The knowledge of the agent in the present transaction is important only as showing what the tacit understanding of the contracting parties was. Suppose, instead of proof of such tacit understanding, the plaintiff had offered to make a stronger case by showing that the agent expressly agreed that the building might be used, not only as a country store, as the policy stated, but also as a stable, and that the restraining stipulation did not apply to the extent expressed. Can anyone doubt that, according to the practice and decisions in this state, such proof should have been rejected? A rule of law admitting such evidence would be a repeal of the principle, giving a controlling efficacy to written agreements. The memory and understanding of those present at the formation of the contract would be quite as potent as the written instrument.

"I have not found that it is anywhere supposed that this general rule which illegalizes parol evidence under the conditions in question has been relaxed with respect to contracts for insurance. Decisions of the utmost authority, both in England and in this country, propound this doctrine as applicable to policies in the clearest terms."

After citing a number of cases, the Chief Justice took notice of the case of *Plumb v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 392, 72 Am. Dec. 52, in the following terms:

"In the case from New York here referred to, there was, in the application for the policy, a misdescription of the distance of the adjacent buildings from the premises insured, and to this defense the reply was, that the agent of the company had made the measurements, and had obtained the signature of the plaintiff, on the assurance 'that the application was all right and just as it should be.' The court decided that this declaration of the agent could not be offered for the purpose of altering or contradicting the written contract, but that it was admissible as an *estoppel in pais*. Now it is at once obvious that, by force of that view, the agreement in question was enforced, not in the sense of the written terms, but in the sense of the oral evidence, and that the practical result was precisely the same as though the instrument had been reformed in conformity to such evidence at the trial. I think there

[336] is no doubt that this application of the doctrine of estoppel to written contracts is an entire novelty. In the long line of innumerable cases which have proceeded and been decided on the ground that parol evidence is not admissible as against a written instrument, no judge or counsel has ever intimated, as it is believed, that the same result could be substantially attained by a resort to this circuitry. It is true that, if there be a substantial ground in legal principle for its introduction, the fact that it is new will not debar from its adoption; but I have not been able to perceive the existence of such substantial ground. In my apprehension the doctrine can be made to appear plausible only by closing the eyes to the reason of the rule which rejects, in the presence of written con-

tracts, evidence by parol. That reason is, that the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected, whose effect is to vary or contradict such expressed understanding. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result; most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected, not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties. In the case now criticized, the party insured stipulated against the existence of buildings within a definite number of feet from the insured property; by the admission of parol testimony, this stipulation was restricted and limited in its effect. This result, no doubt, was strictly just, if we assume that the parol evidence was true; but, standing opposed to the written evidence, the law presumes the reverse. The alternative is unavoidable—it is a choice between that which is written and that which is unwritten. In the case cited, the effect of the rule adopted by the court was to give a different effect to the written terms from that which they intrinsically possessed—a result induced by the admission of oral evidence. This, I cannot but think, was a palpable alteration of the agreement [337] of the parties. The mistake of the court appears to have been in regarding simply the legal effect of the facts which were proved by parol. Receiving that testimony into the case, a clear estoppel was made out; but the error consisted in the circumstance that such oral evidence was, on rules well settled, inadmissible. The question presented was purely one as to a rule of evidence, but it was treated as a problem relating to the application of general legal principles to an admitted state of facts. The case was not decided by a unanimous court, three judges dissented, and, in my judgment, that dissent was based on satisfactory grounds. . . . The facts now before us do not present the elements of an estoppel. Such a defense rests on a misconception as to a state of facts, induced by the party against whom it is set up. The person who seeks to take advantage of it must have been misled by the words or conduct of another. Now, in the present case, the agent did not make any statement, nor did he do anything which led the plaintiff to alter his condition. The most that can be laid to his charge is that from carelessness he omitted properly to describe the use of the premises insured. But this was not a misstatement of a fact on which the plaintiff acted, because the plaintiff was aware of the circumstance that the building was put to another use. The alleged error in the description is plain on the face of the policy, and the law incontest-

ably charges the parties with knowledge of the meaning and legal effect of his own written contract. . . . To found an estoppel on the ignorance of the plaintiff of the plainly expressed meaning of his own contract would be absurd."

In Pennsylvania, it has always been held that courts of law will not permit the terms of written contracts to be varied or altered by parol evidence of what took place at or before the time the contracts were made, and that policies of insurance are within the protection of the rule.

[338] Thus, when it was stipulated in the conditions of insurance that a false description of the property insured should avoid the policy, it was held that a misdescription defeated the plaintiff's right to recover under it, though the statements were known to be false by the insurer's agent, who prepared the description, *and informed the plaintiff that in that respect the description was immaterial. *Smith v. Cash Mut. F. Ins. Co.* 24 Pa. 320; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331.

In *Com. Mut. F. Ins. Co. v. Huntzinger*, 38 Pa. 41, the subject was examined at length and the previous cases considered, and it was held that mere mutual knowledge by the assured and the agent of the falsity of a fact warranted is entirely inadequate to induce a reformation of the policy so as to make it conform with the truth; that it is rather evidence of guilty collusion between the agent and the assured, from which the latter can derive no advantage. "The conditions of insurance," said the court, "provide that notice of additional insurance, or of any change in existing insurance, shall be given to the company by the insured in writing, and shall be acknowledged in writing by the secretary; and no other notice shall be binding or have any force against the company. In absence of evidence of waiver of the notice required in this stipulation, we do not think 'the jury would be justified in inferring that the knowledge of the agent will bind the principal of notice of subsequent insurance or surrender of previous insurance.' The parties agreed that written notice should be given, and in like manner acknowledged by the secretary; mere knowledge of an agent is not the equivalent of that."

That the law enunciated in these and numerous other cases in Pennsylvania was not overturned by the case of *Kalmutz v. Northern Mut. Ins. Co.* 186 Pa. 571, 40 Atl. 816, as claimed in the brief of defendant in error, will appear on examining the facts of that case and the reasoning of the court.

The opinion shows that the court refused to hold that what was alleged to have taken place at the time the contract was entered into might be received to change the legal effect of the policy, Sterrett, Ch. J., saying:

"The policy in suit contains this provision as to other insurance: 'Policies of all other insurance upon property herein described—whether made prior or subsequent to the date hereof—must be indorsed on this policy, otherwise the insurance shall be void.' The existence of such other insurance of which no indorsement was made on the policy, was

conceded; and, in order to avoid the *effect[339] of the condition above quoted, the plaintiff undertook to prove that the defendant company, by its own acts, had waived the condition, and was thereby estopped from setting it up as a bar to his recovery. As is usual in such cases, there was more or less conflicting testimony as to what passed between the plaintiff and the defendant's agent at the inception of the contract. In the court below, as well as here, it was forcibly contended on plaintiff's behalf that the testimony referred to was sufficient to warrant the jury in finding such facts as legally constitute an estoppel; but, *inasmuch as the record discloses other undisputed evidence which necessarily leads to the same conclusion*, it is unnecessary to consider in detail the conflicting testimony that was submitted to the jury on that question. The policy in suit was issued in April, 1894, and the last assessment thereon was made in October following. Defendant company's secretary testified that he had notice of the additional insurance on the first Wednesday of November, 1894. Notwithstanding that notice to the company, the policy was neither recalled nor canceled; the premiums or assessments collected were not returned, nor was any effort made to return the premium note given by plaintiff, binding him to pay the premiums at such times and in such manner as the company's directors might by law require. These facts were admitted; and if, as the authorities appear to hold, they operated as an estoppel, it will be unnecessary to consume time in the consideration of other questions sought to be raised by several of the specifications of error."

The court then cited *Elliott v. Lycoming County Mut. Ins. Co.* 66 Pa. 26, 5 Am. Rep. 325, where Justice Sharswood said:

"Undoubtedly, if the company, after notice or knowledge of the over insurance, treated the contract as subsisting, by making and collecting assessments under it from the insured, they could not afterwards set up its forfeiture. It would be an estoppel, which is the true ground upon which the doctrine of waiver in such cases rests.' . . . Enough has been said to show that upon the undisputed evidence in the case the learned trial judge would have been warranted in holding, as matter of law, that the defendant was estopped from setting up the condition *above quoted as a bar to plaintiff's[340] claim, and in instructing the jury accordingly."

As, therefore, there was no limitation put in the policy upon the powers of the company's secretary, and as the company, after having received notice of the existence of other insurance, declined to avail itself of the right to rescind the contract, but, on the contrary, elected to enforce payments under the terms of the policy as a subsisting contract, and these facts having been made to appear by undisputed evidence, the court would seem to have been justified in applying the doctrine of estoppel.

It must be conceded that it is shown, in the able brief of the defendant in error, that,

in several of the states, the courts appear to have departed from well-settled doctrines, in respect both to the incompetency of parol evidence to alter written contracts, and to the hindering effect of stipulations in policies restricting the authority of the company's agents. The nature of the reasoning on which such courts have proceeded will receive our consideration when we come to discuss the particular terms of the contract before us.

Leaving, then, the state courts, let us inquire what is the voice of the Federal authorities.

We do not consider it necessary or profitable to examine in detail the decisions of the circuit courts or of the circuit courts of appeals. It is sufficient, for our present purpose, to say that the circuit court of appeals for the seventh circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (*United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406), and that the court of appeals for the eighth circuit, in the present case, has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. 41 C. C. A. 207, 101 Fed. 77.

[341] *In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari.

As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf.

Policies of fire insurance in writing have always been held by this court to be within the protection of this rule.

The first case to be examined is *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044. The importance of this case is great, because, if the conclusion there reached was sound when expressed, and if it has not been overruled by our subsequent decisions, it is decisive of the case before us.

And first, as to the facts of that case, in so far as they resemble those with which we have now to deal. They were thus stated by Mr. Justice Story, who delivered the unanimous opinion of the court:

"This is a writ of error to the circuit court for the district of Rhode Island. The original action was brought by Carpenter, the

plaintiff in error, against the Providence Washington Insurance Company, the defendants in error, upon a policy of insurance under written by the insurance company of \$15,000 'on the Glenco Cotton Factory, in the state of New York,' owned by Carpenter, against loss or damage by fire. The policy was dated on the 27th of September, 1838, and was to endure for one year. Among other clauses in the policy are the following: 'And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect.' 'And if the said insured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy *shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property.' . . . Annexed to the policy are the proposals and conditions on which the policy is asserted to be made, and among them is the following: 'Notice of all previous insurances upon property insured by this company shall be given to them, and indorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect.'

"The declaration averred that during the continuance of the policy he, Carpenter, was the owner of the property by the policy insured, and was interested in said property to the whole amount so insured by the company; and that on the 9th of April, 1839, the factory was totally destroyed by fire, of which the company had due notice and proof. The cause came on for trial upon the general issue, and a verdict was found for the defendants. The plaintiff took a bill of exceptions to certain instructions refused, and other instructions given by the court in certain matters of law arising out of the facts in proof at the trial; and judgment having been given upon the verdict for the defendants, the present writ of error has been brought to ascertain the validity of these exceptions. . . .

"From the 17th of October, 1836, to the 6th of December, 1837, Henry M. Wheeler and Samuel G. Wheeler continued to own the factory in equal moieties, and transacted business under the firm of Henry M. Wheeler & Co. On that day Samuel G. Wheeler sold his moiety to Jeremiah Carpenter. On the 18th of April, 1838, Henry M. Wheeler sold and conveyed his moiety to Carpenter, who thus became the sole own-

er of the entire property. The last conveyance declared the property subject to a mortgage on the premises from Henry M. Wheeler and wife, dated in June, 1835, to Epenetus Reed, on which there was then [343] due \$6,000, which Carpenter *assumed to pay. There had been a prior policy on the premises in the Washington Insurance office, which, upon Carpenter's becoming the sole owner, the company agreed to continue for account of Carpenter, and in case of loss, the amount to be paid to him. That policy expired on the 27th of September, 1838, the day on which the policy, upon which the present suit is brought, was effected. It is proper farther to state that other policies on the same factory had been effected and renewed from time to time, from December 12, 1836, for the benefit of the successive owners thereof, by another insurance company in Providence, called the American Insurance Company; and among these was a policy effected, by way of renewal, on the 14th of December, 1837, in the name of Henry M. Wheeler & Co., for \$6,000, for the benefit of Henry M. Wheeler and Carpenter (who were then the joint owners thereof), payable in case of loss to Epenetus Reed. The sale by Henry M. Wheeler to Carpenter, on the 18th of April, 1838, of his moiety having been notified to the American Insurance Company, the latter agreed to the assignment; and the policy thenceforth became a policy for Carpenter, payable in case of loss to Epenetus Reed. And on the 23d of May, 1838, Carpenter transferred all his interest in the policy to Epenetus Reed. The policy thus effected on the 14th of December, 1837 [in the American Insurance Company] was, (as the Washington Insurance Company assert), not notified to them at the time of effecting the policy made on the 27th of September following, and declared upon in the present suit; nor was the same ever mentioned in, or indorsed upon, the same policy; and upon this account the company insist that the present policy is, pursuant to the stipulations contained therein, utterly void. Subsequently, viz., on the 11th of December, 1838, the American Insurance Company renewed the policy of the 14th of December, 1837, for Carpenter, and at his request, for one year. This renewed policy was never notified to the Washington Insurance Company, nor acknowledged by them in writing; nor does it appear ever to have been actually assigned to Epenetus Reed, down to the period of the loss of the factory by fire. On this account also, the Washington Insurance Company insist that *their [344] policy of the previous 27th of September, 1838, is, according to the stipulations therein contained, utterly void.

"It seems to have been admitted, although not directly proved, that a suit was brought upon the policy of the 14th of December, 1837, at the American Insurance office, after the loss, by Carpenter, as trustee of or for the benefit of Reed, for the amount of the \$6,000 insured thereby; and that at the November term, 1839, of the circuit court, the company set up as a de-

fense that there was a material misrepresentation of the cost and value of the property in the factory insured made to them at the time of the original insurance; and it being intimated by the court that if such was the fact it would avoid the policy, the plaintiff acquiesced in that decision, and discontinued or withdrew the action before verdict.

"The instructions prayed and refused, and also the instructions actually given by the court, are fully set forth in the record. It does not seem important to the opinion, which we are to pronounce, to recite them at large, *in totidem verbis*, since the points on which they turn admit of a simple and exact exposition."

After disposing of the first instruction, which does not relate to our present inquiries, the court said:

"The second instruction asked proceeds upon the ground that although the policy of the American Insurance Company of the 6th of December, 1836, was good upon its face, yet if, in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was to be deemed utterly null and void, and therefore, as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared on.

"The court refused to give the instruction; and, on the contrary, instructed the jury that if the policy of the American Insurance Company was, at the time when that at the Washington Insurance office was made, treated by all the parties thereto as a subsisting and valid policy, and had never, in fact, been avoided, but was still held by the assured as valid, then, that notice thereof ought to have been given to the Washington Insurance Company, and if it [345] was not, the policy declared on was void. We are of opinion that the instruction, as asked, was properly refused, and that given was correct."

After discussing the question, the court added the following observations:

"Indeed, we are not prepared to say that the court might not have gone farther, and have held that a policy—existing and in the hands of the insured, and not utterly void upon its very face, without any reference whatever to any extrinsic facts—should have been notified to the underwriters, even although by proofs afforded by such extrinsic facts it might be held in its very origin and concoction a nullity.

"And this leads us to say a few words upon the nature and importance and sound policy of the clauses in fire policies, respecting notice of prior and subsequent policies. They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might materially affect their rights and interests, to judge whether they ought to insure at all, or for what premium; and to ascertain whether there still remains any such substantial interest of the insured in the premises insured as will gnar-

antee on his part vigilance, care, and strenuous exertions to preserve the property. To quote the language of this court in the passage already cited, the underwriters do not rely so much upon the principles as upon the interest of the assured. Besides, in these policies there is an express provision that in cases of any prior or subsequent insurances, the underwriters are to be liable only for a ratable proportion of the loss or damage as the amount insured by them bears to the whole amount insured thereon. So that it constitutes a very important ingredient in ascertaining the amount which they are liable to contribute towards any loss; and whether there be any other insurance or not upon the property, is a fact perfectly known to the insured, and not easily or ordinarily within the means of knowledge of the underwriters.

[346] "The public, too, have an interest in maintaining the validity of these clauses, and giving them full effect and operation. They have a tendency to keep premiums down to the lowest rates, and to uphold institutions of this sort, so essential in the present state of our country for the protection of the vast interest embarked in manufactures and on consignments of goods in warehouses. If these clauses are to be construed with a close and scrutinizing jealousy, when they may be complied with in all cases by ordinary good faith and ordinary diligence on the part of the insured, the effect will be to discourage the establishment of fire insurance companies, or to restrict their operations to cases where the parties and the premises are within the personal observation and knowledge of the underwriters. Such a course would necessarily have a tendency to enhance premiums, and to make it difficult to obtain insurance where the parties live, or the property is situate, at a distance from the place where the insurance is sought. But be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for those stipulations, would not have been entered into.

"We are, then, of opinion that there is no error in the second instruction. On the contrary, there is strong ground to contend that the stipulations in the policy as to notice of any prior and subsequent policies, were designed to apply to all cases of policies then existing in point of fact, without any inquiry into their original validity and effect, or whether they might be void or voidable. . . .

"The third instruction prayed the court to instruct the jury that if the Washington 183 U. S.

Insurance Company had notice, in fact, of the existence of the policy in the American office, that 'was in law a compliance with the terms of the policy.' The court refused to give the instruction as prayed, but instructed the jury that at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to *comply with the requirements [347] of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect.

"We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect."

Two propositions, then, are clearly established by this decision: (1) That where a policy provides that notice shall be given of any *prior* or *subsequent* insurance, otherwise the policy to be void, such a provision is reasonable and constitutes a condition, the breach of which will avoid the policy; (2) that where the policy provides that notice of *prior* or *subsequent* insurance must be given by indorsement upon the policy or by other writing, such provision is reasonable and one competent for the parties to agree upon, and constitutes a condition, the breach of which will avoid the policy.

We are next to inquire whether this decision has been overruled, or whether it remains as an authoritative declaration of the law.

Shortly after the case was decided at law, it appears that an effort was made by said Carpenter to invoke the aid of a court of equity to enable him to avoid the effect of his own disregard of the conditions contained in the policy. *Carpenter v. Providence Washington Ins. Co.* 4 How. 185, 11 L. ed. 931.

This court held, affirming the circuit court of the United States for the district of Rhode Island, sitting in equity, that, under the facts disclosed by the pleadings and evidence, the complainant was not entitled to equitable relief.

"It is a matter of regret that so great a loss, which the plaintiff and those under whom he claims intended to guard against by insurance, should happen entirely without indemnity. But it is to be remembered that the defendants gave abundant and *re- [348] peated notice to him, in writing and print in the policy itself, as well as other ways, that they would not take any risks on property where it was insured beyond a certain ratio of its full value, unless the circumstances were made known to them, and the additional policy recognized in writing so as to avoid any mistake, or accident, or want of deliberate attention to the subject.

If the plaintiff, after all this, omitted to comply with so substantial a provision in the contract itself, as we are bound to believe on the evidence now offered, we see no way, equitably or legally, to prevent the consequences from falling on himself, rather than others, being the result either of his own neglect, or that of some of the agents he employed. An adherence to such important rule is peculiarly necessary for the protection of absent stockholders, often interested extensively in insurance companies; and so far from its being unconscientious to enforce them, when their existence is well known, and when the risk has been increased without conforming to them, it is the only and just safeguard of all concerned in such institutions."

Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044, has been frequently referred to as an authority in subsequent cases on points collateral to the one we are now considering. *Taylor v. Benham*, 5 How. 260, 12 L. ed. 143; *Russell v. Southard*, 12 How. 145, 13 L. ed. 929; *Oates v. First Nat. Bank*, 100 U. S. 246, 25 L. ed. 583; *Burgess v. Schigman*, 107 U. S. 34, 27 L. ed. 365, 2 Sup. Ct. Rep. 10.

In *Phoenix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 189, 30 L. ed. 644, 646, 7 Sup. Ct. Rep. 500, 502, we find *Carpenter v. Providence Washington Ins. Co.* cited, per Mr. Justice Gray, as an authority for the proposition that "the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract."

It is not pretended in the opinion of the majority in the circuit court of appeals in the present case that the case of *Carpenter v. Providence Washington Ins. Co.* has been [349] modified *or overruled by this court, but the cases relied on by that court are wholly decisions of several state courts and of some of the circuit courts. Nor is it claimed by the learned counsel for the defendant in error that the *Carpenter Case* has been formally overruled or modified by this court. He, however, does cite three decisions of this court which, as he views them, should be regarded as abandoning the doctrines of that case, viz., *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 232, 20 L. ed. 622; *Eames v. Home Ins. Co.* 94 U. S. 621, 24 L. ed. 298, and *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689.

These cases must, therefore, receive our attention. What, then, was the case of *Union Mut. L. Ins. Co. v. Wilkinson*? That was a case where the agent of a life insurance company had inserted in the application a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person and inserted without the assent of the as-

sured. It was held that this untrue statement contained in the application did not invalidate the policy; that permitting verbal testimony to show how this untrue statement found its way into the application did not contradict the written contract sued on, but proceeded on the ground that this statement was not that of the assured. The trial court said to the jury that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defense to the action to show that the agent was mistaken. The case, as reported, does not disclose that the plaintiff's testimony as to the way in which the untrue statement was put in the application was contradicted or denied by the company. It may therefore be presumed that the plaintiff's case, in that respect, was made out by undisputed evidence. And it would seem, such being the state of facts, that this court had reason to hold that the untrue statement was not made by the assured, and that it would operate as a fraud on the plaintiff if he were not permitted to show this fact, which was not a fact or statement contained in *the policy sued on, but an extrinsic fact [350] or statement contained in the application. The defense made upon that statement was, in legal effect, a denial of the execution of the statement—a defense that can always be sustained by parol evidence.

However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so.

That Mr. Justice Miller did not intend, in the case of *Union Mut. L. Ins. Co. v. Wilkinson*, to lay down a new rule of evidence in insurance cases, is clearly shown in the subsequent case of *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. 664, 21 L. ed. 246, where the opinion was delivered by the same learned justice, and who used the following language:

"Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing.

"But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it that other written instruments have.

"Counsel for the defendants in error here relies on two propositions, namely, that the policy, though executed January 5th, is really but the expression of a verbal contract,

made the 31st day of December previous, and that the loss of the vessel between those two dates does not invalidate the contract, though known to the insured and kept secret from the insurers; and, secondly, that they can abandon the written contract altogether and recover on the parol contract.

[351] "We do not think that either of these propositions is sound. Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company. When the company *came to make this instrument they were entitled to the information which the plaintiffs had of the loss of the vessel. If then they had made the policy, it would have bound them, and no question could have been raised of the validity of the instrument or of fraud practiced by the insured. On the other hand, if they had refused to make a policy, no injury would have been done to the plaintiffs, and they would then have stood on their parol contract, if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid.

"To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law.

"We think it equally clear that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement."

Fames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298, is another case relied on as showing that the general rule of evidence was not applicable in insurance cases. But that was the case of a bill in equity filed against an insurance company of New York to require said company to issue to the complainants a policy of insurance against loss or damage by fire, in pursuance of a contract for that purpose alleged to have been made with their agents in Illinois. It was made to appear that the terms of a contract for insurance upon property which was destroyed by fire before the policy was received had been agreed upon. This agreement was manifested by an application signed by the complainant, *and in several letters which had passed between the local agent and the general agent of the company, and between the complainant and the local agent. The re-

port of the case states that there was an agreement as to certain facts by the attorneys in the cause, but what those facts were does not distinctly appear in the report. However, all that can be claimed for the case is that this court considered, from the agreement as to facts between the attorneys, and from the application and the several letters between the agents and the complainant, that a case was made out justifying a court of equity to decree that complainant was entitled to a policy of insurance to be issued for the amount and at the premium shown by the proofs. What was the scope of the authority of the agents who prepared the application and conducted the correspondence does not appear, but the court seems to have assumed that it sufficiently appeared that the agents had authority to act as they did. It is not perceived that this case has any valid application to the case now before us, beyond apparently holding, with *Union Mut. L. Ins. Co. v. Wilkinson*, in 13 Wall. 232, 20 L. ed. 622, that it may be shown by parol that a statement which purports to have been made by an applicant for insurance was not, in point of fact, his statement, but was really that of the agent.

The next case relied on is *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689, and in which it was held by a majority of this court that an insurance company may waive any condition of a policy inserted therein for its benefit. As to this proposition there was, and could have been, no disagreement among the judges, but the difference arose over the sufficiency of the evidence to show the waiver. The question really was whether the company's agent had authority to extend the payment of a premium note, notwithstanding a provision in the policy that a failure to pay the note at maturity would incur a failure of the policy, and a declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures. It was held by the majority that a waiver by the company of both these conditions might be shown by admitting evidence as to the practice of the company in allowing its agents to extend the *time for pay-[353] ment of premiums and of notes given for premiums, as indicative of the power given to those agents, and that error was not committed by submitting to the jury, upon such evidence, to find whether the defendants had or had not authorized its agent to make an extension in this case. In speaking for the majority, Mr. Justice Bradley said:

"The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts, or waive forfeiture. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or

stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. . . . That it [the company] did authorize its agents to take notes, instead of money for premiums, is perfectly evident from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf."

Mr. Justice Strong, speaking for the dissenting parties, said:

"The insurance effected by the policy became forfeited by the nonpayment *ad diem* of the premium note. The policy then ceased to be a binding contract. It was so expressly stipulated in the instrument. Admitting that the company could afterwards elect to treat the policy as still in force, or, in other words, could waive the forfeiture, the local agent could not, unless he was so authorized by his principals. The policy declared that agents should not have authority to make such waivers. And there is no evidence in this case that the company gave to the agent parol authority to waive a forfeiture after it had occurred. They had ratified his acts extending the time of payment of premium notes, when the extension was made before the notes fell due. But no practice of the company sanctioned 354] any act of its agent, done after a policy had expired, by which new life was given to a dead contract."

Whatever may be thought of these divergent views, it is clear that the facts of that case are widely different from those here under consideration, where there is no evidence whatever of a waiver by the company, or of authority to the agent, express or implied, from a course of practice by the company. Here, the company "has chosen," in the language of Mr. Justice Bradley, "to insist upon the terms of the written contract."

The subject of waiver by agents was further considered in the case of *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. ed. 387, when the unanimous opinion of the court was delivered by Mr. Justice Field:

"By the residence of the insured within the prohibited district of country during the period designated in the policy without the previous consent of the company, and the failure of the assured to pay the annual premium when it became due, the policy, by its express terms, was forfeited, and the company released from liability, unless the forfeiture was waived by the action of the company, or of its agents authorized to represent it in that respect.

"The waiver of the forfeiture for the nonpayment of the premium due on the 1st of November, 1872, is alleged on the ground that the premium was subsequently paid to an agent of the company, he delivering its receipt for the same, signed by its secretary and countersigned by the manager and cashier of the local office, the plaintiff contending that the company, by its previous gen-

eral course of dealing with its agents, and its practice with respect to the policy in suit, had authorized the premiums to be paid and the agent to receive the same after they became due, and thus had waived any right to a strict compliance with the terms of the policy as to the payment of premiums.

"The waiver of the forfeiture arising from the residence within the prohibited district between the 1st of July and November, without the previous consent of the company, is also alleged from the subsequent payment of the premium and its receipt by the local agent, the plaintiff contending that the premium was received with knowledge by the agent of the *previous residence of the in- 355]sured within the prohibited district. . . .

"The conditions mentioned in the policy could, of course, be waived by the company, either before or after they were broken; they were inserted for its benefit, and it depended upon its pleasure whether they should be enforced. The difficulty in this case, and in nearly all cases where a waiver is alleged in the absence of written proof of the fact, arises from a consideration of the effect to be given to the acts of agents of the company in their dealings with the assured. Of course, such agents, if they bind the company, must have authority to waive a compliance with the conditions upon the breach of which the forfeiture is claimed, or to waive the forfeiture when incurred, or their acts waiving such compliance or forfeiture must be subsequently approved by the company. The law of agency is the same, whether it be applied to the act of an agent undertaking to continue a policy of insurance or to any other act for which his principal is sought to be held responsible.

"The company, notwithstanding the provision in the policy that its agents were not authorized to waive the forfeitures, sent to them renewal receipts signed by its secretary, to be used when countersigned by its local manager and cashier, leaving their use subject entirely to the judgment of the local agent. The propriety of their use, in the absence of any fraud in the matter, could not afterwards be questioned by the company. . . . So far, then, as the waiver of the forfeiture incurred for nonpayment of the premiums is concerned, it is clear that the company, by its course of dealing, had, notwithstanding the provision of the policy, left the matter to be determined by its local agent, to whom the renewal receipts were intrusted.

"But so far as a forfeiture arose from the residence of the insured within the prohibited district, the case is different. There is nothing in the acts of the company which goes to show that it ever authorized its agents to waive a forfeiture thus incurred, or that it ever knew of any residence of the insured within the prohibited district until informed of his death there. In every case where premiums were received after the day they were payable, the fact that a forfeiture had been incurred was *made known to 356] the company, from the date of the payment,

and the retention of the money constituted a waiver of the forfeiture; but no information of a forfeiture on any other ground was imparted by the date of such payment. The agent receiving the premium, in the case at bar, testified that he knew nothing of the residence of the insured within the prohibited district during the excepted period, and the evidence in conflict with his testimony was slight. He knew that the insured had a place of business there, and that he was permitted to make occasional visits there within that period, and to reside there at other times. Everything produced as evidence of knowledge of residence within the prescribed district is consistent with these occasional visits and residence at other times than during the excepted period.

"But, even if the agent knew the fact of residence within the excepted period, he could not waive the forfeiture thus incurred without authority from the company. The policy declared that he was not authorized to waive forfeitures; and to the provision effect must be given, except so far as the subsequent acts of the company permitted it to be disregarded. There is no evidence that the company in any way, directly or indirectly, sanctioned a disregard of the provision with reference to any forfeitures, except such as occurred from nonpayment of premiums. As soon as it was informed of the residence of the insured within the prohibited district, it directed a return of the premium subsequently paid. It would be against reason to give to the receipt of the premium by the agent, under the circumstances stated, the efficacy claimed. The court, in its instructions, treated the receipt of the premium by the agent, with knowledge of the previous residence of the insured within the prohibited district, if the agent had such knowledge, as itself a sufficient waiver of the forfeiture incurred, without any evidence of the action of the company when informed of such residence; and in this respect we think the court erred. It is essential that the company should have had some knowledge of the forfeiture, before it can be held to have waived it. It is true that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge [357] affecting its liability; and if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived. But here there was no ground for any inference of this kind from the subsequent action or silence of the company. There was no evidence of a disregard of the condition as to the residence of the insured in any previous year, and, consequently, there could be no inference of a waiver of its breach from a subsequent retention of the premium paid. This is a case where immediate enforcement of the forfeiture incurred was directed when information was received that the condition of the policy in that respect had been broken.

"Not only should the company have been

informed of the forfeiture before it could be held by its action to have waived it, but it should also have been informed of the condition of the health of the insured at the time the premium was tendered, upon the payment of which the waiver is claimed. The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked when the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured, if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed, should be apprised of all the facts; of those which create the forfeiture and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the insured being *in extremis*, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policy holder, instead of protecting him against the commission of one by the company."

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, *is [358] an instructive case on the points in controversy here. The facts of the case, as stated in the syllabus, were as follows:

"A person applied in St. Louis to an agent of a New York insurance company for insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written down and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading, and by the agent transmitted to the company, and the company thereupon assumed the risk. It was conditioned in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on his principal; and a copy of the answers, with these conditions conspicuously printed upon it, accompanied the policy. *Held*, that the policy was void."

The unanimous opinion of the court was delivered by Mr. Justice Field, the principal portions of which were as follows:

"It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made up-

on the faith of them, and upon his agreement, accompanying them, that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name was signed; that he truthfully answered those questions; that false answers, written by an agent of the company, were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovery. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy

359] ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract which, upon a truthful report of his condition, could not have been obtained. By then the company was imposed upon, and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri.

"But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove, not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed

lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his *verbal statements, or by those of its [360] agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.

"In *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 329, 24 L. ed. 388, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as the subsequent acts of the company permitted it to be disregarded. In *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 240, 24 L. ed. 691, the policy contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures, and this court held that the company could have insisted upon those terms had it so chosen. . . . The present case is very different from *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617, and from *American Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. ed. 593. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance, 'as the full and complete representative of the company in all that is said or done in making the contract,' and the court held that the powers of the agent are prima facie coextensive with the business intrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which *the assured [361] was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

What, then, are the principles sustained by the authorities, and applicable to the case in hand?

They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the in-

stance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.

[362] *In the light of these principles, let us examine the contract that was made between the parties to the controversy before us. The contract was in writing, and in clear and unambiguous terms; that contract provided that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured *now has, or shall hereafter* make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," and that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions or conditions, no officer, agent, or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Such being the contract, and the property

183 U. S.

insured having been destroyed by fire on June 1, 1898, and the insurance company having denied liability because informed that other insurance was held by the insured on the same property, without the knowledge or consent of the company, this action was brought.

It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at the time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In other words, the contention [363] is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to be insured. It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, it elected to ratify the act of its agent in accepting the premium. On the contrary, all the record discloses is that the jury found that the agent knew, when the policy in the defendant company was issued and delivered to the plaintiff, that there was then subsisting fire insurance to the amount of \$1,500 in another fire insurance company, and that such knowledge had been communicated to the agent by or on behalf of the assured. There is no finding that the agent communicated to the company or to its general agent at Chicago, at the time he accounted for the premium, the fact that there was existing insurance on the property, and that he had undertaken to waive the applicable condition. Indeed, it appears from the letter of defendant's manager at Chicago, to whom the proofs of loss had been sent, which letter was put in evidence by the plaintiff and is set forth in the bill of exceptions, that the additional insurance held by the plaintiff was without the knowledge or consent of the company; and it further appears, and was found by the jury, that immediately on the company's being informed of the fact, the amount of the premium was tendered by the agents of the company to the insured. So that there is not the slightest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium. The plaintiff's case, at its best, is based on the alleged fact that the agent

had been informed, at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defense and escape from the operation of the condition, is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen, entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court.

[364] *This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts, and by approving the conduct of agents and persons applying for insurance in disregarding the express limitations put upon the agents by the principal to be affected.

It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form, is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations, for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing and to the legal doctrine that protects them when so expressed, and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection.

Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony. Increased importance should be given to the

[365] rules involved in this discussion *by that fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy.

The judgment of the Circuit Court of Ap-

peals is reversed. The judgment of the Circuit Court is likewise reversed, and the cause remitted to that court with directions to proceed in conformity with this opinion.

The CHIEF JUSTICE, Mr. Justice Harlan, and Mr. Justice Peckham dissent.

I. STANTON CARTER (on Behalf of Oberlin M. Carter), Appt.,
v.

ROBERT W. McCLAUGHRY, Warden of the United States Penitentiary at Fort Leavenworth, Kansas.

(See S. C. Reporter's ed. 365-401.)

Habeas corpus—direct appeal to Supreme Court—court-martial—former jeopardy—validity of sentence—conspiring to defraud United States—causing false and fraudulent claims to be made against United States—conduct unbecoming officer and gentleman—embezzlement—crime prejudicial to good order and discipline.

1. A final order of a circuit court dismissing a writ of habeas corpus must be affirmed on appeal, if the return shows sufficient cause for detention, where the record of that court shows that the matter came on to be heard on petitioner's oral motion for discharge based upon the averments of the return, no evidence having been offered or considered by the court.
2. A contention that by the sentence of an army court-martial the accused was twice punished for the same offense is so raised as to authorize a direct appeal to the Supreme Court of the United States from an order of a circuit court discharging a writ of habeas corpus, as a case involving the construction and application of the Constitution of the United States, where such contention was put forward in the petition and was argued on the return.
3. A sentence of an army court-martial imposed upon a commissioned officer is not illegal on the ground that the punishment prescribed is in excess of the maximum punishment fixed by the President under the act of Sept. 21, 1890 (26 Stat. at L. 491, chap. 998), since all the executive orders made under such act relate to cases of enlisted men.
4. Punishments of fine and imprisonment imposed by the sentence of an army court-martial are not illegal on the theory that, because by such sentence the accused was also dismissed from the army, such punishments were inflicted after the accused had ceased to be an officer of the army, since, having been proceeded against as such, jurisdiction attached, which included not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law, and, having been sentenced, the status of the accused was that of a military prisoner held by the authority of the United States as an offender against its laws.

NOTE.—On jurisdiction of Federal courts on habeas corpus to review sentences of courts-martial—see note to *Re Huse*, 25 C. C. A. 28.

On former jeopardy—see notes to *Com. v. Fitzpatrick* (Pa.) 1 L. R. A. 451; *Altenburg v. Com. (Pa.)* 4 L. R. A. 543; *United States v. Perez*, 6 L. ed. U. S. 165, and *Ex parte Lange*, 21 L. ed. U. S. 872.

5. A sentence of an army court-martial convened by orders issued by the President does not cease to be the sentence of such court-martial, on the theory that the punishment fixed thereby must be regarded as increased, because the President, acting as the reviewing authority under act July 27, 1892 (27 Stat. at L. 277, chap. 272), disapproved the findings of guilty of some of the specifications under two of the charges, and approved findings of guilty of one or more specifications under each of the charges, and of the findings of guilty of all of the charges, and approved the sentence.
6. A person is not twice put in jeopardy within the meaning of U. S. Const. 5th Amend. by a sentence of an army court-martial imposing both fine and imprisonment upon an army officer convicted of two charges of violating the 60th article of war, one of which charges a conspiracy to defraud the United States and the other the causing of false and fraudulent claims to be made against the United States, even if the punishment prescribed by such article for violations of its provisions is confined to fine, or imprisonment in the alternative, as such charges are separate and distinct offenses, although they related to and grew out of one transaction.
7. Punishment of dismissal from the army imposed by sentence of an army court-martial for conduct unbecoming an officer and a gentleman, under the 61st article of war, is not illegal on the theory that, as by such sentence fine and imprisonment are also imposed for conspiring to defraud the United States and causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war, a third punishment is inflicted where but two offenses were committed, in violation of the provision of U. S. Const. 5th Amend. against putting a person twice in jeopardy for the same offense, since the offense of conduct unbecoming an officer and a gentleman is not the same offense as conspiracy to defraud, or the causing of false and fraudulent claims to be made, although to be guilty of the latter involves being guilty of the former.
8. An army officer who applies to a purpose not prescribed by law public moneys intrusted to him for river and harbor purposes, by causing them to be paid out by checks on false accounts, in violation of U. S. Rev. Stat. § 5488, relating to the improper disposition of public moneys by a disbursing officer of the United States, may be convicted by an army court-martial of a violation of the 62d article of war, which provides for the punishment of all crimes prejudicial to good order and military discipline "not mentioned in the foregoing articles of war," although the 60th article provides for the punishment of any person in the military service who causes false or fraudulent claims to be made against the United States, or who, for the purpose of obtaining payment of any claim against the United States, makes or procures the making of any writing or other paper, knowing it to contain any false or fraudulent statement.
9. The embezzlement by an army officer of moneys appropriated for river and harbor improvements, with whose disbursement he is intrusted, in violation of U. S. Rev. Stat. § 5488, relating to the improper disposition of public money by any disbursing officer of the United States, is not the embezzlement of money "furnished or intended for the military service," within the meaning of the 60th article of war, subd. 9.
10. An army officer in charge of river and harbor improvements, who pays out the money subject to his order and control on false accounts, represented by false and fraudulently certified vouchers purporting to be issued as against the appropriation for the improvements, which moneys, to his knowledge, are not due or owing from the United States to the parties paid, or to anyone else, applies to a purpose not prescribed by law public moneys of the United States, within the meaning of U. S. Rev. Stat. § 5488, relating to the improper disposition of public moneys by a disbursing officer of the United States.
11. It is peculiarly for an army court-martial to determine whether the crime of embezzlement charged is "to the prejudice of good order and military discipline," within the meaning of the 62d article of war, providing for the punishment of such crimes.

[No. 251.]

Argued December 3, 4, 1901. Decided January 6, 1902.

APPEAL from the Circuit Court of the United States for the District of Kansas to review an order discharging a writ of habeas corpus. *Affirmed.*

See same case below, 105 Fed. 614.

Statement by Mr. Chief Justice **Fuller**:

*This was a petition for the writ of habeas corpus filed on behalf of Oberlin M. Carter in the circuit court of the United States for the district of Kansas, October 17, 1900, on which the writ was issued returnable October 26.

The petition alleged that Carter was imprisoned and restrained of his liberty by the warden of the United States prison at Fort Leavenworth, Kansas, by virtue of a sentence imposed upon him by a general court-martial of the United States, approved by the Secretary of War, and approved and confirmed by the President of the United States on the 29th day of September, 1899.

That the warrant under which the warden detained petitioner was an order from the headquarters of the army; that is to say, General Orders No. 172, dated September 29, 1899, and set forth at length.

From this it appeared that Captain Oberlin M. Carter, Corps of Engineers, United States Army, was arraigned and tried before a general court-martial on four charges with specifications under each.

*To the first specification of Charge I., [367] the first, second, third, fourth, and fifth specifications of Charge II.; the first, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, and twenty-first specifications of Charge III.; and the second specification of Charge IV., he pleaded the statute of limitations, the 103d article of war, and the plea was sustained by the court. To the charges and the other specifications he pleaded not guilty, and was found not guilty on the eighth, tenth, twelfth, and twenty-third specifications under Charge III.

Omitting the above specifications and abbreviating those disapproved by the Presi-

dent, as stated hereafter, the charges and specifications were as follows:

Charge I.—“Conspiring to defraud the United States, in violation of the 60th article of war.”

Specification II.—“In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, devising and intending to defraud the United States, and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims hereinafter described; and in pursuance of the said conspiracy the said Oberlin M. Carter, in the months of June, July, and August, September, and October, 1896, being an officer of the United States in charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in the harbor of Savannah, Georgia, in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of [368] receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company afterwards, to wit, from about the 8th day of October, 1896, to July 31, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for, and did, on or about July 6, 1897, cause to be paid, out of the moneys of the United States, \$230,749.90 to the said The Atlantic Contracting Company, on account of the said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

“And in further pursuance of the said

conspiracy the said Captain Carter, about June, July, August, September, and October, 1896, did advertise for proposals for a contract for improving Cumberland sound, Georgia, in said river and harbor district, and so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8, 1896; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain mattresses, stone, and other materials which were different in kind and character from the mattresses, stone, and other materials contracted for in said contract, and very much less costly to [369] the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for, and did, on or about July 6, 1897, cause to be paid, out of the moneys of the United States, \$345,000.00 to the said The Atlantic Contracting Company, on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

“This on the 6th day of June, 1896, and thereafter to the 1st day of August, 1897.”

Charge II.—“Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war.”

Specification VI.—“In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: The claim represented by the following voucher submitted by the said Captain Carter with his accounts, and marked ‘Appropriation for improving harbor at Savannah, Georgia:’ Voucher No. 8, \$230,749.90, July, 1897; and the claim represented by the following voucher submitted by the said Captain Carter with his accounts, and marked ‘Appropriation for improving Cumberland sound, Georgia and Florida:’ Voucher No. 9, \$345,000.00, July, 1897; which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into con-

[370] tracts, dated October 8, 1896, to furnish the United States certain mattresses, *stone, and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VII.—In that the accused caused to be entered on a government pay roll the names of sundry persons as laborers, and caused to be paid to them certain sums for services as laborers, whereas none of such persons had rendered services as laborers, and the accused knew such claims were false and fraudulent.

Specification VIII.—For fraudulently allowing an account of \$121.60 of the Atlantic Contracting Company against the United States, for piling in repairing the Garden Bank training wall.

Specification IX.—For fraudulently allowing an account of \$384 to the Atlantic Contracting Company for pile work.

Specification X.—For fraudulently allowing an amount of \$108.80 to the Atlantic Contracting Company for pile dams.

Charge III.—"Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

[371] Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did wilfully and knowingly cause the following amounts to be paid out of the moneys of the United States subject to his order and control as officer in charge of said improvements, to the Atlantic Contracting Company, a corporation; the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the said company, or to any *one, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and indorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving harbor at Savannah, Georgia;'

"Voucher No. 8, \$230,749.90, July, 1897; and the one indicated and designated by the following voucher (and the entries therein and indorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia and Florida;'

"Voucher No. 9, \$345,000, July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

Specification III.—For making a false statement to the chief of engineers as to new soundings for work in Savannah harbor, with intent to deceive.

Specification IV.—For falsely entering on the pay roll the names of certain persons as laborers to an amount of \$29.50.

Specification V.—For falsely certifying as correct an account of the Atlantic Contracting Company for \$121.60.

Specification VI.—For falsely certifying as correct an account of the Atlantic Contracting Company for \$384.

Specification VII.—For falsely certifying as correct an account of the Atlantic Contracting Company for \$108.80.

Specification IX.—For indorsing a certain false statement on a letter from the chief of engineers as to rentals on property proposed to be acquired by the United States at Savannah.

Specification XI.—For failing to account for the sum of \$132.10, money of the United States, received by the accused from Alfred Hirt.

Specification XXII.—For making false reports as to his absence from his station.

Charge IV.—"Embezzlement, as defined in § 5488, Revised Statutes of the United States, in violation of the 62d article of war."

*Specification I.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah river and harbor district, and, as such officer, in charge of said improvements, being a disbursing officer of the United States, and having intrusted to him large amounts of public money of the United States, did wilfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so intrusted to him, by wilfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control of such officer in charge of said improvements; the accounts on which the same were being paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following voucher (and the entries therein and the indorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving harbor at Savannah, Georgia;'

Voucher No. 8 (\$230,749.90), July, 1897; and the one indicated and designated by the following voucher (and the entries therein and indorsements thereon) sub-

mitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia and Florida.' Voucher No. 9 (\$345,000.00), July, 1897; each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

The court-martial found the accused guilty of the second specification under Charge I., "except the words 'and other material,' and interpolating the word 'and' between the words 'mattresses' and 'stone' wherever those words occur in the specification, of the excepted words not guilty, and of the interpolated word guilty;" and guilty [373] of the charge; guilty of the *sixth specification under Charge II., "except of the words 'and other material' where they occur the second and third time, and interpolating the word 'and' between the words 'mattresses' and 'stone' where they occur the second and third time; of the excepted words not guilty; of the interpolated word guilty;" guilty of the seventh, eighth, ninth, and tenth specifications, and guilty of the charge; guilty of the second, third, fourth, sixth, seventh, ninth, eleventh, and twenty-second specifications under Charge III. of the fifth specification, "except of the words 'the articles have been,' and of the excepted words not guilty;" and not guilty of the eighth, tenth, twelfth, and twenty-third specifications; and guilty of the charge; guilty of the 1st specification under Charge IV., and guilty of the charge.

The general order then set forth the sentence and subsequent action as follows:

Sentence.

And the court does therefore sentence the accused, Captain Oberlin M. Carter, Corps of Engineers, United States Army, "to be dismissed from the service of the United States, to suffer a fine of \$5,000, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name, and place of abode of the accused to be published in the newspapers in and about the station and in the state from which the accused came, or where he usually resides."

The record of the proceedings of the general court-martial in the foregoing case of Captain Oberlin M. Carter, Corps of Engineers, having been submitted to the President, the following are his orders thereon:

The findings of the court-martial in the matter of the foregoing proceedings against Captain Oberlin M. Carter, Corps of Engineers, U. S. Army, are hereby approved as to all except the following:

Charge II. Specifications seven, eight, nine, and ten.

Charge III. Specifications three, four, five, six, seven, nine, eleven, and twenty-two, which are disapproved. And the sentence

*imposed by the court-martial upon the defendant Oberlin M. Carter, is hereby approved. Elihu Root, Secretary of War.

Executive Mansion,

Washington, D. C., September 29, 1899.

Approved and confirmed.

William McKinley.

By direction of the Secretary of War Captain Oberlin M. Carter, Corps of Engineers, ceases to be an officer of the army from this date, and the United States penitentiary, Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent by the commanding general, Department of the East, under proper guard.

By command of Major General Miles:

H. C. Corbin, Adjutant General.

The petition averred that said Carter, in pursuance of the sentence, had been dismissed from the Army of the United States, and the order of dismissal served upon him; that the crime, punishment, name, and place of abode of said Carter had been published in the newspapers in and about his station and in and about the state whence he came and where he usually resided; and that said Carter had paid to the United States the fine of \$5,000 imposed by the sentence. And that said Carter, "having been cashiered the army, having suffered degradation, and having paid the fine imposed, as above set forth, his imprisonment and detention are contrary to law, are in violation of the Constitution of the United States, and are illegal and without warrant of law, for the following reasons, that is to say:"

First. That there was no evidence delivered before the court-martial which tended to show that any crime whatever had been committed by said Carter; but, on the contrary, all the evidence taken together affirmatively showed that Carter was wholly innocent of any wrongdoing; "and that in imposing the sentence above set out said court-martial acted beyond its jurisdiction, and said sentence was and is wholly void." Petitioner stated that he had no copy of the evidence, but that he *attached a copy of an [375] abstract of all the evidence adduced before the court-martial.

Second. That the finding of said Carter guilty of Charge IV. and the specification thereunder, and the imposing of sentence on him as for a violation of the 62d article of war, were and each of them was wholly illegal and void, for that: (a) It was shown by the evidence, and appeared from the charges and specifications, that the two sums of money alleged to have been paid out by Carter "for a purpose not authorized by law" were paid out by him under and in accordance with the specifications of two certain contracts for the improvement of Savannah harbor and Cumberland sound, which contracts were entered into pursuant to the act of Congress of June 3, 1896; (b) It appeared from the specification that the acts described therein were not in violation of the 62d article of war, and were not cogniz-

able by a court-martial under that article, but if justiciable at all by the court-martial, were justiciable under the 60th article of war.

Third. That the imprisonment and detention were illegal and contrary to article 102 prohibiting a second trial for the same offense, and contrary to the 5th Amendment to the Constitution of the United States in this: (a) That it appeared from the charges and specifications, and also from the evidence, that the payment of the two checks drawn by Carter, and described in each of the specifications under which he was convicted, were the only basis of each of the four charges, and that the single act of drawing the two checks had been carved up into four distinct and different crimes, and a punishment assessed on each; (b) That the sentence was beyond the powers of the court-martial and void, for that under the 60th article of war the court-martial was authorized to inflict the punishment of a fine or imprisonment, or such other punishment as it might adjudge; (c) That under the 61st article of war, the violation of which was laid in Charge III., the court-martial had jurisdiction to inflict the judgment of dismissal from the army only; (d) That the facts set out in the specifications under Charges I., II., and IV., respectively, brought the offense therein described under the 60th article of war, under which the [376] court-martial *had jurisdiction only to inflict a fine or an imprisonment or some other punishment, in the alternative, and not emulatively.

Fourth. That the punishment of fine and imprisonment were and each of them was beyond the power of the court-martial to inflict, because the same were imposed after Carter had ceased to be an officer of the Army of the United States, and after he had ceased to be subject to the jurisdiction of the court-martial.

Fifth. That the punishment of imprisonment was beyond the powers of the court-martial and void in this: That under and by virtue of an act of Congress approved September 27, 1890, the President, by an order dated March 20, 1895, fixed the maximum punishment for a violation, by an enlisted man in the Army of the United States, of the 60th article of war, and for the violation by such person of the 62d article of war, by embezzlement of more than \$100, at a term of four years' confinement at hard labor, under each article; and that thereafter, on October 31, 1895 (prior to these proceedings), the President, in accordance with the act of Congress, prescribed that said maximum limit should extend to all such violations, whether by officers or enlisted men of the army.

Sixth. That the sentence was wholly void in this—

"That said court-martial found the said Captain Carter guilty of Charge I. and of specification two thereunder; of Charge II. and specifications six, seven, eight, nine, and ten thereunder; of Charge III. and specifications two, three, four, five, six, seven, [377]

nine, eleven, and twenty-two thereunder; and of Charge IV. and specification one thereunder; and thereupon sentenced the said Carter to be punished as hereinabove set forth; but the President of the United States disapproved the findings of said court-martial as to specifications seven, eight, nine, and ten, under Charge II., and specifications three, four, five, six, seven, nine, eleven, and twenty-two under Charge III., and approved the said sentence as originally fixed by the said court; the said several specifications so approved and the said several specifications so disapproved charging several and distinct offenses, growing out of several distinct and disconnected transactions, *said several offenses charged [377] not being of the same class of crimes.

"That the sentence thus confirmed by the said President of the United States was not the sentence of said court-martial, and was not in mitigation or commutation of such sentence, but was for the offenses of which said Carter was finally determined to be guilty, in excess of the sentence imposed by said court-martial."

The petition further alleged that October 2, 1899, said Carter, by Abram J. Rose, applied to the United States circuit court for the southern district of New York for a writ of habeas corpus, which writ was on October 20, 1899, dismissed; that on January 24, 1900, the decision of the circuit court was affirmed by the United States circuit court of appeals for the second circuit; that thereafter the petitioner last named prosecuted a writ of error to the circuit court and a certiorari out of the Supreme Court of the United States, but the Supreme Court dismissed the appeal and writ of error. Copies of the opinions in each of these courts were attached. Petitioner further averred that this application was made on the same evidence as in the application to the circuit court for the southern district of New York, to wit, the evidence adduced before the court-martial.

By amendment a further allegation was added to the petition to the effect that on December 9, 1899, said Carter and Benjamin D. Green and others were indicted in the United States circuit court for the southern district of Georgia for a conspiracy to defraud the United States, a copy of which indictment was attached; "that said indictment was based on the same facts as set out in the charges and specifications, for the conviction of which by said court-martial said Carter is now undergoing imprisonment,—that is to say, Charge I., specification two, Charge II., specification six, Charge III., specification two, and Charge IV., specification one, as set out in the petition filed herein,—and that said indictment was found after the circuit court of the United States for the southern district of New York had denied the application for a writ of habeas corpus on October 20, 1899."

*The respondent, the warden of the United States penitentiary at Fort Leavenworth, Kansas, returned to the writ that he had Oberlin M. Carter in custody, as such war-

den, and detained him by direction of the Secretary of War, the said Carter being under sentence of a general court-martial, sentenced to be imprisoned at said penitentiary for five years, and that Carter was now in custody as aforesaid, undergoing said sentence of imprisonment; that the warden was acting in the capacity of eustodian of said Carter, in virtue of General Orders No. 172 of September 29, 1899, a duly authenticated copy of which was filed as part of the return; and the respondent contended that said Carter had been lawfully convicted and sentenced by the said general court-martial, which had jurisdiction of the person of said Carter, and of the various offenses for which he was tried.

Respondent further set forth the proceedings by habeas corpus in the southern district of New York, during the pendency of which the said Carter paid the fine imposed, and averred that on hearing the circuit court dismissed the writ, and Carter was remanded to custody (*Re Carter*, 97 Fed. 496); that thereafter the cause was carried to the circuit court of appeals for the second circuit, and that court affirmed the final order of the circuit court. 40 C. C. A. 199, 99 Fed. 948. That on February 5, 1900, a petition for certiorari was submitted to the Supreme Court of the United States, which on February 26, 1900, was denied. *Carter v. Roberts*, 176 U. S. 684, 44 L. ed. 638, 20 Sup. Ct. Rep. 1026. That, on the same day the application for certiorari was denied, an appeal was taken to the Supreme Court, and a writ of error sued out, to review the order of the circuit court in dismissing the habeas corpus and remanding the said Carter; and that thereafter the Supreme Court, on April 23, 1900, dismissed said appeal and writ of error for want of jurisdiction. *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713. That on the mandate issuing from the Supreme Court April 24, 1900, to the circuit court, the circuit court, on April 25, 1900, entered judgment, and remanded Carter to the custody from which he was produced, for the purpose of having the sentence executed. Duly authenticated transcripts of these various proceedings and copies of accompanying briefs were made parts of the return.

[379] *That in accordance with the sentence Carter was received at the penitentiary on the 27th day of April, and had been there until the present date, undergoing the same.

Respondent objected in conclusion to the admission by the court of the abstract of the evidence alleged to have been taken before the court-martial and made part of petitioner's petition, because the record of the whole proceedings of a court-martial is required by law to be reduced to writing, and deposited in the office of the Judge Advocate of the Army, and this record or a copy thereof duly authenticated is the best evidence; and, even if produced, would be inadmissible for the purpose for which it was sought to be introduced, as the courts in habeas corpus proceedings cannot examine the evidence for the purpose of determining the

guilt or innocence of the party convicted; and this case presented no exception justifying departure from this rule, as General Orders No. 172 afforded all the information necessary to dispose of the case.

The record of the circuit court shows that the matter came on to be heard on November 23, 1900, on petitioner's "oral motion to discharge the said Oberlin M. Carter, based upon the averments of respondent's return, no evidence having been offered or considered by the court." On December 10, 1900, it was ordered by the court "that the writ of habeas corpus herein be discharged; and it is further ordered that the said Oberlin M. Carter be remanded to the custody of Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas." The opinion of the court was delivered by Hook, J., in which Thayer, Circuit Judge, concurred. 105 Fed. 614.

This appeal was then prosecuted, and errors duly assigned. Errors were also specified in appellant's brief, in substance as follows:

1. That the finding of "guilty" under Charge IV. and its specification was void, inasmuch as the specification was wrongly laid under article 62, because (a) the money was applied to a purpose prescribed by law; (b) and the crime charged was not "to the prejudice of good order and military discipline;" and inasmuch as the crime charged was "mentioned in the foregoing articles of war," being covered by paragraphs 1, 4, and 9 of article 60.

2. The finding under article 62 being void, that the sentence is in violation of the 5th Amendment of the Constitution, because it was greater than could be imposed for any alleged crime taken singly, and there were only two separate crimes charged, *viz.*, conspiracy and paying fraudulent claims, while there were three several penalties imposed, *viz.*, dismissal, fine, and imprisonment. Dismissal and fine had been discharged, and the third, imprisonment, is illegal.

3. That the entire sentence is illegal and void because, the President having disapproved the conviction as to certain offenses, and having ordered the original sentence to stand, such sentence ceased to be the sentence of the court-martial.

4. The imprisonment is illegal because inflicted after Carter ceased to be an officer of the army.

5. The sentence of imprisonment is void because in excess of the maximum allowed by law.

6. The court-martial had no jurisdiction to try Carter, "because it stands admitted that no evidence whatever was adduced tending to show his guilt."

Mr. Frank P. Blair argued the cause, and, with Mr. Jere M. Wilson, filed a brief for appellant:

Moneys appropriated for river and harbor improvements, and confined to the control of the war department, are, in the contemplation of Congress, "furnished or intended for the military service."

Wisconsin v. Duluth, 96 U. S. 379, 24 L. ed. 668; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782.

The accused was performing the very duties expressly enjoined upon him as an officer in the military service.

United States v. Tyler, 105 U. S. 244, 26 L. ed. 985. See also *United States v. La Tourrette*, 151 U. S. 572, 38 L. ed. 274, 14 Sup. Ct. Rep. 422; *United States v. Morton*, 112 U. S. 1, 28 L. ed. 613, 5 Sup. Ct. Rep. 1.

The duty of an engineer officer on public work is a military duty, because such duty is under the military establishment.

Dig. Op. J. A. G. 67, par. 12.

A soldier is on military duty when he is employed in the military service of the United States. He can be employed to discharge civil functions only when express authority is given by some act of Congress.

Dig. Op. J. A. G. 118, par. 9; *Runkle v. United States*, 122 U. S. 543, 30 L. ed. 1167, 7 Sup. Ct. Rep. 1141.

The special statutory embezzlements defined in U. S. Rev. Stat. §§ 5488, 5491, and 5492, though in terms made the subject of trial and punishment by the United States civil tribunals, are, when committed by military disbursing officers, properly taken cognizance of by courts-martial under the 60th article of war.

Winthrop, Military Law, 2d ed. p. 1097.

The 62d article of war was intended as a dragnet wherewith to catch all offenders whose acts could not properly be laid under some other specific article, provided such acts were subversive of military discipline.

2 Winthrop, Military Law, 2d ed. p. 118.

It is the rule of our military law, knowing no exception, that if any offense can properly be laid under some other specific article it must not be laid under the general or 62d article.

2 Winthrop, Military Law, p. 1126; Benet, Military Law, p. 53; Dig. Op. J. A. G. (Winthrop), p. 146; *Re Carter*, 97 Fed. 496.

The jurisdiction of courts-martial is confined to the punishment of military persons for strictly military offenses. Nor can Congress confer jurisdiction upon courts-martial for the trial of civil offenses.

Ex parte Henderson, Fed. Cas. No. 6,349.

The argument *ab inconvenienti* is not without force in this connection. It is alleged in the petition, and not traversed, that petitioner has been indicted by a Federal grand jury for the same offense set out under Charge 1. As the authorities now stand he cannot plead *autrefois convict*, when he shall be arraigned in the United States district court in Georgia.

Re Esmond, 5 Mackey, 64; *United States v. Cashiel*, 1 Hughes, 552, Fed. Cas. No. 14,744; *Howe's Case*, 6 Ops. Atty. Gen. 506; *United States v. Maney*, 61 Fed. 140.

Such a situation is abhorrent to the mind of the American lawyer; it is contrary to the genius of our institutions; and if such a principle has crept into our Anglo-183 U. S.

Saxon jurisdiction, it is high time it should be scourged out of our temples of justice.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

This court in habeas corpus will examine the evidence or pleadings to determine the identity of the offense for which petitioner claims he is being twice punished.

Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672.

Under a statute precisely similar to the 60th article of war it has been held error to inflict cumulative punishment, and the error may be reached by habeas corpus proceedings.

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872.

While the legislature may pronounce as many combinations of things as it pleases as criminal, resulting not infrequently in a plurality of crimes in one transaction, or even in one act, for any of which there may be a conviction without regard to the others, it is a fundamental rule of law that out of the same facts a series of charges shall not be preferred.

1 Bishop, New Crim. Law, par. 1060; *Reg. v. Elrington*, 9 Cox C. C. 86.

If two indictments set out like offenses and relate to one transaction, yet if one contains more of criminal charge than the other, but upon either there would be a conviction for what is embraced in the other, the offenses, though of different names, are, within our constitutional guaranty, the same.

Fox v. State, 50 Ark. 528, 8 S. W. 836; *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; 1 Chitty, Crim. Law, 455.

The offenses are the same whenever evidence adequate to the one indictment will equally sustain the other.

United States v. Lee, 4 Cranch, C. C. 446, Fed. Cas. No. 15,586; *United States v. Miner*, 11 Blatchf. 511, Fed. Cas. No. 15,780; *Holt v. State*, 38 Ga. 187; *State v. Cameron*, 3 Heisk. 78; *State v. James*, 63 Mo. 570; *Wright v. State*, 17 Tex. App. 152; *Re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672. See also *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *United States v. Chouteau*, 102 U. S. 603, 26 L. ed. 246; *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437.

A several or collective sentence assessed on all counts after finding of a several verdict of guilty on good and bad counts alike cannot be unheld.

State v. Dooley, 64 Mo. 146; *Wood v. People*, 59 N. Y. 117; Bishop, Crim. Proc. par. 1015; *State v. Hinckley*, 4 Minn. 345, Gil. 261; Wharton, Crim. Pl. & Pr. par. 771.

The punishments by fine and imprisonment were, each of them, illegal and void, because inflicted after Captain Carter had ceased to be an officer of the army, and had passed beyond the jurisdiction of a court-martial.

1 Winthrop, Military Law, 2d ed. p. 116; 5 Ops. Atty. Gen. 735. See also *Steiner's Case*, 8 Ops. Atty. Gen. 328; *Ex parte Henderson*, Fed. Cas. No. 6,349.

The amenability of an officer to the military jurisdiction ceases even during absence on leave.

1 Winthrop, *Military Law*, 2d ed. pp. 120, 121.

A petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office.

Warner Valley Stock Co. v. Smith, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225; *United States v. Boutwell*, 17 Wall. 604, 21 L. ed. 721.

The clause in the 60th article of war providing that an officer after dismissal or a soldier after discharge shall continue to be liable to be arrested and held for trial and sentence by a court-martial, for an offense provided for in that article, as though he had not received his discharge nor been dismissed, is unconstitutional because it subjects civilians to trial by court-martial.

Winthrop's *Military Law*, pp. 122, 123; *Ex parte Henderson*, Fed. Cas. No. 6349.

By the failure of the return to deny the allegation of the petition that no evidence was given before the court-martial tending to show the petitioner's guilt the averment stands admitted.

Gould, Pl. Heard's 5th ed. § 98; Stephen, Pl. Andrews's ed. § 132.

If there was no evidence at all before the court martial tending to prove the matters alleged in the specification, the court-martial had no jurisdiction to punish and the matter may be inquired into collaterally.

People ex rel. Spahn v. Townsend, 10 Abb. N. C. 169.

This rule has been invoked as against a committing magistrate, and where the evidence adduced shows that no crime has been committed the prisoner will be discharged.

Ex parte McNulty, 77 Cal. 164, 19 Pac. 237; *Re Eberle*, 44 Kan. 472, 24 Pac. 958; *Re Brandau*, 26 Fla. 142, 7 So. 528; *Ex parte Kearny*, 55 Cal. 212; *Ex parte Jackson*, 45 Ark. 158; *Re Simon*, 37 N. Y. S. R. 48, 13 N. Y. Supp. 399.

Mr. H. G. Stone also argued the cause, and, with Mr. Frank P. Blair, filed a reply brief for appellant.

Mr. John W. Clous and Solicitor General Richards argued the cause and filed a brief for appellee.

The power of courts-martial to arrive at a final determination is as inherent as that of any court constituted under the Constitution and acts of Congress.

Re Davison, 21 Fed. 620; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Re MeVey*, 23 Fed. 879.

A writ of habeas corpus does not possess the functions of a writ of error, whereunder, upon a proper bill of exceptions, the errors in the pleadings, at the trial or in the judgment, may be reviewed.

Ex parte Watkins, 3 Pet. 493, 7 L. ed. 650; *Re MeVey*, 23 Fed. 879; *Dynes v. Hoover*, 20 How. 81, 15 L. ed. 844; *Ex parte Reed*, 100 U. S. 23, 25 L. ed. 539; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Keyes v. United States*, 109 U. S. 336, 27 L. ed. 954, 3 Sup. Ct. Rep. 202; *Ex parte Siebold*, 100

U. S. 375, 25 L. ed. 718; *Re Grimley*, 137 U. S. 147, *sub nom. United States v. Grimley*, 34 L. ed. 636, 11 Sup. Ct. Rep. 54.

To entitle this court to overthrow the sentence imposed by the court-martial it would have to be shown that the sentence imposed was not merely erroneous or voidable, but so far erroneous as to be absolutely void or a nullity *ab initio*.

United States v. Pridgeon, 153 U. S. 59, 38 L. ed. 635, 14 Sup. Ct. Rep. 746.

The trial court must of itself determine the sufficiency of the charges and specifications before it and of the evidence adduced in their support.

Dynes v. Hoover, 20 How. 81, 15 L. ed. 844; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Swain v. United States*, 165 U. S. 561, 41 L. ed. 825, 17 Sup. Ct. Rep. 448; *Re Bogart*, 2 Sawy. 396, Fed. Cas. No. 1-596; *Re White*, 9 Sawy. 49, 17 Fed. 724. See also *Ex parte Yarbrough*, 110 U. S. 654, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Re Eckart*, 166 U. S. 482, 41 L. ed. 1086, 17 Sup. Ct. Rep. 638.

The courts-martial, in the absence of positive enactment, are bound to regulate their mode of procedure by the customary military law.

Ex parte Henderson, Fed. Cas. No. 6349; *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Martin v. Mott*, 12 Wheat. 19, 35, 6 L. ed. 537, 542; *Re Poe*, 5 Barn. & Ad. 681.

It is the province of courts-martial to decide what constitutes conduct to the prejudice of good order and military discipline.

Clode, *Military Law*, 19; *Darwins v. Rokeby*, 4 Fost. & F. 831; *Grant v. Gould*, 2 H. Bl. 100; *United States v. Fletcher*, 148 U. S. 84, 37 L. ed. 378, 13 Sup. Ct. Rep. 552; *Smith v. Whitney*, 116 U. S. 178, 29 L. ed. 604, 6 Sup. Ct. Rep. 570; *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537; *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838; *Swain v. United States*, 165 U. S. 561, 41 L. ed. 825, 17 Sup. Ct. Rep. 448.

Under the Constitution and laws of the United States the appropriations made for river and harbor improvements are for the benefit of commerce and navigation, and not for military or naval purposes; the money so appropriated is therefore furnished and intended for public works in aid of commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; Cooley, *Principles of Const. Law*, p. 63.

The 5th Amendment to the Constitution does not apply to trials by courts-martial. *Re Esmond*, 5 Mackey, 73; *Ex parte Henderson*, Fed. Cas. No. 6349; *Ex parte Milligan*, 4 Wall. 123, 18 L. ed. 296.

The provisions of the 5th, 6th, and 8th Amendments relate to judicial proceedings in courts of the United States.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; *Ex parte Watkins*, 7 Pet. 573, 8 L. ed. 788; *Twitchell v. Pennsylvania*, 7 Wall. 326, 19 L. ed. 224; *Edwards v. Elliott*, 21 Wall. 557, 22 L. ed. 492; *Walker v. Sauvi-*
183 U. S.

net, 92 U. S. 90, 23 L. ed. 678; *Pearson v. Fewdall*, 95 U. S. 294, 24 L. ed. 436; 1 Bishop, *Crim. Law*, 931, 946; *Dynes v. Hoover*, 20 How. 78, 15 L. ed. 843; *Re Bigelow*, 113 U. S. 330, 28 L. ed. 1006, 5 Sup. Ct. Rep. 542.

A plea of the accused that he was being twice tried for the same offense in the same proceeding is a defense which must be raised at the trial, and cannot be made the ground of an application for a writ of habeas corpus.

15 Am. & Eng. Enc. Law, 2d ed. p. 169; *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; *Ex parte Ulrich*, 43 Fed. 661.

A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.

Morey v. Com. 108 Mass. 433.

A punishment adjudged upon conviction of the offender on several charges is valid and operative, provided it is a punishment legally imposed, upon conviction of any one of the charges on which the conviction is duly approved.

Dig. Ops. J. A. G. p. 696.

A sentence of fine for one of the offenses set out in the 60th article of war, and imprisonment for the other, or of fine and dismissal, or of dismissal and imprisonment, is valid.

1 Bishop, *Crim. Law*, 1060, 1062; *United States v. Bennett*, 17 Blatchf. 361, Fed. Cas. No. 14,572; *Re Haynes*, 30 Fed. 764; *Re Fry*, 3 Mackey, 138; *Ex parte Peters*, 4 Dill. 169, Fed. Cas. No. 11,027; *United States v. O'Callahan*, 6 McLean, 596, Fed. Cas. No. 15,910; Wharton, *Crim. Pl. & Pr.* 910, 911, and note 5; *Ex parte Hibbs*, 26 Fed. 427; *Howard v. United States*, 34 L. R. A. 509, 21 C. C. A. 586, 43 U. S. App. 678, 75 Fed. 986; *Carlton v. Com.* 5 Met. 532.

Prior to the amendment of the 104th article of war by the act of July 27, 1892, the reviewing officer, although disapproving the findings to one or more charges and approving others, might nevertheless approve the sentence and direct its execution, provided it was sustained by and appropriate to the offenses under the approved charges.

1 Winthrop, *Military Law*, 1st ed. p. 635; *Ives*, *Military Law*, p. 183; *Dig. Ops. J. A. G.* ed. of 1895, par. 5, p. 696.

Nothing more is required under the law as it is in force since 1892 than that the sentence should be expressly approved or disapproved.

Op. J. A. G. Jan. 2, 1897; 1 Winthrop, *Military Law*, 2d ed. 685-693; Davis, *Military Laws*, 537-541.

Every sentence of a court-martial is interlocutory and inchoate until an order of confirmation by the commanding officer.

Mills v. Martin, 19 Johns. 7; *Runkle v. United States*, 122 U. S. 555, 30 L. ed. 1170, 7 Sup. Ct. Rep. 1141; 1 Winthrop, *Military Law*, 2d ed. 685.

The approval of the sentence by the re-

viewing officer is made by the 104th article of war the only essential requisite to the taking effect of the sentence.

1 Winthrop, *Military Law*, 2d ed. 686.

The jurisdiction of the court-martial having once attached by arrest of the prisoner, it retains jurisdiction for all purposes of trial, judgment, and execution.

1 Winthrop, *Military Law*, 646; *Barrett v. Hopkins*, 2 McCrary, 109, 7 Fed. 312. See also *Re Wildman*, Fed. Cas. No. 17,653a; *Re Craig*, 70 Fed. 971; 16 Ops. Atty. Gen. 292; *Re Bogart*, 2 Sawy. 396, Fed. Cas. No. 1,596; *Coleman v. Tennessee*, 97 U. S. 515, 24 L. ed. 1121; *Esmond Case*, 5 Mackey, 74; *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213.

Where there is a verdict of guilty upon a number of counts and the sentence imposed does not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is found to be sufficient.

Claassen v. United States, 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169; *Evans v. United States*, 153 U. S. 595, 38 L. ed. 834, 14 Sup. Ct. Rep. 934, 939; *Peters v. United States*, 36 C. C. A. 105, 94 Fed. 127; *Jewett v. United States*, 53 L. R. A. 568, 41 C. C. A. 88, 100 Fed. 832.

*Mr. Chief Justice Fuller delivered the [380] opinion of the court:

In *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713, it was said: "The 8th section of article I. of the Constitution provides that the Congress shall have power 'to make rules for the government and regulation of the land and naval forces;' and in the exercise of that power Congress has enacted rules for the regulation of the army, known as the 'articles of war.' Rev. Stat. § 1342. Every officer, before he enters on the duties of his office, subscribes to these articles, and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them. Courts-martial are lawful tribunals, *with authority to finally deter-[381] mine any case over which they have jurisdiction: and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced."

Jurisdiction over the person is conceded, but it is argued that there was no jurisdiction over the subject-matter, because the evidence affirmatively showed that no crime whatever had been committed. Whether the sentence of a military court, approved by the reviewing authority, is open to attack in the civil courts on such a ground is a question which does not arise on this record. The motion to discharge conceded the return to be true, and if the return showed sufficient cause for detention, the circuit court was right in dismissing the writ, and its final order to that effect must be affirmed.

No evidence was adduced in or considered by the circuit court, and none is before us, nor is any inquiry into the innocence or guilt of the accused permissible.

Was, then, the sentence void for want of power to pronounce and enforce it?

The particular ground on which the appeal directly to this court may be rested is that the case involved the construction or application of the Constitution in the contention that by the sentence petitioner was twice punished for the same offense.

That question was put forward in the petition and manifestly argued on the return. The circuit court states in its opinion that "it is contended in behalf of Carter that his imprisonment is in violation of the Constitution of the United States, and is otherwise illegal and without warrant of law." And, indeed, the application of the Constitution would seem to be necessarily involved if the sentence were held invalid on other grounds.

Holding the case to be properly before us, it will be more convenient to examine the constitutional point specially raised after we have considered some of the other objections to the sentence.

[382] One of these objections is that the sentence exceeded the *maximum punishment fixed by the President, under the act of Congress approved September 27, 1890 (26 Stat. at L. 491, chap. 998), because the term of imprisonment imposed was five instead of four years.

That act provides that "whenever by any of the articles of war for the government of the army the punishment on conviction of any military offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe."

February 26, 1891, the President made an executive order in limitation of punishment which was promulgated to the army in General Orders No. 21, February 27, 1891; and therein it was said: "In accordance with an act of Congress of September 27, 1890, the following limits to the punishment of enlisted men, together with the accompanying regulations, are established for the government in time of peace, for all courts-martial, and will take effect thirty days after this order." This executive order was amended by the President March 20, 1895, and again amended March 30, 1898, and in 1901. In neither of these executive orders were its provisions extended to commissioned officers, and they solely related to the cases of enlisted men. It is true that clause 938 of the army regulations promulgated October 31, 1895, provides: "Whenever by any of the articles of war punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the Manual for Courts-Martial, published by authority of the Secretary of War." But we do not find in the manual any attempt to extend the limitations to others than enlisted men; and

it is evident that a limit on discretion in punishment to be imposed by the President only, can only have such operation as he may affirmatively prescribe.

It is further urged that the punishments of fine and imprisonment were illegal because inflicted after Captain Carter had ceased to be an officer of the army.

The different provisions of the sentence took effect concurrently while the accused was under the control of the military authorities of the United States as a commissioned officer of *the army. The dates of the [383] order of dismissal, of the infliction of the fine, and of the beginning of the imprisonment were the same date.

The accused was proceeded against as an officer of the army, and jurisdiction attached in respect of him as such, which included, not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. Rev. Stat. § 1361.

It may be added that the principle that where jurisdiction has attached it cannot be divested by mere subsequent change of status has been applied as justifying the trial and sentence of an enlisted man after expiration of the term of enlistment (*Barrett v. Hopkins*, 2 McCrary, 129, 7 Fed. 312), and the execution of sentence after the lapse of many years, and the severance of all connection with the army. *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118.

In the latter case this court held, at October term, 1878, that a soldier who had been convicted of murder and sentenced to death by a general court-martial in 1865, but whose sentence had not been executed, might "be delivered up to the military authorities of the United States, to be dealt with as required by law." In this matter it was subsequently advised by Attorney General Devens that the death sentence might legally be carried into effect notwithstanding the fact that the soldier had in the meantime been discharged from the service, under the circumstances detailed; but he recommended that the sentence be commuted, and this recommendation was followed. 16 Ops. Atty. Gen. 349.

In *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213, where the accused was sentenced by a general court-martial to dishonorable discharge, forfeiture of pay, and eight years' imprisonment in the Albany penitentiary, an application for release on habeas corpus was denied, and the sentence held to be legal.

*Another objection strenuously insisted [384] on is that the sentence ceased to be the sentence of the court-martial because of the disapproval of certain specifications by the President.

The 65th article of those enacted by Congress
183 U. S.

gress April 10, 1806 (2 Stat. at L. 359, chap. 20), provided: "But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being." In the Revised Statutes this part of the 65th article of war was made article 104, and read: "No sentence of a court-martial shall be carried into execution until the whole proceedings shall have been approved by the officer ordering the court, or by the officer commanding for the time being." By the act of July 27, 1892 (27 Stat. at L. 277, chap. 272), the 104th article was amended so as to read: "No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being."

The original article required *the whole proceedings to be laid* before the reviewing authority; the Revised Statutes, that *the whole proceedings should be approved*; the act of July 27, 1892, that *the sentence should not be carried into execution until it was approved*. From this legislation it appears that the approval of the sentence, and not of the whole proceedings, is now the prerequisite to carrying the sentence into execution; and this is in harmony with articles 105, 106, 107, and 108.

In *Claassen v. United States*, 142 U. S. 140, 146, 35 L. ed. 966, 968, 12 Sup. Ct. Rep. 170, it was said: "In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' *Peake v. Oldham*, 1 Cowp. 275, 276; *Rea v. Benfield*, 2 Burr. 980, 985. See also *Grant v. Astle*, 2 Dougl. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show [385] the contrary, the presumption of law is that the court awarded sentence on the good count only."

In *Ballew v. United States*, 160 U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263, where the indictment embraced two counts, each setting up a distinct offense, the court instructed the jury that if they considered the defendant guilty on one count and innocent on the other, they should so find; and that if they found him guilty on both counts, that they should return a general verdict of guilty. A general verdict of guilty was returned, and judgment rendered thereon.

This court held that error had been committed in the conviction as to the first count, but none in the conviction upon the other; and as the general verdict covered both, the judgment was reversed under the statute in that behalf, and the cause remanded, with 183 U. S.

instructions to enter judgment on the second count.

In *Putnam v. United States*, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923, where there was a conviction on two counts, and the sentence imposed was distinct and separate as to each count, but was made concurrent so that the entire amount of punishment imposed would be undergone if the judgment were sustained under either count, error being found in the conviction as to one of them, the judgment was reversed as to that count, and affirmed on the other.

We are dealing here with no matter of insufficient counts or of conviction of two offenses, sustainable only as to one, but the analogies of the criminal law bear out the procedure under the military law, the rules of which determine the present contention.

That contention after all amounts to no more than to say that if the court-martial had acquitted on the disapproved findings, it must be assumed that the sentence would have been less severe, and therefore that the President should have sent the case back or mitigated the punishment, and that because he did not the punishment must be conclusively regarded as increased. This is wholly inadmissible when the powers vested in the ultimate tribunal are considered.

The court-martial for the trial of Captain Oberlin M. Carter was convened by orders issued by the President; and he was therefore the reviewing authority, and the court of last resort.

*The law governing courts-martial is found [386] in the statutory enactments of Congress, particularly the articles of war; in the army regulations, and in the customary military law. According to military usage and practice, the charge is in effect divided into two parts, the first technically called the "charge," and the second the "specification." The charge proper designates the military offense of which the accused is alleged to be guilty. The specification sets forth the acts or omissions of the accused which form the legal constituents of the offense. The pleading need not possess the technical nicety of indictments as at common law. "Trials by courts-martial are governed by the nature of the service, which demands intelligible precision of language, but regards the substance of things rather than their forms." 7 Ops. Atty. Gen. 604. Not only do military usage and procedure permit of an indefinite number of offenses being charged and adjudicated together in one and the same proceeding, but the rule is recognized that whenever an officer has been apparently guilty of several or many offenses, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together, and together brought to trial. 1 Winthrop, Military Law, 219; 22 Ops. Atty. Gen. 595. And it has been repeatedly ruled by the Judges Advocate General that "a duly approved finding of guilty on one of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence, although

the similar findings on all the other charges are disapproved as not warranted by the testimony." Digest of Opinions of Judge Advocate General, ed. 1895, p. 696; Id. ed. 1868, pp. 343, 350.

The sentence against Captain Carter was rendered on findings of guilty of four charges and certain specifications thereunder.

It devolved on the President to approve or to disapprove the sentence. Before taking action he referred the proceedings to the Attorney General, who submitted a careful report thereon, and recommended the disapproval of certain findings. 22 Ops. Atty. Gen. 589. These related to facts of less gravity under Charges I. and II. than the others set up thereunder, and those under [387] Charge III. *thought objectionable were not material, as dismissal was the sole punishment under that charge. The President disapproved of the findings of guilty of some of the specifications under two of the charges, and approved findings of guilty of a specification or specifications under each of the charges, and of the findings of guilty of all of the charges, and approved the sentence. He might have referred the proceedings back to the court for revision, but he was not required to do so if in his opinion this was not necessary, and the sentence was justified by the findings which he did approve. As President he might have exercised his constitutional power to pardon, or, as the reviewing authority, he might have pardoned or mitigated the punishment adjudged, except that of dismissal, although he had no power to add to the punishment. He did not think it proper to remand, to mitigate, or to pardon. He clearly acted within his authority, whether the articles of war, the army regulations, or the unwritten or customary military law be considered, and the judgment he rendered cannot be disturbed on the ground suggested.

We are brought then to consider the two propositions on which much of the stress of the argument was laid.

First. That the finding of guilty of Charge IV. and its specification was beyond the powers of the court-martial;

Second. That if that finding were void, then that the sentence was in violation of the 5th Amendment to the Constitution.

Charge I. was: "Conspiring to defraud the United States, in violation of the 60th article of war." Charge II. was: "Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

Charge III. was: "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war." Charge IV. was: "Embezzlement, as defined in § 5488 of the Revised Statutes, in violation of the 62d article of war."

If Charge IV. be laid out of view, let us see if the sentence was void because in violation of the 5th Amendment.

That amendment declares: "Nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb."

*The government objects in the outset [388] that the 5th Amendment is not applicable in proceedings by court-martial, and that the question could only be raised under the 102d article of war, which reads: "No person shall be tried a second time for the same offense," and that, moreover, the point was not raised in the court-martial that proceeding to judgment under these three charges would be either in violation of the 102d article of war or of the 5th Amendment, and comes too late on application for habeas corpus. And, further, that the question was one within the power of the court-martial to decide, and must be held to have been waived, or be assumed to have been ruled against the accused, in which case the decision would be conclusive on habeas corpus, since if incorrect it would be merely error, and would not go to the jurisdiction.

In *Re Belt*, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987, we held that the supreme court of the District of Columbia had jurisdiction and authority to determine the validity of an act which authorized the waiver of a jury, and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense; and that, this being so, this court could not review the action of that court and the court of appeals in this particular on habeas corpus.

The case of *Ex parte Bigelow* was referred to and quoted from thus: "In *Ex parte Bigelow*, 113 U. S. 328, 330, 28 L. ed. 1005, 1006, 5 Sup. Ct. Rep. 542, which was a motion for leave to file a petition for habeas corpus, the petitioner had been convicted and sentenced in the supreme court of the District to imprisonment for five years under an indictment for embezzlement. It appeared that there were pending before that court fourteen indictments against the petitioner for embezzlement, and an order of the court had directed that they be consolidated under the statute and tried together. A jury was impanelled and sworn, and the district attorney had made his opening statement to the jury, when the court took a recess, and upon reconvening a short time afterwards, the court decided that the indictments could not be well tried together, and directed the jury to be discharged from the further consideration of them, and re- [389] seined the order of consolidation. *The prisoner was thereupon tried before the same jury on one of the indictments, and found guilty. All of this was against his protest and without his consent. The judgment on the verdict was taken by appeal to the supreme court of the District in general term, where it was affirmed. It was argued here, as it was in the court in general term, that the impanelling and swearing of the jury and the statement of his case by the district attorney put the prisoner in jeopardy in respect of all the offenses charged in the consolidated indictment, within the meaning of the 5th Amendment, so that he could not be again tried for any of these offenses:

and Mr. Justice Miller, delivering the opinion of the court, after remarking that if the court of the District was without authority in the matter, this court would have power to discharge the prisoner from confinement, said: 'But that court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which that court must pass, so far as it was purely a question of law, and on which the jury, under the instructions of the court, must pass if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal,—a much stronger case than this,—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense; and if the identity of the offense were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial, it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea, both

[390] as matter of law and of fact, *cannot be doubted. . . . It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court, so as to make its action when erroneous a nullity. But the general rule is that when the court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities.' And the application was denied."

It is difficult to see why the sentences of courts-martial—courts authorized by law in the enforcement of a system of government for a separate community recognized by the Constitution—are not within this rule. Its application would seem to be essential to the maintenance of that discipline which renders the army efficient in war and morally progressive in peace, and which is secured by the military code and the decisions of the military courts.

Reserving, however, the determination of these questions, it is nevertheless clear that the system under which the accused was tried and his status as an officer of the army must be borne in mind in deciding whether the amendment, if applicable, was or was not violated by this sentence.

The contention is that Captain Carter was twice put in jeopardy because the sentence was greater than the court-martial had jurisdiction to inflict on conviction of any one of the offenses charged, taken singly, and

183 U. S.

because the offenses charged were the same within the meaning of the constitutional provision.

Articles 60 and 61 are as follows:

"Art. 60. Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"*Who, for the purpose of obtaining, or [391] aiding others to obtain, the approval, allowance, or payment of any claim against the United States, or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States, or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States, or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

"Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any persons having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

"Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or

[392] "Who knowingly purchases or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other *person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,

"Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge. And if any person, being guilty of any of the offenses aforesaid, while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

"Art. 61. Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." [Rev. Stat. § 1342.]

It is said that the punishment must be imposed under either the 60th or the 61st articles: or under both; that the only penalty under the 61st article is dismissal; that the punishment under the 60th article may be "fine or imprisonment, or by such other punishment as a court-martial may adjudge;" and that this is in the alternative, and cannot be cumulative.

That that is the necessary construction is not to be conceded. Offenses under this article may be of greater or less gravity, and the necessity for the exercise of discretion is obvious. Conviction in some cases might deserve the punishment of fine, or of imprisonment, or of both, as well as of dismissal in addition to either or both; in others lesser penalties might suffice. The word "or" was properly used to give play to discretion. This is the view expressed in 2 Winthrop, Military Law, p. 1101.

[393] The 60th article was taken from §§ 1 and 2 of the act of March 2, 1863 (12 Stat. at L. 696, chap. 67), "to prevent and punish frauds upon the government of the United States," brought forward in the Revised Statutes as § 5438; and that act provided that any person in the military service, if found guilty, "shall be punished by fine and imprisonment, or such other punishment as the court-martial shall adjudge, save the punishment of *death;" while a person in civil life guilty of the offense was punishable under § 3 "by imprisonment not less than one nor more than five years, or by fine of not less than one thousand dollars and not more than five thousand dollars;" but when the military offense was transferred to the military code, the word "and" was changed to the word "or." Hence, it is argued that Congress thereby indicated that it intended to confine the punishment to either fine or imprisonment. We do not think this is necessarily so. The punishment of persons not in the military or naval service (in addition to a pecuniary forfeiture and double damages) was fixed at fine or imprisonment, and

no other. The punishment of persons in the military service was fixed at fine and imprisonment, or such other punishment as the court-martial might adjudge. The change of the word "and" to "or" tended to obviate controversy as to the range of discretion.

But suppose this otherwise, still it does not follow that a fine might not be inflicted for the commission of one of the offenses enumerated in article 60, and imprisonment for the commission of another.

The penalty denounced by article 60, that the accused, on conviction, may "be punished by fine or imprisonment or by such other punishment as a court-martial may adjudge,"—is plainly to be taken distributively, and is applicable on conviction of either of the offenses enumerated.

We understand the rule established by military usage to be "that the sentence of a court-martial shall be in every case an *entirety*; that is to say, that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offenses found, and however different may be the punishments called for by the offenses." 1 Winthrop, Military Law, 2d ed. p. 614.

Where, then, there is conviction of several offenses, the sentence is warranted to the extent that such offenses are punishable.

This was so ruled by the circuit court of appeals for the second circuit in *Rose ex rel. Carter v. Roberts*, 40 C. C. A. 199, 99 Fed. 948, *and Wallace, J., speaking for the [394] court, said: "As has been stated, the relator was convicted of two of the offenses defined by the 60th article of war. The record presents the charges and specifications upon which he was found guilty of those offenses. The charges describe each offense in the language of the article. Whether the specifications support the charges, or the evidence supports the specifications, we are not at liberty to consider. Nor is it open to inquiry whether the two offenses were in fact but one and the same criminal act. When properly constituted and convened, a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses created by the articles of war. This jurisdiction necessarily includes the authority to decide, when the charge preferred against the accused is the commission of one or more of these offenses, whether the specifications and the evidence sufficiently exhibit the incriminating facts. As was said by the Supreme Court in *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838, the sentence (when confirmed by the President) 'is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject-matter or charge, or one in which, having jurisdiction over the subject, it has failed to observe the rules prescribed by statute for its exercise.' Having found the relator to be guilty of two offenses, the court was empowered by the statute to punish him as to one by

fine and as to the other by imprisonment. The sentence was not in excess of its authority."

Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute. *Re De Bara*, 179 U. S. 316, 45 L. ed. 207, 21 Sup. Ct. Rep. 110; *Re Henry*, 123 U. S. 372, 31 L. ed. 174, 8 Sup. Ct. Rep. 142.

The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses, that the same evidence is required to sustain them, be applied. The first charge alleged "a conspiracy to defraud," and the second charge alleged "causing false and fraudulent claims to be made," which were separate and distinct offenses, one requiring certain evidence which the other did not. [395] The *fact that both charges related to and grew out of one transaction made no difference.

In *Morey v. Com.* 108 Mass. 433, the supreme judicial court of Massachusetts, speaking through Mr. Justice Gray, then a member of that tribunal, held: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

The sentence, then, of fine and imprisonment, was justified by the convictions of the first and second charges.

Finally, it is contended on this branch of the case that the offense under Charge III. is the same offense as those under Charges I. and II., called by a different name, and hence that the punishment of dismissal was illegal because a third punishment where but two offenses were committed.

As heretofore said, dismissal might have been added to fine and imprisonment, as part of the punishment, for either or both of the offenses, under the first and second charges.

But the offense of conduct unbecoming an officer and a gentleman is not the same offense as conspiracy to defraud or the causing of false and fraudulent claims to be made, although to be guilty of the latter involves being guilty of the former.

Article 61 prescribes that "any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," and article 100 that "when an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name and place of abode of the delinquent shall be published 183 U. S.

lished in the newspapers in and about the camp and in the state from which the offender came, or where he usually resides."

*Article 97 is: "No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the state, territory, or district in which such offense may be committed, or by the common law, as the same exists in such state, territory, or district, subject such convict to such punishment."

Confinement at hard labor in a penitentiary is prescribed by §§ 5438 and 5488 of the Revised Statutes, § 5438 having been brought forward from the act of March 2, 1863, from which the 60th article was taken. And see Rev. Stat. § 5442, act March 2, 1895 (28 Stat. at L. 957, chap. 189).

Conviction of Charges I. and II. was conviction of fraud, and article 100 contemplates that the officer may be dismissed under article 60 or under article 61. Conviction of fraud under article 60 plainly involves conviction under article 61; and dismissal is as mandatory as degradation.

The contention that an officer convicted of crimes punishable in the penitentiary under articles 60 and 97 cannot be so punished if he be also dismissed, or cannot be dismissed if he be so punished, is too unreasonable to be countenanced.

The result is that we are of opinion that the sentence cannot be invalidated on any of the grounds so far considered.

The fourth charge was: "Embezzlement, as defined in § 5488, Revised Statutes of the United States, in violation of the 62d article of war."

Section 5488 reads: "Every disbursing officer of the United States who deposits any public money intrusted to him in any place or in any manner, except as authorized by law, or converts to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is in every such act deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied: and shall be punished by imprisonment with *hard labor [397] for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment."

Article 62 is:

"Art. 62. All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

The construction would not be unreasonable if it were held that the words "though not mentioned in the foregoing articles of war" meant "notwithstanding they are not mentioned," and that the article was intended to cover *all* crimes, whether previously enumerated or not. The reference is to crimes created or made punishable by the common law or by the statutes of the United States, when directly prejudicial to good order and military discipline. Our attention has not been called to any former adjudication of the particular point by the military courts, but we think it would be going much too far to say that if a court-martial so construed the words, and sentenced for a crime previously mentioned, the sentence, when made his own by the President, would be absolutely void.

Colonel Winthrop says, however, that "the construction of these words has uniformly been that they are words of limitation restricting the application of the article to offenses not named or included in the articles preceding, the policy of the provision being, as it is expressed by Samuel, 'to provide a general remedy for wrongs not elsewhere provided for.'" Vol. 2, p. 1126.

Accepting this construction, we are nevertheless of opinion that the specified crime was not "mentioned in the foregoing articles."

[398] The 1st and 4th subdivisions of the 60th article of war provide that "any person in the military service of the United States who makes or causes to be made any claim thereof, knowing such claim to be false or fraudulent," or "who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States, or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement," shall, on conviction, be punished.

The specification under Charge IV. alleged that the accused, as a disbursing officer of the United States, applied to a purpose not prescribed by law large sums of public money intrusted to him for river and harbor purposes, by causing them to be paid out by checks on false accounts, the payment being accomplished by the drawing and delivery of the checks directing payment to be made of moneys of the United States, and thus withdrew, by means of checks, from the authorized depository, moneys for an unauthorized purpose, and applied them to unlawful purposes. The application, coupled with the payment and withdrawal of the funds by checks, constituted the embezzlement defined in § 5488, while the specific acts set forth in subdivisions 1 and 4 of the 60th article were distinct from the acts prohibited by § 5488. By the charge the particular offense was laid in general terms, and by the specification the facts constituting the offense charged were stated. The specification here set forth abstraction, by fraudulent means, of \$230,749.90 and \$345,000, 252

moneys of the United States intrusted to the accused as a disbursing officer of the government, but it was none the less *malum prohibitum* because it was also *malum in se*.

Nor are we persuaded by the ingenious argument of appellant's counsel that the crime alleged in this charge was covered by subdivision 9 of article 60, because it was embezzlement of money "furnished or intended for the military service," § 5488 relating to the improper disposition of any public money. That subdivision denounces punishment of any person in the military service of the United States "who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of, any ordnance, arms, equipments, ammunition, clothing, subsistence*stores,money, or other[399] property of the United States, furnished or intended for the military service thereof." Most of these enumerated classes of property are obviously military stores used for military purposes; and on the principle of *noscitur a sociis* all the classes designated fall into the same category. And this seems to be put beyond question by the words "furnished or intended for the military service thereof." The military service as used in this connection means the land forces or the army. The fact that money appropriated for river and harbor improvements is disbursed by an officer of the army, and the work supervised by the engineer force in the service of the government, does not make the moneys so appropriated moneys "furnished or intended for the military service," as the words are used in paragraph 9. This was the view of Lacombe, J., in holding the sentence supported by the conviction of the fourth charge. 97 Fed. 496. The circuit court of appeals, without questioning the correctness of that conclusion, did not consider the question, because it sustained the sentence under the conviction of the first and second charges. The circuit court for the district of Kansas concurred in the conclusions of each of the other courts. We are of opinion that officers of the army are, in the eye of the law, on military duty although employed as such officers under statutes of the United States in the public service on duties not in themselves pertaining to the army; and that the moneys disbursed by them when so employed do not, because they are such officers, become money furnished and intended for the military service.

* Illustrations are found in the administration of appropriations for the Indian service, the light-house service, superintending the Washington aqueduct, maintaining the public grounds about the White House, and the like.

The appropriations made for river and harbor improvements are *per se* for the benefit of commerce and navigation, and not for military or naval purposes, and the money is furnished and intended for public works in aid of commerce. In the exercise of the power to regulate commerce Congress has

repeatedly legislated in regard to the construction of river and harbor improvements in the navigable waters of the United States, [400] and *enacted rules in relation thereto. The money made the subject of the embezzlement in this case was appropriated to be expended under the War Department by the act of Congress of June 3, 1896 (29 Stat. at L. 202, chap. 314), entitled "An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes;" and the act of June 4, 1897 (30 Stat. at L. 11, 44, chap. 2), entitled "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Ninety-Eight, and for Other Purposes."

The status of Captain Carter was not changed by his detail to the charge of these improvements, and he was still subject to the military jurisdiction.

It is further argued that the specification was wrongly laid under article 62, because "the money was applied to a purpose prescribed by law," and "the crime charged 'was not to the prejudice of good order and military discipline,'" but the contention is without merit.

The fact that the vouchers purported to be issued as against the appropriations for the improvement of the Savannah river and of Cumberland sound, if these vouchers were false and falsely certified to, and if the accounts on which the moneys were paid were false, "the moneys not being due or owing from the United States to the parties paid, or to anyone else, and he, the said Captain Carter, well knowing this to be the case," as stated in the specification,—could not make the application of the money by that payment an application to a purpose prescribed by law.

We should suppose that embezzlement would be detrimental to the service within the intent and meaning of the article, but it is enough that it was peculiarly for the court-martial to determine whether the crime charged was "to the prejudice of good order and military discipline." *Swain v. United States*, 165 U. S. 553, 41 L. ed. 823, 17 Sup. Ct. Rep. 448; *Smith v. Whitney*, 116 U. S. 178, 29 L. ed. 605, 6 Sup. Ct. Rep. 570; *United States v. Fletcher*, 148 U. S. 84, 37 L. ed. 378, 13 Sup. Ct. Rep. 552.

In *Swain v. United States*, which involved a sentence under the 62d article of war, Mr. Justice Shiras, delivering the opinion, said: "But, as the authorities hereto- [401] fore cited show, this is the *very matter that falls within the province of courts-martial, and in respect of which their conclusions cannot be controlled or reviewed by the civil courts. As was said in *Smith v. Whitney*, 116 U. S. 178, 29 L. ed. 605, 6 Sup. Ct. Rep. 570, 'of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent

judges than the courts of common law. . . . Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in a private business.'"

The case has been argued with zeal and ability, and it has received the consideration which its importance demanded. If these observations have been extended beyond what was strictly required, that should at least serve to show that no material suggestion bearing on the disposal of this appeal has escaped attention.

But we must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of courts-martial, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed.

Order affirmed.

Mr. Justice Harlan did not hear the argument, and took no part in the consideration and disposition of the case.

*GUARANTEE COMPANY OF NORTH [402]
AMERICA, *Petitioner*,
v.

MECHANICS' SAVINGS BANK & TRUST
COMPANY, for the Use of J. J. Pryor,
Assignee.

(See S. C. Reporter's ed. 402-424.)

Surety companies—construction of employee's bond—duty of employer to notify company of speculation by employee—misrepresentations in employer's declaration.

1. The rule that of two constructions of a bond executed by a guarantee company to secure a bank against defalcation by an employee, the one favorable to the bank, if consistent with the objects for which the bond was given, must be adopted, cannot be availed of to refine away terms of a contract expressed with

NOTE.—On the construction of insurance contract in general—see *Kratzenstein v. Western Assur. Co.* 5 L. R. A. 799, and note; *Hoose v. Prescott Ins. Co.* (Mich.) 11 L. R. A. 340, and note. And see notes to *Equitable Life Assur. Soc. v. Hazlewood* (Tex.) 7 L. R. A. 217, and *Fowler v. Metropolitan L. Ins. Co.* (N. Y.) 5 L. R. A. 808.

On guaranty insurance—see note to *American Credit Indemnity Co. v. Wood*, 19 C. C. A. 271.

As to liability of sureties on official and other bonds—see notes to *United States v. Giles*, 3 L. ed. U. S. 708; *Postmaster-General v. Early*, 6 L. ed. U. S. 578, and *American Surety Co. v. Pauly*, 42 L. ed. U. S. 987.

sufficient clearness to convey the plain meaning of the parties, and embodying requirements, compliance with which is made the condition to liability thereon.

2. The failure of a bank, upon its officers being told that its teller was speculating, to notify at once the guarantee company which was on the teller's bond, of such information as it had, will defeat a recovery on such bond for defalcation after the information was received by such officers, where such bond provided that the bank should at once notify the company on its "becoming aware" that the teller was engaged in speculation or gambling.
3. Negative answers by the president of a bank to the questions in a statement or declaration, in reliance on which a guarantee company executed a bond insuring the bank against defalcation by its cashier, "Have you known or heard anything unfavorable as to his habits or associations, past or present?" "Or of any matters concerning him about which you deem it advisable to make inquiry?"—when he had heard that such employee had been speculating, will defeat any recovery on such bond, which provided that any misstatement of any material fact in the declaration should invalidate it.

[No. 48.]

Argued April 23, 24, 1901. Decided January 6, 1902.

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment modifying and affirming a decree of the Circuit Court in favor of complainant in an action on an employee's bond. *Reversed and remanded.*

See same case below, 40 C. C. A. 542, 100 Fed. 559.

Statement by Mr. Chief Justice **Fuller**:

This was a bill in equity brought by the Mechanics' Savings Bank & Trust Company for the use of J. J. Pryor, assignee, against the Guarantee Company of North America, for an accounting and for a decree for the [403] amount alleged to be due *complainant on two bonds executed by the guarantee company to the bank, one insuring the latter corporation against such pecuniary loss as it might sustain by reason of the fraudulent acts of John Schardt, as teller and collector, and the other insuring the same corporation against pecuniary loss by reason of fraudulent acts committed by him in his office of cashier. On hearing a decree was rendered against the guarantee company on both bonds (68 Fed. 459), which was affirmed on appeal. 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766. The case was then brought to this court by certiorari, and the decree of the circuit court of appeals was reversed, and the cause remanded, on the ground that the decree of the circuit court was not final. 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. Rep. 551.

The guarantee company subsequently made an unsuccessful attempt to have the cause reopened for additional evidence alleged to have been discovered since the first decree. A final decree was rendered against

the company, which, on appeal to the circuit court of appeals for the sixth circuit, was modified and affirmed (40 C. C. A. 542, 100 Fed. 559), and the present certiorari was then allowed.

The Mechanics' Savings Bank & Trust Company was a banking institution located at Nashville, Tennessee, with a capital of \$50,000. John Schardt was its teller from 1888 to January, 1893, when he was elected cashier, and remained such until his death on April 17 following. As teller and cashier he embezzled more than \$100,000 of the funds of the bank, beginning in 1890 and continuing until about the time of his death. In discovering the defalcation the bank ascertained its insolvency, closed its doors, and made a general assignment for the benefit of its creditors.

The Guarantee Company of North America was a company organized under the laws of the Dominion of Canada, and engaged in the business of guaranteeing pecuniary losses by the fraudulent acts of persons in positions of trust, and issued to the bank in 1888 a bond for the period of one year on Schardt as teller for \$10,000, which was subsequently *renewed each year, until Janu-[404] ary, 1893, when it issued a bond on Schardt as cashier for \$20,000.

The defalcation of more than \$100,000 was occasioned by losses in speculation; and just prior to Schardt's death he assigned to the bank some property of slight value and about \$80,000 of life insurance as indemnity. From these collaterals the bank realized the sum of \$46,448.86, and for the remainder of the default the company was held liable to the extent of each bond. On the second appeal to the circuit court of appeals, that court found the default under the cashier's bond to have been some \$6,000 less than as ascertained by the circuit court, and modified the decree accordingly.

The teller's bond was dated January 16, 1888, and described Schardt as the employee and the bank as the employer. It provided:

"Whereas, the employee has been appointed in the service of the said employer, and has been assigned to the office or position of teller and collector, by the said employer, and application has been made to the Guarantee Company of North America for the grant by them of this bond;

"And whereas, the employer has delivered to the company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed;

"Now, therefore, in consideration of the sum of \$100 lawful money of the United States of America, to the said company, as a premium for the term of twelve months, ending on the 16th day of January, 1889, at 12 o'clock, noon, and in order to effect a continuance of the currency of this bond, a like premium hereafter to be paid to the said company, on or before the 16th day of January in each year, as a premium for the ensuing year, so long as the said employer may wish to continue this bond, and the said

company shall consent to receive said premiums, it is hereby agreed that the company shall, within three months after proof satisfactory to the directors, make good and reimburse to the employer such pecuniary loss as the employer shall have sustained by the [405] fraudulent acts *of the employee, in connection with the duties of his said office or position, or with any other duties assigned to him, by the employer in the said service, committed by him, and discovered during the continuance of the currency of this bond, and within six months from the employee's ceasing to be in the said service.

"The following provisions are also to be observed and binding as a part of this bond:

"The actual payment of the premium and its acceptance by this company, either for the issue or renewal of this bond, is essential to its currency, and a condition precedent to the right or claim hereunder.

"That this bond is issued and renewed on the express understanding that the employee has not within the knowledge of the said employer at any former period, either in this or other employment, been guilty of any default or serious dereliction of duty.

"That the employer shall observe or cause to be observed all due and customary supervision over the said employee for the prevention of default, and if the employer shall at any time during the currency of this bond condone any act or default on the part of the employee which would give the employer the right to claim hereunder, and shall continue the employee in his service, without notification to the company, the said company will not be responsible hereunto for any default which may occur subsequent to said act or default of said employee, so condoned.

"That the employer shall at once notify the company on his becoming aware of the said employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits.

"That there shall be an inspection or audit of the accounts or books of the employee on behalf of the employer at least once in every twelve months from the date of this bond.

"That the company shall be notified in writing of any act on the part of said employee which may involve a loss for which the company is responsible hereunder to the employer immediately or without unreasonable delay, after the occurrence of such act shall have come to the knowledge of the [406] employer; and *upon the making of such a claim, this bond shall wholly cease and determine as regards any liability for any act of the employee committed subsequent to the making of such claim, and shall be surrendered to the company on the payment of all claims due hereunder.

"That the company may cancel this bond at any time by notifying the employer and refunding the premium paid less a *pro rata* part thereof for the time said bond shall have been in force; but said cancelation shall not affect or impair the company's liability
183 U. S.

hereunder for any acts committed or discovered previous to such cancelation during the currency of this bond, and within three months after said cancelation.

The statement referred to was signed by the then cashier, and delivered to the company before the bond was issued. It commenced with a communication from the managing director of the guarantee company, desiring answers to certain accompanying questions. These answers were given by the cashier, who also declared his answers and representations to be true, and that he was "not aware of any matter or thing affecting the character or reputation of the applicant which should create any doubt as to his reliability or trustworthiness." This bond was renewed each year up to January, 1893, and, in each year, before the bond was renewed, the company furnished the bank with a blank form to be filled out, and stating: "It is necessary before the bond can be renewed that you obtain the certificate on the back hereof by your president or cashier, and on its return with remittance of the premium the renewal can be immediately effected."

The certificate on the back was filled up and signed by the cashier, and among other things stated that the accounts of said teller Schardt had been examined and verified by the finance committee of said bank; and the bond was not renewed in any year until this certificate had been made out and delivered to the company.

Before the cashier's bond was issued, the company "submitted for reply on behalf of the bank" certain questions, addressed to the [407] president, which, and the answers thereto by the president as such, are referred to in the bond as "employers' guarantee proposal No. 154,806." Among these questions and answers were the following:

Q. 2. If a new employee, by whom was the applicant introduced, or how did he become known to you? If hitherto in continuous service, for how long, in what capacities, and has he uniformly performed his duties faithfully and satisfactorily?—A. Applicant began service in this bank six years ago as collector—cl'k, and has since been advanced to bank's teller and now cashier.

Q. 3. Has he ever been in arrears or default in the bank's service, or, as far as you have heard, in any previous employment?—A. No.

Q. 4. Have you known or heard anything unfavorable as to his habits or associations, past or present?—A. No.

Q. —. Or of any matters concerning him about which you deem it advisable for the company to make inquiry?—A. No.

Q. 5. Is he to your knowledge pecuniarily embarrassed or insolvent? Or is he in any way indebted to the bank?— —. —.

Q. 6. Is he now or about to be engaged in any other business or employment than in the bank's services?—A. No.

Q. 7. Applicant's position or capacity for which this bond is required?—A. Cashier.

Q. 8. Amount of his salary or other emoluments, if any?—A. \$2,000 per annum.

Q. 9. Amount or bond hereby required, from what date to commence, and by whom premium will be paid?—A. \$20,000 to date from Jan. 1, 1893. Premium payable by bank.

Q. 10. What further security, if any, will be held or required from applicant?—A. None.

Q. 11. Have you hitherto held other security from applicant? If so, why discontinued or changed to this?—A. Formerly teller and general bookkeeper in this bank; elected cashier at annual meeting January 1, 1893.

Q. 12. Has there been any fault in the bank by any employee in applicant's position?—A. No.

[408] Q. 13. When were applicant's books and accounts (including *cash, securities, and vouchers, if any) last examined, and by whom?—A. December 31, 1892, by finance committee (were they found correct) of bank, and found correct.

Q. 14. In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts, and vouchers, and by whom?—A. Not less than quarterly, and often monthly, by finance committee.

Q. 15. In case of applicant acting as teller: (a) Will he be required to balance his cash daily, and report same to president or cashier? (b) And will a record of same be kept?—A. . . .

Q. 16. Will applicant handle funds or securities not subject to a routine check or periodical examination? If so, please describe their nature?—A. No.

The above answers and representations are true to the best of my knowledge and belief.

The cashier's bond was then executed and delivered to the bank, and provided:

"Whereas, the said employee has been appointed cashier at Nashville, Tennessee, in the service of the said employer, and has been required to furnish security that he shall not be guilty of any fraudulent act in the performance of his duties in the said capacity, by which the said employer shall suffer pecuniary loss, and whereas the said company, in consideration of the sum of \$100, now therefor paid for the term expiring January 1, 1894, and for the purposes of the renewal of this contract the sum or premiums of \$100, hereafter to be therefor paid to the said company, on or before the 1st day of January, 1894, and a like payment for each and every succeeding term of one year, so long as the said company shall consent to receive it,—hath agreed upon the terms, and subject to the provisos and conditions hereinafter contained and indorsed thereon, hereby to become such security to the said employer:

"Now, therefore, this bond witnesseth that the said employee, for and on his own

behalf and the said company, fully relying on the truth of the statement and declaration contained in a certain document distinguished as employer's guarantee proposal No. 154, 806, dated the 10th day of Jan., 1893, and signed Lewis T. Baxter, president on behalf of the said employer, and *lodged [409] with the said company at its office in Montreal, and on the strict performance and observance hereafter, by the said employer, of the contract thereby created, do hereby, respectively, severally, and jointly covenant with the said employer to reimburse unto the said employer or his or their representatives or assigns the amount of any loss not exceeding in the whole sum of \$20,000, which, during the currency of this bond, shall be sustained by the said employer by reason of any act of fraud committed by the said employee in connection with the duties of said appointment, and constituting embezzlement or larceny,—such reimbursement to be made within three calendar months next after proof shall have been given to the satisfaction of the directors of the said company of the occurrence of such loss, and the proof thereof to include, if the company shall so require, an affidavit to be made or taken by the person for the time being entitled to the benefit of this guarantee, to the effect that he hath been actually defrauded by the said employee, and that he suffers absolute and ultimate loss thereby to the full amount claimed hereunder, and that the contract created as aforesaid hath been fully performed and observed on the part of the said employee.

"Provided always, that this bond and guarantee hereby granted or undertaken shall be subject and liable to the terms and conditions hereupon indorsed.

Among the terms and conditions referred to were these:

"This bond is granted upon the following express conditions:

"1. Any misstatement of a material fact, in the declaration within mentioned, or in any claim made under this bond, will render this bond void from the beginning.

"2. That the said employer shall use all due and customary diligence in the supervision of said employee, for the prevention of default, and to that end shall cause an inspection or audit of his accounts to be made at least once within twelve months, and if the said employer shall at any time during the currency of this bond become aware of any act or default on the part of said employee which would constitute a claim hereunder, and shall continue said employee in his service without notification to the said company, the said company will not be responsible *hereunder for any loss or default [410] which may occur subsequent to said act or default of said employee.

"3. That any written answers or statements made by or on behalf of said employer in regard to or in connection with the conduct, duties, accounts, or methods of supervision of the said employee delivered to the company, either prior to the issue of this bond or to any renewal thereof, or at any

time during its currency, shall be held to be a warranty thereof, and form a basis of this guarantee or of its continuance.

"4. That the said employee has not, to the knowledge or belief of said employer, been guilty of any serious dereliction of duty, or default in this or any other service, or that his habits have been such as to incur said employer's censure, previous to the issue of this bond.

"5. The said employer shall, immediately, upon it becoming known to him or them that the said employee has been guilty of any act entitling the said employer to claim under this bond, notify the said company at its head office; and this bond shall become absolutely void, both as to existing and future liability, if the said employer shall neglect or omit to so notify the said company.

"8. That in addition to the supervision to be exercised by the said employer as mentioned in the statement and declaration within referred to, the said company shall be afforded every reasonable facility to examine from time to time, as they may desire, for the purposes of this bond, the books, papers, and affairs of the said employer intrusted to the keeping and charge of the said employee."

It appeared from the evidence that Schardt defaulted as teller and collector from September 12, 1890, to January 1, 1893, in the sum of \$78,819.24, subdivided as follows: From September 1, 1890, to January 16, 1891, \$5,879.34; from January 16, 1891, to January 1, 1892, \$22,290; from January 1, 1892, to January, 1893, \$50,649.90; and as cashier, from January 16, 1893, to April 15, \$22,964.17.

[411] The principal books of the bank were: A general ledger, showing generally the accounts of the bank, including the account in totals of the deposits made and checked out daily; a cash book, giving each day's business; a daily balance book, which was a summary of the general ledger; these three books were kept by Schardt; and an individual ledger, which showed in detail the deposit account of each individual depositor, and was kept by a clerk, who had no other duties, and was known as individual bookkeeper. The aggregate of the amounts due each depositor shown on the individual ledger and the totals due depositors on the general ledger and daily balance book should have agreed, but this they did not do, because, after the latter part of 1890, the general ledger and daily balance book did not correctly show the amount due to all depositors, although the individual ledger correctly gave the amount due to each depositor. Up to the latter part of 1890 trial balances were taken from the individual ledger every two weeks, or once a month, and entered in a trial balance book, and these balances were compared with the balances on the general ledger, and any differences settled and corrected, but at that time Schardt told the individual bookkeeper that it was not necessary to take off trial balances any longer, and thereafter none were taken off.

183 U. S. U. S., Book 46.

Schardt, as teller, abstracted the funds of the bank, and understated on the general ledger the amount due to depositors by the amount he abstracted. The difference in the balances represented the shortage at the respective dates. The individual and general ledgers were out of balance January 16, 1891, \$2,098; January 1, 1892, \$19,600; and January 1, 1893, \$69,700.

The leading expert accountant testified that he was employed to examine the books on April 15, 1893, and went to the bank on the morning of that day between 8 and 8:30 o'clock, and that by 4 o'clock that afternoon he had discovered that, while the daily balance book kept by Schardt showed less than \$18,000 due depositors, the individual ledger from "A" to "I" (leaving "M" to "Z" to be examined) showed an indebtedness due depositors of in the neighborhood of \$55,000. He reported at once that something was radically wrong, although it required considerable time subsequently to ascertain the exact condition of the bank.

Quarterly examinations of the bank's condition were made *by the finance committee, [412] but the individual bookkeeper was not requested to furnish the total amount shown on the individual ledger to be due depositors. The committee "examined no book except the daily balance sheet, with which we compared the reports as made out by Schardt." "Q. In what way could you tell that the amounts reported by Schardt were correct? A. We only had his word for it and the reports that he made to us and the exhibit on the daily balance book." "Q. In what way did you verify the statement on the book kept by Schardt, which would have shown and purported to show the amount due individual depositors? A. We made no verification of it only in the manner in which I have stated. Q. Have you stated any manner in which you verified this particular account? A. We took his word for it, which we had to do or go into an examination of all the books."

Schardt also abstracted proceeds of notes paid to him as teller. This shortage was not concealed on the books. The amount of notes in the bank did not equal the amount called for by the books by the amount abstracted.

January 1, 1892, the books showed a defalcation of \$28,169.34, of which \$19,600 was abstracted deposits, and \$3,765.44 proceeds of notes collected and not accounted for. January 1, 1893, the books showed a defalcation of \$78,819.24, of which \$69,700 was abstracted deposits and \$4,015.44 proceeds of notes collected.

The following evidence was also introduced:

Charles Sykes, who was the cashier of the bank from January, 1890, to January, 1893, testified:

Q. 6. Did you at any time during that year receive information that John Schardt was speculating; if so, state when, how, and all the circumstances?—A. Yes, sir; I did receive such information. Some time in the

summer or fall of 1892 a gentleman by the name of Kyle came here from New York, representing Myers & Co. of New York. Kyle wanted me to become interested in the brokerage business, and represent Myers & Co. at this point. I told him that I did not like the idea because it would be purely a

[413] speculative business, and he *then said that that made no difference; that John Schardt, our teller, was a part owner in a similar concern.

Q. 7. Did you impart this knowledge to any one; if so, whom?—A. Yes, sir; I once told Mr. L. T. Baxter, the president of the bank, of the conversation.

Q. 8. Did you say anything to Schardt about the matter?—A. Yes, sir; on the next day, I think I told Mr. Schardt of what Kyle had said.

Q. 9. What did Schardt say to you in reply?—A. He admitted that he had at one time been interested in such a concern, but had sold his interest; and that he had speculated to some extent, but had made money on every transaction, and had seen the error of his way, and had ceased to do so any more.

Q. 10. Did you impart this information received from Schardt to any one connected with the bank; if so, whom?—A. Yes, sir; I immediately told Mr. Baxter, the president of the bank, what Schardt had said.

Q. 11. Did you receive any other information at any other time with reference to Schardt's speculating?—A. Yes, sir; some time thereafter I received an anonymous letter telling me that Schardt had been speculating.

Q. 12. What did you do with it, and what became of it?—A. I showed it to Mr. L. T. Baxter, the president, and he said not to pay any attention to an anonymous letter; and I spoke to Schardt about it, and he said he thought he knew the author, and asked me to let him have the letter, and he would bring the party before me and make him acknowledge it was false.

Q. 13. Did you give him the letter, and did he bring the party before you?—A. I gave him the letter, and asked him about it more than once, and he always replied that he was working on it.

Q. 14. Did you tell Mr. Baxter of this conversation?—A. I think I did.

On cross-examination the witness said there was litigation pending between him and the bank's assignee; that he signed several applications for the renewal of [414] Schardt's bond as teller, *relying on the fact that the finance committee said his accounts were correct; that he did not remember that he recommended Schardt as his successor to Porter or Duncan, though he might have, and if Mr. Porter said that he did, he supposed he did. Mr. Porter testified that he asked Sykes about Schardt's ability; "there was no question as to his integrity."

J. M. Eatherly testified that he had been a director of the bank from its organization until its assignment; a member of the finance committee for several years prior to

being elected president, and president from March 28 to April 17, 1893.

In answer to questions from complainant's counsel in respect of an interview with Schardt on the evening of April 15, 1893, he said:

"I told him that we had come out for the purpose of getting an explanation as to the discrepancies mentioned above. I told him we had found errors in his books. He said, 'Mr. Eatherly, my books are correct.' I told him that I did not see how he could reconcile the two things that we had found, the daily balance sheet showing something less than \$18,000 due depositors, while the individual ledger, as far as had been examined by Mr. McEwan and Mr. Richardson, showed about \$55,000 due depositors. He reiterated that his books were absolutely correct. I said, 'John, I cannot understand it that way.' I was satisfied there was an error somewhere. I asked Mr. Richardson if he wanted to ask him any question. He was silent a moment or two, and said, 'I don't know that I do.' He then turned to Mr. Schardt, and said: 'John, I am bound to say to you that you are a defaulter.' Mr. Schardt broke out into a cry, putting his hands over his face, and said: 'My God! it is true—too true.' I said: 'John, compose yourself; we have come here for facts, and want facts.' I then asked him how much was his default, and he said about \$40,000. I told him if the other individual ledger showed the same proportion of discrepancy that this one did that he was a defaulter to a much larger amount,—I would say to not less than \$60,000 or \$70,000. He said 'Mr. Eatherly, you are mistaken. It cannot be that much.' I then asked him how he had lost it, and he said, 'Speculating in New York, and you can get it all back.' He said 'you,' *meaning the bank. I said, [415] 'No, John, we can do no such thing; the laws of New York legalize this sort of trading, and we cannot recover it in that way.'"

On cross-examination he testified:

Q. 98. Did you ever hear of Schardt's speculating before January, 1893?—A. I think I did.

Q. 99. Did you see the anonymous letter written with respect to his speculating?—A. I saw a letter directed to Judge John Woodward. Judge Woodward brought that letter to the bank and showed it to me, and I asked permission to call Mr. Schardt up and show it to him, and he said that he was perfectly willing that I should do so. I at once called Mr. Schardt to where we were, and told him there was a communication I wanted him to read. He did so, and his remarks were: "It is a lie and I can prove it." In this letter it was stated that Mr. Schardt was a partner in a bucket shop. I told Mr. Schardt that it devolved on him to prove it false. I at once reported the contents of this letter to the president of the bank, Mr. Baxter. Mr. Schardt asked that I and Judge Woodward remain there for a few minutes. He went out and got Frank Searight and Dr. Barry. Judge

Woodward, Mr. Baxter, and myself went into the rear of the bank building. Mr. Schardt and the other gentlemen came back, and Mr. Schardt says: "Here are men who can tell you whether that is so or not." I asked them if they knew why we had sent for them, and they said that Mr. Schardt had told them. Mr. Searight said some time before that Mr. Schardt, Dr. Barry, and himself had agreed to open a brokerage association. They objected very much to the term bucket shop. Each one was to put in a small amount—\$200, I think. Mr. Schardt, in a short time, became dissatisfied, and sold his interest to Frank Searight at a small loss. Subsequent to that I went to Mr. Schardt's house to see him, having heard again that he was speculating. I told him what I had heard, and he said it was not so, that he did not own any stocks at all. I told him if he was he ought to quit that or quit the bank, and he said he had sold everything he had. I again heard that he was speculating, but from sources that I did not attach any importance to, as it all emanated from the same source as the [416] anonymous letter. I again approached him and he denied it.

Q. 100. Was this just prior to the resignation of Judge Woodward as a member of the board?—A. I think it was.

Q. 101. Do you know when he resigned?—A. His resignation bears date Feb. 17, 1893. Was placed before the board of directors and accepted March 25, 1893.

Q. 102. Did Mr. Baxter, the president, ever say anything to you about Schardt speculating?—A. I don't think he ever did.

The general agent of the company at Nashville testified that Schardt's bond as cashier was canceled through him on April 15, he having ascertained that Schardt had been speculating in futures; that he had not heard of any defalcation or wrongdoing on the part of any employee of the bank other than this; and that the company did not bond persons holding a fiduciary position, who speculated in futures, as they had found from experience that the risk was not safe.

There was evidence that Schardt had borne a good reputation for honesty, integrity, and industry; and of experts that, without trial balances from the individual ledger, the true condition of the bank could not be known; and that to verify accounts meant to apply some other test than the statements of those who kept them.

Mr. William L. Granbery argued the cause and filed a brief for petitioner:

There is no room for the application of canons of construction, where there is no ambiguity in the policy and no inconsistent or conflicting provisions and nothing requiring construction or interpretation.

Holmes v. Phenix Ins. Co. 47 L. R. A. 308, 39 C. C. A. 45, 98 Fed. 240.

Whatever conditions are contained in the contract will be upheld and enforced by the court.

Imperial F. Ins. Co. v. Coos County, 151 183 U. S.

U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379.

The representations of the president and cashier as to the examination of the employee's books and accounts, and with respect to the previous conduct of the employee, were made for the bank, and are binding upon it.

The teller's bond was breached by the bank in not reporting the speculation and disreputable habits of the bonded employee.

Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, 29 Fed. 502; *Scott v. National Bank*, 72 Pa. 479, 13 Am. Rep. 711; *Gray v. Merriam*, 148 Ill. 179, 32 L. R. A. 769, 35 N. E. 810; *Merchants Nat. Bank v. Guilmartin*, 93 Ga. 503, 21 S. E. 55; *Allen v. Dunham*, 92 Tenn. 257, 21 S. W. 898.

When an employer knows the employee has been guilty of dishonest conduct, and conceals the information from the contemplated surety, the bond is void, whether inquiry be made by the intended surety or not.

Smith v. Bank of Scotland, 1 Dow. P. C. 294; *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Franklin Bank v. Cooper*, 36 Me. 179; *Franklin Bank v. Stevens*, 39 Me. 532; *Wayne v. Commercial Nat. Bank*, 52 Pa. 343; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *Clark v. Manufacturers' Ins. Co.* 8 How. 335, 12 L. ed. 1061.

When this teller's bond was renewed in January, 1892, it was, in legal effect, the making of a new contract of insurance.

Biddle, Ins. § 341; *May, Ins.* § 70a.

Directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiating as figureheads. They are entitled under the law to commit the banking business as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision.

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 652, 15 S. W. 448.

The information sought by the company, and the representations made by the bank with respect to these examinations, were matters peculiarly and exclusively within the knowledge of the bank. The company had the right to rely upon its representations, and for that reason the duty of knowing and telling the truth was imperative.

Pom. Eq. Jur. § 888; *Morse, Banks & Banking*, § 21; *Biddle, Ins.* § 462; *Cooley, Torts*, § 499; *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861; *Franklin Bank v. Cooper*, 36 Me. 179; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50; *Deposit Bank v. Hearne*, 20 Ky. L. Rep. 1019, 48 S. W. 160.

The neglect of the officers of the bank to examine the books and accounts of the employees is equivalent to bad faith, where the slightest examination would have shown the default.

Knapp v. Bailey, 79 Me. 195, 9 Atl. 122.

A statement recklessly made, without knowledge of its truth, is a false statement, knowingly made.

Cooper v. Schlesinger, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. Rep. 360; *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338.

Mr. Edward H. East argued the cause and filed a brief for respondent:

Prior to the act of April 30, 1893, dealing in futures, whether actual delivery was intended or not, was privileged or licensed by the state of Tennessee and was not gambling or gaming or in any sense unlawful.

State v. Duncan, 16 Lea, 79.

To prove that a man was a stockholder in a brokerage association does not necessarily prove that he was speculating or gambling or indulging in any disreputable or unlawful habits.

Scott v. National Bank, 72 Pa. 471, 13 Am. Rep. 711.

A provision requiring written notice to the obligor of any act of the cashier involving loss to the bank, to be given as soon as practicable after the bank had knowledge of such act, does not require notice upon suspicion, but only after the bank has knowledge of such facts as would justify the charge of fraud and dishonesty against the cashier.

American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552.

The bank was not obligated under this contract, or independently of it, to ransack Schardt's past life, or to run down rumors and suspicions and report them to the Guarantee Company. The company had its agent at Nashville to do this character of work.

State ex rel. Southern Bank v. Atherton, 40 Mo. 209.

In the case of an ordinary surety upon the bond of an officer of a bank, it has been held that negligence of the officers of a bank, in failing to examine the books and to discover the defalcations of the paying teller, does not release the sureties on his bond, given for the faithful performance of his duties.

Lieberman v. First Nat. Bank (Del.) 40 Atl. 382; *Amherst Bank v. Root*, 2 Met. 540; *Tapley v. Martin*, 116 Mass. 275; *Franklin Bank v. Stevens*, 39 Me. 532; *Farmington v. Stanley*, 60 Me. 472; *Wayne v. Commercial Nat. Bank*, 52 Pa. 343; *Phillips v. Bossard*, 35 Fed. 100; *Sparks v. Farmers' Bank*, 3 Del. Ch. 302.

Graves v. Lebanon Nat. Bank, 10 Bush, 23, 19 Am. Rep. 50, has been overruled in every case in which it has been discussed, and stands alone and unsupported.

Lieberman v. First Nat. Bank (Del.) 40 Atl. 386; *Ashuelot Sav. Bank v. Albee*, 63 N. H. 161, 56 Am. Rep. 501.

It is good faith, and not diligence, which is required of the creditor as a condition of his right to hold the surety, but the creditor or obligee on a bond is not obliged, for the benefit of the surety, to watch the principal beyond what he literally contracted to do.

Amherst Bank v. Root, 2 Met. 540; *Wayne v. Commercial Nat. Bank*, 52 Pa.

349; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50; *McShane v. Howard Bank*, 73 Md. 135, 10 L. R. A. 552, 20 Atl. 776.

The cashier or his sureties are not released from liability because of the negligence or misconduct of the president or of the board of directors.

Amherst Bank v. Root, 2 Met. 541; *Minor v. Mechanics Bank*, 1 Pet. 71, 7 L. ed. 58; *First Nat. Bank v. Drake*, 29 Kan. 328, 44 Am. Rep. 646; *McShane v. Howard Bank*, 73 Md. 150, 10 L. R. A. 556, 20 Atl. 779; *Frelinghuysen v. Baldwin*, 16 Fed. 453; *Phillips v. Bossard*, 35 Fed. 100.

Sureties are not exonerated because of the neglect of the directors to examine into the affairs of the bank.

Sparks v. Farmers' Bank, 3 Del. Ch. 303.

Neglect of directors to supervise the accounts does not discharge the sureties of a teller.

State use of Southern Bank v. Atherton, 40 Mo. 217.

This rule also applies to sureties of book-keeper.

Chew v. Ellingwood, 86 Mo. 272, 56 Am. Rep. 434; *Frankfort Bank v. Johnson*, 24 Me. 504; *Tapley v. Martin*, 116 Mass. 278.

And the sureties of a cashier who committed fraud unknown to the directors are not discharged because such directors were guilty of gross negligence.

Lieberman v. First Nat. Bank (Del.) 40 Atl. 384.

Nor are the sureties of a cashier discharged by failure of directors to examine his books.

United States v. Cutter, 2 Curt. C. C. 625, Fed. Cas. No. 14,911.

A surety is not discharged because of the failure of the government agents to discharge their duty.

United States v. Robertson, 5 Pet. 666, 8 L. ed. 266.

Every illegal act of the officers of a bank, although sanctioned by usage, is void.

Minor v. Mechanics Bank, 1 Pet. 46, 7 L. ed. 47.

It is not the business or duty of directors to go back to original entries.

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924.

When a contract is so drawn as to leave room for two constructions of its provisions, it must be interpreted most strongly against the party who prepared it, and delivered to the other party for his protection.

American Surety Co. v. Pauly, 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. Rep. 563.

The words that the facts are true "to the best of insured's knowledge" imply a wilful untruth to avoid the policy.

1 Biddle, Ins. § 562; *Clapp v. Massachusetts Ben. Asso.* 146 Mass. 519, 16 N. E. 433; *United Brethren Mut. Aid Soc. v. Kinter*, 12 W. N. C. 76; *France v. Aetna L. Ins. Co.* 94 U. S. 561, 24 L. ed. 287; *Northwestern Mut. L. Ins. Co. v. Gridley*, 100 U. S. 614, 25 L. ed. 746; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563.

The fact that a bank cashier has at one time owned stock in a brokerage association, or has had one or more transactions in speculation, cannot be said to constitute habits or create "associations."

Atina L. Ins. Co. v. Davey, 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. Rep. 331; 3 Joyce, Ins. § 2076.

Representations, expectations, belief, or opinion, without fraud, do not avoid a policy.

2 Joyce, Ins. §§ 1903, 1904; *Benham v. United Guarantee & Life Assur. Co.* 7 Exch. 744, 21 L. J. Exch. N. S. 317.

The bond or policy issued on the teller and collector contains no warranty by its words or construction.

Phoenix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500.

The cashier's policy or bond does make an effort to create a limited warranty in respect to certain things mentioned therein—such as "conduct," "duties," accounts, or methods of supervision—but it is fatally defective in these particulars because it is signed by a third party on information and belief.

Gage v. Lewis, 68 Ill. 604; *Towle v. National Guardian Assur. Soc.* 3 Giff. 42; *Benham v. United Guarantee & Life Assur. Co.* 7 Exch. 744.

The addition of the words "so far as the same are known to the applicant," in an application for insurance, has been held to reduce or lower what otherwise would have been a warranty to a representation which could not be recovered upon in the absence of fraud.

Fisher v. Crescent Ins. Co. 33 Fed. 549. See also *Wilkins v. Germania F. Ins. Co.* 57 Iowa, 529, 10 N. W. 916; *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 32 Am. Rep. 751, 1 N. W. 393; *Connecticut Mut. L. Ins. Co. v. Fisher*, 30 Fed. 662; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *Moulton v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466.

[416] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

The teller's bond, as originally given, expired January, 1889, and was renewed from year to year. Before each renewal the bank was informed by the company that it was necessary that a certain certificate by the president or cashier should be furnished, which was done, and stated, among other things, that the accounts of the teller had been examined and verified by the finance committee of the bank. The bond provided

[417] that it *was issued and renewed "on the express understanding that the employee has not, within the knowledge of the said employer, at any former period, either in this or other employment, been guilty of any default or serious dereliction of duty;" "that the employer shall observe, or cause to be observed, all due and customary supervision over the said employee, for the prevention of default;" and that there shall be "an in-

spection or audit of the accounts or books of the employee on behalf of the employer at least once in every twelve months from the date of this bond."

The company, not unnaturally, contends that as when the bond was renewed in January, 1892, the bank's books showed that the employee was a defaulter in the sum of \$19,600 understated liabilities, and of \$3,765.44 abstracted from bills receivable, both of which could have been detected by the taking of a trial balance, as is customary, or a mere comparison between the books kept by Schardt and the individual ledger, and a correct footing of the notes, the bank had not only not complied with its engagements above referred to, and falsely certified to a verification which in fact had not been had, but was guilty of such laches as in itself to defeat a recovery.

These are matters which, while not controlling our decision, should be considered in connection with that aspect of the case which we regard as decisive.

In addition to the provisions already mentioned, it was agreed "that the employer shall at once notify the company, on his becoming aware of the said employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits."

The legislation of Tennessee and the decisions of its courts placed dealing in futures, when either party did not contemplate delivery, in the category of gambling, and aimed to suppress it. *Allen v. Dunham*, 92 Tenn. 257, 21 S. W. 898; *McGrew v. City Produce Exchange*, 85 Tenn. 578, 4 S. W. 38; *Palmer v. State*, 88 Tenn. 553, 8 L. R. A. 280, 13 S. W. 233; Acts 1883, chap. 251.

The evidence showed that in the summer or fall of 1892 the cashier of the bank was told that the teller was part owner in a concern engaged in speculative business; he at once informed *the president of the bank, [418] and also called Schardt's attention to the matter, who admitted that he had once been engaged in such a concern, but said he had sold out, and also that he had speculated to some extent, but had ceased to do so. The cashier further testified that he afterwards received an anonymous letter that Schardt was speculating, and showed it to the president; that he spoke to Schardt about it; that the latter said he thought he knew the author, and asked for the letter, that he might bring the party before the cashier and make him acknowledge that it was false. The letter was given him, but nothing came of it, although he was asked about it more than once. This conversation was reported to the president. A leading director and a member of the finance committee was shown by another director an anonymous letter to him, to the same effect, which was reported to the president. The letter stated that Schardt was in partnership in a bucket shop. Schardt said it was a lie, and brought his partners before the president and the two directors, and they said that they had opened a brokerage association with Schardt, but that Schardt had sold out.

This director subsequently heard again that Schardt was speculating and went to Schardt's house and interviewed him, and he said he did not own any stocks at all; he had sold everything he had. He heard this again shortly after the cashier's bond was given, and Schardt again denied it. Complainant did not put the president of the bank on the stand.

In these circumstances was it the duty of the bank to notify the company of what it had heard?

In *American Surety Co. v. Pauly*, 170 U. S. 133, 144, 42 L. ed. 977, 982, 18 Sup. Ct. Rep. 552, 556, which was an action against the maker of a bond given to insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, the applicable rule was thus laid down:

"If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted; and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys,*officers or agents of the surety company. This is a well-established rule in the law of insurance. . . . As said by Lord St. Leonards in *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 507 'it [a life policy] is, of course, prepared by the company, and if, therefore, there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank."

But this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon.

Whatever the common-law duty on the part of the employer to notify the guarantor of the fraud or dishonesty of the employee whose fidelity is guaranteed, the parties to this contract undertook to declare the duty of the bank to the company in certain specified particulars. It required that the employee should not have been guilty of previous default or dereliction *within the knowledge* of the employer. It provided for notification of any act of the employee which might involve a loss without unreasonable delay after the occurrence of the act came to *the knowledge* of the employer.

262

And it required immediate notification on the employer *becoming aware* of the employee being engaged in speculation or gambling. The words "becoming aware" were manifestly used as expressive of a different meaning from having "knowledge."

In *Pauly's Case*, where the bond required that the company should be notified in writing "of any act on the part of the employee which may involve a loss for which the company is *responsible hereunder, as soon as [420] practicable after the occurrence of such act may have come to the knowledge of the employer," it was ruled that it had been properly held "that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty."

But the bond before us not only contained that clause, but the clause under consideration, which was a different and additional clause intended to secure the safety of prevention through timely warning.

It seems to us that the obvious meaning of "becoming aware," as used in this bond, is "to be informed of," or "to be apprised of," or "to be put on one's guard in respect to," and that no other meaning is equally admissible under the terms of the instrument. These are the definitions of the lexicographers, distinctly deducible from the derivation of the word "aware," and that is the sense in which they are here employed. It is used in the same sense in the cashier's certificate on the renewals of the teller's bond.

To be aware is not the same as to have knowledge. The bond itself distinguishes between the two phrases, and uses them as not synonymous with each other. And, in view of the plain object of the clause, we cannot regard the words as equivalent to "becoming satisfied," though perhaps they may be to "having reason to believe." Even then these facts would have demanded investigation or notification, for we think the bank cannot be heard to say it did not have reason to believe that Schardt was speculating when it took his professions of repentance as sufficient assurance that he had ceased speculating, and turned its back on any independent inquiry or investigation. Our understanding of the provision is that what the company stipulated for was prompt notification of information by the bank in regard to speculation or gambling on the part of the employee. It was entitled to exercise its own judgment on that information, and had not agreed to rely on the bank's belief in that regard. It had the right to investigate for itself, whether *the bank did so or not. Notification of the existence of reason for inquiry was exactly what the clause was intended to secure. The bank neither investigated nor gave the company notice of the information it had, and substituted its own judgment as to the value of that information for that of the

183 U. S.

company. In our view this conduct on its part amounted to a breach of the stipulation.

The Circuit Judge in his opinion said: "The language of the bond is that the employer shall report 'on his becoming aware of the employee being engaged in speculation.' Without now stopping to consider at length the meaning of the terms here used, I am of opinion that, in the absence of fraud or bad faith, the failure to disclose the result of the inquiry made in this instance did not invalidate the bond as to the surety. Certainly speculation in a reasonable and substantial sense is meant, such in length of time or magnitude as would make it serious. This, when brought to the attention of the bank officials, was a past event, and apparently in itself unimportant. The bank was under no duty by the contract or independently of it to actively institute or prosecute inquiries about Schardt, or to run down loose rumors or anonymous letters." 68 Fed. 459, 465.

The circuit court of appeals said: "There is not the least evidence of any bad faith on the part of any of these officers of the bank, including Sykes, the old cashier, in not making a disclosure of what was known, but only of bad judgment in not being more considerably affected by their information." 26 C. C. A. 161, 47 U. S. App. 115, 80 Fed. 781.

These quotations show that the circuit court of appeals and the circuit court concurred in the opinion that if the president and directors had such confidence in Schardt that they did not feel called upon to make any investigation in view of the information that they had received, or to notify the company of that information, and were not guilty of intentional bad faith, then the bank could not be held to have violated the stipulations of the bond on its part.

As will have been seen, we are unable to accept this conclusion. The company's defense did not rest on the duty of diligence growing out of the relation of the parties, [422] but on the *breach of one of the stipulations entered into between them. The question was not merely whether the conduct of the bank was contrary to the nature of the contract, but whether it was not contrary to its terms. Engagement in speculation or gambling was what the company sought to guard against because experience had admonished it of the probability that speculation or gambling would lead to acts involving loss of which it would be responsible. Bad faith, in the view of the courts below, would not exist if the bank had such confidence in Schardt's integrity that it accepted his bare statement that he was not speculating as overcoming the weight of his admission that he had been. How anything but such a denial could be expected it is not easy to see, nor how careful and prudent men could have been justified in omitting independent inquiry.

The truth is that, in spite of strict supervision and the pursuit of the best systems
183 U. S.

of keeping accounts, there is always a risk of defalcation. The prevention of defaults or their detection at the earliest possible moment are of even more vital importance to financial institutions than to the guarantors of the fidelity of their employees. The provisions intended to protect the company in this case were not in themselves unreasonable, and, so far as they operated to compel the bank to exercise due supervision and examination and due vigilance, were consistent with sound public policy. We think it was the duty of this bank to have made prompt investigation, or, at all events, to have notified the company at once of the information that it had; and we decline to hold that the bank's misplaced confidence in Schardt affords sufficient ground for enforcing the liability of the surety company on the theory of good faith.

Our conclusion is that the failure of the bank in the particulars adverted to defeats a recovery on the teller's bond for defalcation after information of Schardt being engaged in speculation was received.

It also results that there can be no recovery at all on the cashier's bond. If the bank had observed the stipulation in the teller's bond to which we have referred, it is obvious that *there would have been no [423] cashier's bond, and the question would not have arisen. But this it did not do, and the bond was given. The bond provided that the company covenanted with the bank in reliance on the statement and declaration of the president on behalf of the bank, and on the bank's strict observance of the contract; that any misstatement of a material fact in the declaration should invalidate the bond; that the bank should use "all due and customary diligence in the supervision of said employee for the prevention of default;" "that any written answers or statements made by or on behalf of said employer, in regard to or in connection with the conduct, duties, accounts, or methods of supervision of the said employee, delivered to the company, either prior to the issue of this bond or to any renewal thereof, or at any time during its currency, shall be held to be a warranty thereof, and form a basis of this guarantee, or of its continuance."

Two of the questions and answers in the declaration were as follows:

Q. Have you known or heard anything unfavorable as to his habits or associations, past or present?—A. No.

Q. Or of any matters concerning him about which you deem it advisable for the company to make inquiry?—A. No.

In *Pauly's Case* the president and the cashier were confederates in the dishonesty of the cashier, for the purpose of defrauding the bank; and also it was held no part of the duties of the president under the circumstances there disclosed to certify to the integrity of the cashier as he did. In this case the dishonesty was that of the cashier alone; the statements were required to be and were made on behalf of the bank, and

the president acted for the bank in so doing; and the bonds were procured by the bank, and the bank paid the premiums. There can be no doubt that the bank was responsible for the representations of its cashier in the one instance and its president in the other in procuring these contracts of indemnity. The representations made in the declaration on which the cashier's bond was issued were clearly misrepresentations. The teller's bond required notification if the bank were informed of speculation on Schardt's part. The president had heard [424] of such speculation, *and knew that speculating was something unfavorable as to Schardt's habits; and the president of course knew that the matters concerning him, of which he had heard, were such as it was advisable for the company to make inquiry about. True, the second question was if he had heard of matters about which he deemed it advisable for the company to inquire, and the word "deem" might be said to give a considerable discretion, but it was not a discretion to be abused. That the company would consider it advisable to make inquiry is too plain for argument. The whole tenor of the bond renders any other conclusion impossible.

We cannot regard the representations of the president as consistent with good faith, and he was not even called as a witness by the bank to explain his conduct, if he could have done so.

The decrees of both courts are reversed, and the cause remanded to the Circuit Court for further proceedings consistent with this opinion.

WILLIAM R. TUCKER, Vice-Consul of Russia, *Petitioner*,
v.

LEO ALEXANDROFF.

(See S. C. Reporter's ed. 424-470.)

Treaties — construction — extradition — deserting seamen — deserter from Russian ship of war — habeas corpus — waiver of production of official documents showing deserter formed part of crew.

1. A convention in a treaty which is operative upon both of the signatory powers, and is intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose.
2. A vessel which has been launched, but is still in process of construction under a contract to build a protected cruiser for the imperial Russian government, is a Russian ship of war, within the meaning of the provision of the treaty of 1832 with Russia, which authorizes the arrest and surrender of deserters

from the ships of war of that country, although under such contract the vessel may be rejected for deficient speed or excessive draft, and during her construction is at the risk of her contractors until actually accepted or actual possession taken, where the contract also provides that the vessel shall be constantly subject to inspection by a board appointed by the Russian Ministry of Marine, and that whether finished or unfinished, the vessel and all materials intended for her construction, when brought upon the premises of the contractors, shall immediately become the exclusive property of the Russian Ministry of Marine.

3. Seamen become obligated to merchant vessels from the time they sign the shipping articles, and from that time they may incur the penalties of desertion.
4. A member of the Russian naval service sent to the United States as one of the force ordered to take possession and serve as the crew of a protected cruiser built for the imperial Russian government, who deserts before the crew is organized as such and without ever setting foot upon the vessel, is, nevertheless, a deserter from a Russian ship of war, within the meaning of the treaty of 1832 with Russia, authorizing the arrest and surrender of deserters from ships of war of that country, although such cruiser had not yet been commissioned as a member of the Russian navy.
5. The production by a Russian vice-consul, of official documents showing that a person sought to be arrested and detained as a deserter from a Russian ship of war formed part of her crew, required by the treaty with Russia of 1832 as a condition of receiving the assistance of the local authorities, is waived by petitioner for a writ of habeas corpus to inquire into a detention under such proceedings, by his admission upon the hearing accompanying the offer of the passport under which he entered the United States, that he came to the United States as a member of the Russian navy, detailed to become one of the crew of such cruiser, and that he came for that express purpose.

[No. 303.]

Argued November 15, 18, 1901. Decided January 6, 1902.

ON WRIT of Certiorari to the Circuit Court of Appeals for the Third Circuit to review a decree affirming an order of the District Court for the Eastern District of Pennsylvania discharging a prisoner from custody. *Reversed.*

See same case below, 48 C. C. A. 97, 107 Fed. 137.

Statement by Mr. Justice **Brown**:

*This was a writ of habeas corpus issued [425] upon the petition of Alexandroff to inquire into the cause of his detention by Robert C. Motherwell, keeper of the Philadelphia County Prison, and Captain Vladimir Behr, master of the Russian cruiser Variag.

The petition set forth that the petitioner was illegally detained *upon a commission- [426] er's warrant, issued upon the affidavit of Captain Behr, to the effect that he was a duly engaged seaman of the Russian cruiser Variag whose term of service had not expired, and that he had, on or before April 25, 1900, deserted from said vessel without

NOTE.—On the construction and operation of treaties—see note to United States v. The Amistad, 10 L. ed. U. S. 826.

On habeas corpus in cases of foreign extradition—see note to *Re Huse*, 25 C. C. A. 23.

On extradition of persons accused of crime on demand of foreign governments—see note to *Kentucky v. Dennison*, 16 L. ed. U. S. 717.

any intention of returning thereto. Petitioner further averred that on May 24, 1900, he had declared his intention before the proper authorities to become a citizen of the United States, and to renounce his allegiance to the Emperor of Russia, of whom he was then a subject; that he had never deserted the Variag, and had "never set his foot on that vessel as a seaman thereof."

In return to the writ the superintendent of the county prison produced the body of Alexandroff, with a copy of the commitment by a United States commissioner, stating that he had been "charged" on oath with desertion from the Variag, and "apprehended" upon a warrant issued by the commissioner at the request of the vice-consul, in accordance with the terms of a treaty between the United States and Russia. There was no statement that an examination had been had before the commissioner, and the warrant did not commit him for examination, but "subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag, or until he shall be discharged by the due course of law." The commitment is reproduced in full in the margin.†

[427]*Upon a hearing upon the writ, the return thereto and the evidence, the district court was of opinion, first, that the Variag was not, at the time the petitioner left the service, a Russian ship of war, but simply an unfinished vessel intended for a Russian cruiser; second, that petitioner had not become a member of her crew; that the vessel had no crew in the sense intended by the treaty, inasmuch as the men assigned to that duty had not yet begun that service and might never be called upon to perform it; third, that no such documentary evidence of

petitioner's enlistment as a member of the crew as was required by the treaty had been offered.

It was accordingly ordered that the prisoner be discharged from custody. 103 Fed. 198.

An appeal was taken from this order to the circuit court of appeals, in which court the district attorney entered his appearance and filed a suggestion that, under the facts of the case, the relator should be remanded to the county prison to await the order of Captain Belir, the master of the Variag.

Upon a hearing in the court of appeals, the order of the district court was affirmed. 48 C. C. A. 97, 107 Fed. 437. Whereupon William R. Tucker, vice-consul of Russia at Philadelphia, applied for and was granted a writ of certiorari from this court.

Messrs. John F. Lewis and Paul Fuller argued the cause, and, with *Mr. F. R. Coudert, Jr.*, filed a brief for petitioner:

The captain or commander of a crew forming part of the naval forces of a foreign nation has the right to retain such command while in a friendly port by license express or implied.

The Exchange v. M'Faddon, 7 Cranch, 116, 3 L. ed. 287; *Belligerent Asylum*, 7 Ops. Atty. Gen. 122.

Consular officers have exclusive jurisdiction to determine such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge without the interference of the local authorities.

Wildenhuss's Case, 120 U. S. 12, *sub nom. Mali v. Hudson County Common Jail Keeper*, 30 L. ed. 567, 7 Sup. Ct. Rep. 385; *The Belgenland*, 114 U. S. 364, *sub nom. The Belgenland v. Jensen*, 29 L. ed. 155, 5 Sup. Ct. Rep. 860; *The Belvidere*, 90 Fed. 109; *The Amalia*, 3 Fed. 653.

The judgment of a magistrate in proceedings for extradition, that the accused is guilty of the act charged and that it constitutes an extraditable offense, cannot be reviewed on the weight of evidence, and is final unless palpably erroneous in law.

Ornelas v. Ruis, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689.

In extradition cases it has been repeatedly held that a writ of habeas corpus cannot be made to perform the functions of an appeal, and that the questions to be determined are as to the jurisdiction and authority of the commissioner to pass on the complaint and the legality of his warrant.

Re Maedonnell, 11 Blatchf. 170, Fed. Cas. No. 8,772; *Ex parte Van Aernam*, 3 Blatchf. 160, Fed. Cas. No. 16,824.

It has again been held that on such a hearing it is competent for the court to look into the testimony upon which commitments were made. This was not done in the present case.

United States v. Bates, Fed. Cas. No. 14,544.

The jurisdiction of the court is the thing to be looked into and the court will examine

†Copy of Commitment.

United States of America, }
Eastern District of Pennsylvania, } *scd.*

The President of the United States of America to the marshal of said district and to the keeper of the criminal apartment of the Philadelphia county prison at Moyamensing:

These are to command you, the said marshal, forthwith to deliver into the custody of the said keeper the body of Leo Alexandroff, charged on oath before Henry R. Edmunds, United States commissioner, with desertion from the Imperial Russian cruiser Variag, and apprehended upon my warrant issued at the request of the vice-consul of Russia at Philadelphia upon the complaint of the captain of said cruiser Variag in accordance with the terms of the treaty between the United States and Russia—with the act of Congress in such case made and provided.

And you, the said keeper of the said prison, are hereby required to receive the said Leo Alexandroff into your custody in the said prison and—the same safely keep him subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag, or until he shall be discharged by the due course of law.

Witness the hand and seal of the said commissioner at Philadelphia this first day of June, A. D. 1900, and in the 124th year of the Independence of the United States.

Copy. Henry R. Edmunds,
[Seal.] United States Commissioner.

the proceedings sufficiently to determine that.

Ex parte Farley, 40 Fed. 66.

On a petition for discharge of one arrested as a deserter, on the ground that he was under sixteen when he enlisted and was induced to enlist by fraud, the return denying the fraud and presenting the written consent by his father and his own sworn statement that he was of age sufficient to enlist, was taken as conclusive as to all the facts therein set forth, it having been neither demurred to nor denied.

Re Lawler, 40 Fed. 233.

What is a ship has been the subject of judicial interpretation. At the moment when she leaves the ways, and her keel strikes the elements for which she was originally designed: that is the moment of her birth as a ship.

The Eliza Ladd, 3 Sawy. 519, Fed. Cas. No. 4,364.

The ownership of the vessel determines her national character.

United States v. Jenkins, 1 N. Y. Legal Obs. 344, Fed. Cas. No. 15,473.

Messrs. Isaac Hassler and Bernard Harris by special leave argued the cause and filed a brief for respondent:

Without a treaty, there can, under no circumstances, be a return of deserters.

Moore, Extradition, § 408; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

Ownership of a vessel does not determine her national character.

United States v. Jenkins, 1 N. Y. Legal Obs. 344, Fed. Cas. No. 15,473; *United States v. Rogers*, 3 Sumn. 342, Fed. Cas. No. 16,189.

The commission, the flag actually raised, and the circumstances, and not the ownership, determine national character.

The Industrie, 1 Spinks, Ecol. & Adm. Rep. 444; *United States v. The El Telegrafo*, Newberry Adm. 386, Fed. Cas. No. 15,049; *The Stephen Hart*, Blatchf. Prize Cas. 413, Fed. Cas. No. 13,364; *The Amalia*, 3 Fed. 653.

Political status determines the question of enemy ownership.

The Benito Estenger, 176 U. S. 568, 44 L. ed. 592, 20 Sup. Ct. Rep. 489.

The use of an enemy's flag is a mark and token of her real ownership.

Desty, Shipping & Admiralty, § 416; *The Hallie Jackson*, Blatchf. Prize Cas. 42, Fed. Cas. No. 5,961; *The William Bagaley*, 5 Wall. 410, *sub nom. The William Bagaley v. United States*, 18 L. ed. 590; *The Success*, 1 Dodson Adm. 132; *The Fortuna*, 1 Dodson Adm. 81.

The ship's papers are conclusive of the national character of the ship as against the claimants.

Desty, Shipping & Admiralty, 416; *United States v. Bartlett*, 2 Ware, 16, Fed. Cas. No. 14,532; *The Santissima Trinidad*, 7 Wheat. 283, 5 L. ed. 454. See also Hall, International Law, 4th ed. 167.

If there was no Russian ship, there was no Russian crew.

United States v. Rogers, 3 Sumn. 342, Fed. Cas. No. 16,189.

The Russian government cannot cause the arrest of this person as a deserter from the crew of a particular ship, under an extradition treaty and then claim him on a different ground, *i. e.*, as a deserter from the Russian naval service, which the treaty does not cover.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

The production of such documentary proof that the alleged deserter formed part of the crew is essential to sustain the success of the proceeding before the United States commissioner; and the circumstance that it does not affirmatively appear in the complaint, and in the return to the habeas corpus, that this essential provision of the treaty was fulfilled, renders the commitment nugatory, as the prisoner would be held without warrant of law.

Nash's Case, 4 Barn. & Ald. 491.

U. S. Rev. Stat. § 5280, which provides the machinery for carrying into effect the provision of the treaty with Russia for the arrest and detention of deserters from Russian ships of war, must be read into and in connection with such treaty.

Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

However much a sovereign is exempt from the jurisdiction of another state, if he "appeals to the courts of a foreign state, or accepts their jurisdiction, he brings with him no privileges that can displace the practice as applying to other suitors."

Hall, International Law, § 49, note; *King of Spain v. Hullet*, 1 Clark & F. 333; *The New Battle*, L. R. 10 Prob. Div. 33; Calvo, Droit International, 549.

Defects in the commitment in an extradition cause justify a discharge on habeas corpus.

Ex parte Van Hoven, 4 Dill. 411, Fed. Cas. No. 16,858.

The ground of discharge is in the nature of an ordinary replication to the return on habeas corpus, and will be so considered by the court.

United States v. Wyngall, 5 Hill, 16.

The court may hear evidence to determine the jurisdiction of the commissioner.

Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; *Ex parte Jenkins*, 2 Wall. Jr. 521, Fed. Cas. No. 7,259. See also *Cosgrove v. Winney*, 174 U. S. 64, 43 L. ed. 897, 19 Sup. Ct. Rep. 598, Affirming *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

*Mr. Justice **Brown** delivered the opinion [427] of the court:

Upon the facts of this case, the district court and court of *appeals were agreed in [428] the opinion that neither under terms of the treaty of 1832 with Russia, nor upon principles of international comity, could the relator be delivered over to the master of the *Variag* as a deserter.

In committing him to the Philadelphia County Prison, the commissioner acted in

pursuance of Rev. Stat. § 5280, which provides as follows: "Sec. 5280. On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination." The procedure is then set forth.

The facts were, in substance, that Alexandroff entered the Russian naval service as a conscript, in 1896, at the age of seventeen, and was assigned to the duties of an assistant physician. Some time in October, 1899, an officer and a detail of fifty-three men, among whom was Alexandroff, were sent from Russia to Philadelphia to take possession of and man the Variag, then under construction by the firm of Cramp & Sons, in that city. The Variag was still upon the stocks when the men arrived in Philadelphia. She was, however, launched in October or November, 1899, and at the time Alexandroff deserted was lying in the stream still under construction, not yet having been accepted by the Russian government. Alexandroff left Philadelphia without leave April 20, 1899, went to New York, and there renounced his allegiance to the Emperor of Russia, declaring his intentions of becoming a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed upon a mittimus stating that he had been charged with desertion from the imperial Russian cruiser

[429] Variag, upon the complaint of the *captain, in accordance with the terms of the treaty between the United States and Russia.

The vice-consul, who prosecutes this appeal on behalf of the Russian government, relies chiefly upon article IX. of the treaty of December, 1832, which reads as follows (8 Stat. at L. 444): "The said consuls, vice-consuls, and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges, and officers, and shall in writing demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and, this reclamation being thus substantiated, the surrender shall not be refused." Sections VIII. and IX. of the treaty, which cover the

whole subject of deserting seamen, are reproduced in the margin.†

*While desertion is not a *crime* provided [430] for by any of our numerous extradition treaties with foreign nations, the arrest and return to their ships of deserting seamen is no novelty either in treaties, legislation, or general international jurisprudence. The 9th article of the treaty with the government of France, entered into November 14, 1788, before the adoption of the Constitution, contained a stipulation that "the consuls and vice-consuls may cause to be arrested the captains, officers, mariners, sailors, and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country," specifying the procedure. 8 Stat. at L. 106, 112. The same provision was contained in subsequent treaties with France, of June 24, 1822, and February 23, 1853, and it was to carry these and similar treaties into effect that the act of 1829, reproduced in Rev. Stat. § 5280, was adopted. Similar conventions were entered into with Brazil in 1823, Mexico in 1831, Chili in 1832, Greece in 1837, Bolivia in 1858, Austria in 1870, Belgium in 1880, and at different times with some seventeen or eighteen other powers,

†Treaty with Russia, 1832.

Art. VIII.

The consuls, vice-consuls, and commercial agents shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or the tranquillity of the country, or the said consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country.

Art. IX.

The said consuls, vice-consuls, and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges, and officers, and shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused.

Such deserters, when arrested, shall be placed at the disposal of the said consuls, vice-consuls, or commercial agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessels to which they belong, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever. But if not sent back within four months from the day of their arrest, they shall be set at liberty, and shall not be again arrested for the same cause.

and finally by a special treaty with Great Britain, ratified June 3, 1892. In short, it may be said that, with the exception of China, the Argentine Republic, and possibly a few others, there is not a maritime nation in the world with which we have not entered into a convention for the arrest and delivery over of deserting seamen. The multitude of these conventions is such as to indicate a pressing necessity that masters of vessels should have some recourse to local laws to prevent their being entirely stripped of their crews in foreign ports.

[431] A like provision for the arrest and delivery over of seamen deserting from domestic vessels, adopted by the first Congress *in 1790 (1 Stat. at L. 131, 134, chap. 29), was sustained by this court in *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, and remained upon the statute books for over a hundred years, when it was finally repealed in 1898. 30 Stat. at L. 755, 764, chap. 28.

We are cited to no case holding that courts have the power, in the absence of treaty stipulations, to order the arrest and return of seamen deserting from foreign ships; and it would appear there was no such power in this country, inasmuch as § 5280, under which the commissioner is bound to proceed, limits his jurisdiction to applications by a consul or vice-consul of a foreign government "having a treaty with the United States" for that purpose.

In Moore on Extradition, § 408, it is laid down as a general proposition that, in the absence of a treaty, the surrender of deserting seamen cannot be granted by the authorities of the United States; and an opinion of Attorney General Cushing (6 Ops. Atty. Gen. 148) is cited upon that point. There is also another to the same effect. 6 Ops. Atty. Gen. 209. It is believed that in all the instances which arose between the United States and Great Britain prior to the treaty of 1892 for the reclamation of deserting seamen, both powers have taken the position that in the absence of a treaty there can be no reclamation. Several instances of this kind are cited by Mr. Moore in his treatise.

In the case of the *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, it was held that, apart from the provisions of treaties upon the subject, there was no well-defined obligation on the part of one country to deliver up fugitives from justice to another, "and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked, and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law."

The only case in our reports even indirectly considering such a case as one of international comity is that of *The Exchange v. McFaddon*, 7 Cranch, 116, 3 L. ed. 287. This was a libel for possession promoted by the former owners of the *Exchange*, who alleged that she had been seized under the or-

ders of Napoleon and in violation of the law of nations; that no decree of condemnation had been pronounced *against her, but[432] that she remained the property of the libellants.

The district attorney filed a suggestion to the effect that the vessel, whose name had been changed, belonged to the Emperor of the French, and while actually employed in his service was compelled, by stress of weather, to enter the port of Philadelphia for repairs: that if the vessel had ever belonged to the libellants, their title was divested according to the decrees and laws of France in such case provided. The district judge dismissed the libel upon the ground that a public armed vessel of a foreign sovereign in amity with our government is not subject to the ordinary judicial tribunals of our country, so far as regards the question of title, by which such sovereign holds the vessel.

On appeal, this court, through Mr. Chief Justice Marshall, held that the decree of the district court should be affirmed; that the "perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation." He divided these cases into three classes:

1. The exemption of the person of the sovereign from arrest or detention in a foreign country.

2. The immunity which all civilized nations allow to foreign ministers.

3. Where the sovereign allows the troops of a foreign prince to pass through his dominions.

In respect to this last class he observed: "In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, *and would be withdrawn from[433] the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments, which the government of his army may require."

In this connection he held that there was a distinction between a military force which could only enter a foreign territory by permission of the sovereign, and a public armed vessel, which upon principles of interna-

tional comity is entitled to enter the ports of any foreign country with which her own country is at peace. He further observed: "If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain under the protection of the government of the place." It was upon this ground that the court held the Exchange exempt from seizure.

This case, however, only holds that the public armed vessels of a foreign nation may, upon principles of comity, enter our harbors with the presumed license of the government, and while there are exempt from the jurisdiction of the local courts; and, by parity of reasoning, that, if foreign troops are permitted to enter, or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction.

The case, however, is not authority for the proposition that, if the crews of such vessels, or the members of such military force, actually desert and scatter themselves through the country, their officers are, in the absence of treaty stipulation, authorized to call upon the local authorities for their reclamation. While we have no doubt that, under the case above cited, the foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter *dum fervet opus*, and to that extent this country waives its jurisdiction over the foreign crew or command, yet if a member of that crew actually escapes from the custody of his officers, [434] he *commits no crime against the local government, and it is a grave question whether the local courts can be called upon to enforce what is in reality the law of a foreign sovereign. The principle of comity may imply the surrender of jurisdiction over a foreign force within our territory, but it does not necessarily imply the assumption by our courts of a new jurisdiction, invoked by a foreign power, for the arrest of persons who have committed no offense against our laws, and are perhaps seeking to become citizens of our country. Our attention has been called to no such case. But, however this may be, there can be no doubt that the commissioner, in exercising the powers vested in him by Rev. Stat. § 5280, is limited to the arrest of seamen belonging to a country with whom we have a treaty upon that subject.

Instances are by no means rare where foreign troops have been permitted to enter or cross our territory, although in September, 1790, General Washington, on the advice of Mr. Adams, did refuse to permit British troops to march through the territory of the United States from Detroit to the Mississippi, apparently for the reason that the object of such movement was an attack on New Orleans and the Spanish possessions on the Mississippi. The government might well refuse the passage of foreign troops for the purpose of making an

attack upon a power with which we were at peace.

In January, 1862, the Secretary of State gave permission to the British government to land a body of troops at Portland, and to transport them to Canada, the St. Lawrence being closed at that season of the year. The concession was the more significant from the fact that it occurred during our Civil War, when our relations with Great Britain were considerably strained, and the object was evidently to strengthen the British garrisons in Canada.

In 1875 permission was granted to the Governor General of Canada to transport through the territory of the United States certain supplies for the use of the Canadian mounted police force.

In 1876 the President permitted Mexico to land in Texas a small body of her troops, supposed to be intended to aid in the *de-[435] fence of Matamoras, with the proviso that the stay be not unnecessarily long, and that the Mexican government should be liable for any injury inflicted by these troops.

By a reciprocity of courtesy, permission was given in 1881 by the Governor General of Canada for the passage of a company of Buffalo militia, armed and equipped, over the Canada Southern Railway, from Buffalo to Detroit. These and other instances are collected by Dr. Wharton in his Digest of International Law, § 13.

Our attention is also called by counsel to the following instances:

At the Columbian celebration in 1893 marines from every foreign war vessel, except the Spanish, were allowed to land and did land and parade in the public streets of New York under the control of their various commanders.

On the occasion of the Dewey parade, a regiment of Canadian troops was given permission to come into the United States and join in the procession.

This permission was granted as in the present case by the Secretary of the Treasury.

At the Buffalo Exposition, but recently closed, Mexican troops were allowed to go through the United States and be present at Buffalo, and remain there during the exposition.

In none of these cases, however, did a question arise with respect to the immunity of foreign troops from the territorial jurisdiction, or the power of their officers over them, or the right of the latter to call upon the local officers for the arrest of deserters. While no act of Congress authorizes the Executive Department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters in the absence of positive legislation to that effect.

If the arrest of Alexandroff were wholly without authority of law, we should not feel

it our duty to detain him and deliver him up to the custody of Captain Behr, notwithstanding we *might be of opinion that he had unlawfully escaped from his custody. If Captain Behr by the escape of Alexandroff lost the right to call upon the local authorities for his arrest and surrender, he acquired no new right in that particular by the fact that he was illegally arrested and is still in custody. His detention upon the ground of comity could only be justified by the fact that his original arrest was legal, although if his arrest were authorized by law, the fact that such arrest was irregular might be condoned.

But whatever view might be taken of the question of delivering over foreign seamen in the absence of a treaty, we are of opinion that the treaty with Russia having contained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge those powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject-matter is a negation of all other analogous powers with respect to the same subject-matter. *Ex parte McCordle*, 7 Wall. 506, 19 L. ed. 264; *Endlich*, Interpretation of Statutes, §§ 397, 400. As observed by Lord Denman in *Aspdin v. Austin*, 5 Q. B. 671, 684, "where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." The rule is early stated in the familiar legal maxim, *Expressio unius est exclusio alterius*. In several recent cases in this court we have held that, where a statute gives a certain remedy for usurious interest paid, that remedy is exclusive, although in the absence of such a remedy the defense might be made by way of set-off or credit upon the original demand. *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212; *Driesbach v. Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658; *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336; *Haseltine v. Central Nat. Bank*, 183 U. S. 132, ante, 118, 22 Sup. Ct. Rep. 50. *See also *King v. Sedgley*, 2 Barn. & Ad. 65; *Hare v. Horton*, 5 Barn. & Ad. 715; *Stafford v. Ingersol*, 3 Hill, 38.

We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers, and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. Taylor, International Law, § 383. As treaties are solemn engagements entered into

between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is, not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling, between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries, vol. 1, p. 174: "Treaties of every kind . . . are to receive a fair and liberal interpretation according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."

What, then, are the stipulations to which we must look for the solution of the question involved in this case? They are found in the 9th article of the treaty, which authorizes the arrest and surrender of "deserters from the ships of war and merchant vessels of their country." It is insisted, however, that this article is no proper foundation for the arrest of Alexandroff for three reasons: First, that the *Variag* was not a Russian ship of war; second, that Alexandroff was not a deserter from such ship; and, third, that his membership of such crew was not proved by the exhibition of registers of vessels, the rolls of the crew, or by other official documents. The case depends upon the answers to these questions.

1. At the time Alexandroff arrived in Philadelphia the *Variag* was still upon the stocks. Whatever be the proper construction *of the word under the treaty, she was [438] not then a ship in the ordinary sense of the term, but shortly thereafter and long before Alexandroff deserted, she was launched, and thereby became a ship in its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. *The China*, 7 Wall. 53, *sub nom. The China v. Walsh*, 19 L. ed. 67; *Thorp v. Hammond*, 12 Wall. 408, 20 L. ed. 419; *Workman v. New York City*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep.

212; *United States v. The Little Charles*, 1 Brock, 347, 354, Fed. Cas. No. 15,612; *The John G. Stevens*, 170 U. S. 123, 125, 126, 42 L. ed. 973, 974, 18 Sup. Ct. Rep. 544; *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831. She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale. We have had frequent occasion to notice the distinction between a vessel before and after she is launched. In *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. ed. 961, it was held that the admiralty jurisdiction did not extend to cases where a lien was claimed for work done and materials used in the construction of a vessel; while the cases holding that for repairs or alterations, supplies or materials, furnished after she is launched, suit may be brought in a court of admiralty, are too numerous for citation.

So sharply is the line drawn between a vessel upon the stocks and a vessel in the water, that the former can never be made liable in admiralty, either *in rem* against herself or *in personam* against her owners, upon contracts or for torts, while if in taking [439] *the water during the process of launching, she escapes from the control of those about her, shoots across the stream and injures another vessel, she is liable to a suit *in rem* for damages. *The Blenheim*, 2 W. Rob. 421; *The Vianna*, Swabey, 405; *The Andalusian*, L. R. 2 Prob. Div. 231; *The Glengarry*, L. R. 2 Prob. Div. 235; *The George Reper*, L. R. 8 Prob. Div. 119; *Baker v. Power*, 14 Fed. 483.

Inasmuch as the *Variag* had been launched and was lying in the stream at the time of Alexandroff's desertion, we think she was a ship within the meaning of the treaty.

It requires no argument to show that if she were a ship of any description, she was a ship of war as distinguished from a merchant vessel. Article IX. of the treaty embraces deserters from both classes of vessels. She was clearly not a merchant vessel, and as clearly intended to be and was a ship of war, notwithstanding she had not received her armament. The contract with the Cramps under which she was built was entered into by the Russian Ministry of Marine, and provided for the construction by them for the Russian imperial government of "a protected cruiser, built, equipped, armed and fitted," etc. The appearance of a modern ship of war, too, is so wholly distinct from that of a merchant vessel that there could be no possibility of mistaking one for the other.

We are also of opinion that she was a Russian ship of war within the meaning of the treaty. The contract under which she was built, not only provided that she was to be built for the imperial Russian government, but should be constantly, during the 183 U. S.

continuance of the contract, inspected by a board of inspection appointed by the Russian Ministry of Marine, who should have full liberty to enter the premises of the contractors for such purpose; and that speed trials should be made by the contractors in the presence of such board of inspection. The 10th article of the contract reads as follows:

"Art. 10. The contractors agree that the vessel to be built, as aforesaid, whether finished or unfinished, and all steel, iron, timber, and other materials as may be required by the contractors, and be intended for the construction of the said ship, and *which [440] may be brought upon the premises of the contractors, shall immediately thereupon become, and be, the exclusive property of the Russian Ministry of Marine. The flag of the imperial Russian government shall be hoisted on the said ship whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian Ministry of Marine may at any time appoint an officer or officers to take actual possession of the said ship or materials, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid."

Such being her status with respect to her title and employment, can it be doubted that, if the contractors had seen fit to institute proceedings under the mechanic's lien law of the state for labor and materials furnished in her construction, or if a materialman had filed a libel in admiralty against her for coal furnished in testing her engines, or if upon her trial trip she had negligently come into collision with another vessel whose owner had instituted a suit against her, the Emperor of Russia might have claimed for her an immunity from local jurisdiction upon the ground that she was the property of a foreign sovereign? In making this defense it would necessarily appear that she was a public vessel; in other words, a ship of war, and upon that ground immune from suit or prosecution in the local courts. In the case of *The Constitution*, L. R. 4 Prob. Div. 39, an historical and venerable frigate of the United States, while returning home from the Paris Exposition with a cargo of American exhibits belonging to private parties, was stranded on the south coast of England and received salvage services from an English tug. It was held by the English court of admiralty that no warrant for her arrest could issue, either in respect of ship or cargo. In *The Parlement Belge*, L. R. 4 Prob. Div. 129, a vessel belonging to the King of the Belgians, manned by officers and men commissioned and paid by him, and regularly employed for the purposes of carrying mails, passengers, and cargo, was held by the British court of admiralty not to be entitled to the privileges of a man-of-war as to extraterritoriality, and that she was liable to proceedings *in rem* at the suit of the owner of a vessel injured by her in collision. The decision, however, was reversed by *the court of appeals, upon the ground [441] that the exercise of such jurisdiction was

incompatible with the absolute independence of the sovereign of every superior authority, and that the property as well as the person of the sovereign was exempt from suit. This general question is too well settled to admit of doubt.

It is true there was a provision that the *Variag* might be rejected either for deficient speed or for excessive draft, and that she should be during her construction at the risk of the contractors, until she had been actually accepted by the imperial Russian government, or they had taken actual possession of her. This, however, did not prevent the property passing to the Russian government as stipulated by article X. of the contract, though with a provision for an ultimate rescission. True, the Russian flag had never been hoisted upon the vessel, but that was immaterial, as the government had not finally accepted or taken possession of her.

Mr. Hall, in his treatise upon International Law, discussing foreign ships as non-territorial property of a state (§ 44), says that the commission under which a commander acts is conclusive of the public character of a vessel, although such character is usually evidenced by the flag and pendant which she carries, and, if necessary, by firing a gun. "When in the absence of, or notwithstanding, these proofs, any doubt is entertained as to the legitimacy of her claim, the statement of the commander on his word of honor that the vessel is public is often accepted, but the admission of such statements as proof is a matter of courtesy," and "though attestation by a government that a ship belongs to it is final, it does not follow that denial of public character is equally final; assumption and repudiation of responsibility stand upon a different footing." It is true he says that the immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed not being capable of separate use for these purposes, and consequently are not exempted from the local jurisdiction. But it is pertinent to notice here that he is speaking of immunities of public vessels [442] from local jurisdiction, *and not of the property of a foreign government in such vessels. See also Taylor, International Law, §§ 253, 254, 261. There can be no doubt that the *Variag*, in the condition in which she was at the time Alexandroff deserted, was a subject of local jurisdiction, and that if any crime had been committed on board of her, such crime would have been cognizable in the local courts, although it would have been otherwise had the Russian government taken possession, put a crew on board of her, and commissioned her for active service. This, however, does not touch the question whether she was not a ship of war within the letter and spirit of the treaty of 1832.

2. Was Alexandroff a deserter from a Russian ship of war within the meaning of the treaty, or was he merely a deserter from the Russian naval service, a fact which of

itself would not be sufficient to authorize his arrest under article IX. of the treaty? To be a deserter from a particular ship he must have been a member of the crew of such ship, and bound to remain in its service until discharged. It is earnestly insisted that, although he had been detailed to serve thereafter as a member of the crew of the *Variag*, her crew had never been organized as such, that the detail was merely preliminary to such organization, and that Alexandroff had never set foot upon the vessel. This argument necessarily presupposes that seamen do not become a "crew" until they have actually gone on board the vessel, and entered upon the performance of their duties. We cannot acquiesce in this position. The more reasonable view is that seamen become obligated to merchant vessels from the time they sign the shipping articles, and from that time they may incur the penalties of desertion.

So early as the marine ordinances of Louis XIV.—the foundation of all maritime Codes—the service of the seaman was treated as beginning from the moment when the contract for such service was entered into. By title 3, article 3, of this ordinance, "if a seaman leaves a master, without a discharge in writing, *before the voyage is begun*, he may be taken up and imprisoned wherever he can be found," etc. The present Commercial Code of France makes no express provision upon the subject, but by the general mercantile law of Germany, art. 532, "the master can cause any seaman who, *after having been engaged*, neglects to enter upon or continues to do his duties, to be forcibly compelled to perform the same." By the Dutch Code, art. 402, "the master, or his representative, can call in the public force against those *who refuse to come on board*, who absent themselves from the ship without leave, and refuse to perform to the end of the service for which they were engaged."

The rule is the same in England. By § 243 of the merchants' shipping act of 1854 (17 & 18 Viet. chap. 104), "Whenever any seaman *who has been lawfully engaged*, or any apprentice to the sea service, commits any of the following offenses, he shall be liable to be punished summarily, as follows (that is to say): . . . 2. For *neglecting or refusing*, without reasonable cause, to *join his ship*, or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of the ship's sailing from any port, either at the commencement or during the progress of any voyage, . . . he shall be liable to imprisonment," etc. And by § 246, "Whenever, either at the commencement or during the progress of any voyage, any seaman or apprentice *neglects or refuses to join*, or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve," the master may call upon the local police officers or constables to apprehend him. These provisions have been substantially carried into the new merchants' shipping act. 57 & 58 Viet. chap. 60, § 221.

Congress, however, has so often spoken

upon this subject that we think it can hardly be open to doubt. By Rev. Stat. § 4522, as amended in 1898 (30 Stat. at L. 755, chap. 28), regulating seamen engaged in interstate commerce, there is a provision that "at the foot of every such contract to ship upon such a vessel . . . there shall be a memorandum in writing of the day and the hour when such seaman who shipped and subscribed shall render himself on board to begin the voyage agreed upon. If any seaman shall neglect to *render himself on board the vessel* for which he has shipped at the time mentioned in such memorandum," and if the master shall make a proper entry in the log book, "then every such seaman shall forfeit for every hour which he shall so neglect to render himself one half of one day's pay."

[444] The *rights of the seaman in this connection are protected by § 4527, which declares that "any seaman who has signed an agreement, and is afterward *discharged before the commencement of the voyage* or before one month's wages are earned," shall be entitled to compensation. By § 4558, as amended (30 Stat. at L. 757, chap. 28), "if, after judgment that such vessel is fit to proceed on her intended voyage, . . . the seamen, or either of them, *shall refuse to proceed on the voyage*, he shall forfeit any wages that may be due him." Section 4596 is largely a reproduction of the section above cited from the merchants' shipping act, and provides that "whenever any seaman who has been lawfully engaged . . . commits any of the following offenses, he shall be punishable as follows: . . . Second. For *neglecting and refusing*, without reasonable cause, to *join his vessel* or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel sailing from any port, either at the commencement or during the progress of any voyage," he shall forfeit his wages. By § 4599, "Whenever, either at the commencement of or during any voyage, any seaman or apprentice *neglects or refuses to join*, or deserts from or refuses to proceed to sea in, any vessel in which he is duly engaged to serve," the master may [in accordance with the English practice] apply for the local assistance of police officers or constables for his arrest and detention. It is true this section has been repealed, together with all other provisions authorizing the arrest and surrender to the vessel of seamen of domestic vessels deserting in this country. But throughout all this legislation there is a recognition of the principle that the obligation of the seaman begins with the signing of the shipping articles, and that he is liable to the penalty of a forfeiture of his wages from that moment.

Upon these authorities we are of opinion that, as applied to merchant vessels, the crews are organized and the service of each sailor begins with the signing of the shipping articles, and that the lien of the seaman upon the ship for his wages, and reciprocally the lien of the ship upon the seaman for his services, where such lien still exists, dates from that time. The difficulty

of securing a crew would be greatly enhanced if, after *signing the articles and [445] perhaps drawing advance pay, seamen were at liberty to desert before rendering themselves on board.

The Variag being a ship of war, there was no signing of shipping articles, as required in the merchant service, since the seamen were enlisted or conscribed to serve where ordered. But there was a practical equivalent for the shipping articles in the detail of Alexandroff to this vessel. He entered the Russian naval service in 1896, and his term of service had not expired. He was, of course, subject to the orders of his officers, and was sent as a member of a force of one officer and fifty-three men ordered to take possession of the Variag as soon as she was completed. From the moment of such assignment and until relieved therefrom, he was as much bound to the service of the Variag, and a member of her crew, as if he had signed shipping articles. We express no opinion as to whether, if the Variag had not been launched when he deserted, he could be held as a member of her crew, but when she took the water and became a ship she was competent to receive a crew, and a detail to her service took effect. It will scarcely be disputed that, if the Variag had been in commission and this body of men had gone on board the vessel and rendered some slight service as seamen, and had subsequently gone ashore to remain until she was ready for her final departure from Philadelphia, they would be regarded as a component part of her crew; but this differs in form rather than in substance from what actually took place. The men were in Philadelphia in custody of Captain Behr, and ready to go on board at a moment's notice. They were as much subject to his orders as if they had remained on board the Variag; and as much so as if she had been a regularly commissioned vessel of the Russian navy, which had put into Philadelphia for repairs and sent her crew ashore as the most convenient method of disposing of them while such repairs were being made.

We do not regard it as material that the Variag had not yet been commissioned as a member of the Russian navy. The mere commissioning of a ship does not make her a ship of war, but merely indicates that she is assigned to active service. A merchant vessel, built for the purpose of trade and commerce, *is a merchant vessel, though she [446] may not yet have received her register—a formality only necessary to entitle her to the privileges of an American vessel. To hold that the treaty applies only to commissioned vessels of war is to introduce into it a new element and to rob it of a valuable feature. Under the contract with the builders she was clearly Russian property, and while ownership is not always proof of nationality, since a vessel may be owned in one country and registered in another, where the facts are undisputed, and there was no pretense she was an American vessel, her Russian nationality follows as a matter of course. If she went out of commission and

her armament were taken out of her for a temporary purpose, she would nevertheless be a ship of war of the Russian navy. Being, as we have already held, a *ship*, she must be either a ship of war or merchant vessel, and as she was clearly not a merchant vessel, the only other alternative applies. The treaty should be liberally interpreted in this particular to carry out the intent of the parties, since if a foreign government may not send details of men to take possession of vessels built here, without danger of losing their entire command by desertion, we must either cease building them or foreign governments must send special ships of their own with crews ordered to take possession of them. It is true that possession of the *Variag* had not yet been delivered, but the title had passed, and the very fact that the Russian government had detailed a crew to take possession of her indicated that it regarded her as a constituent part of the Russian navy. It is unnecessary to consider whether, if the *Variag* had been rejected, her crew would have been *eo instanti* at liberty to leave the Russian service and acquire a citizenship here. That probably would have involved the other question, whether they could be treated as a military force entering this country with the permission of the Executive and remaining subject to the orders of their officers.

Holding, as we do, that the rights of the parties must be determined by the treaty, the manner in which this body of men entered the country does not seem to be material, so long as it appears that they were detailed as part of the crew of the *Variag*. If they were not here as a military force, 447] which had landed *with the permission of the government, they were lawfully here as individual seamen directed to take possession of the *Variag*, and the purpose of their coming was of no moment to the authorities. It appears, however,—and it is not improper to allude to it here,—that, as the *Variag* approached her completion, the naval agent of the Russian Embassy to the United States addressed a letter to the Secretary of the Treasury, requesting that the necessary orders be given for allowing “admittance to the United States, through the port of New York, without examination, the detail of one officer and fifty-three regular sailors, imperial Russian navy, detailed to this country for the purpose of partly manning the cruiser,” etc. In reply, the acting Secretary of the Treasury issued instructions to the Commission of Immigration to admit the detail without examination for the purposes named, and to remit the usual head tax of \$1.

3. The only remaining question is whether there was a compliance with article IX. of the treaty, that the vice-consul “shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused.” We have no doubt this provision is obligatory, and that the

vice-consul must show either that it was complied with or that a compliance was waived. We are not informed by the record what evidence was laid before the commissioner upon this subject. Alexandroff himself, however, swears that he entered the naval service in 1896 as an assistant physician; that he arrived in the United States October 14, 1899; that he never asked to become a member of the crew, but was simply sent to the United States and lived with the crew of the Russian ship, received his equipment, support, and wages; that he left the crew on April 20, 1900, went to New York, declared his intention to become a citizen, and obtained employment. On cross-examination he stated that a subject is not required to sign any enlistment or anything of that kind, but is simply sent into the service. After the oral *testimony[448] had been introduced, the Russian vice-consul, to further sustain his case, made the following offer:

“Mr. Adler: I also have here the Russian officer who accompanied these fifty-three sailors to this country, together with the other members of the crew, who has with him the passport issued by his government entitled these men to come here. I understand it is admitted by the other side that this defendant did come here as a portion of the crew of this cruiser, and the passport so states. If that is admitted, I presume it is not necessary to offer the passport in evidence. If your honor cares to have it, I will produce this officer with the passport and offer it. It merely shows that this defendant, with fifty-two other members of a company in the Russian navy, were admitted to free passage here to become members of the crew of the cruiser *Variag*, and that he came here in pursuance of that passport accompanied by this officer.

“Mr. Hassler: I should object to the officer, not so much on account of what is in the passport, but my friend made a statement which I do not think is exactly accurate, as to what we stated. We stated this man came here with a company of men, but we do not state that he came here as part of the crew of the *Variag*.

“The Court: He came here as a member of the Russian navy, ordered here to become one of the crew of the cruiser *Variag*, and he came for that express purpose.

“Mr. Hassler: We concede that.”

There was here a clear waiver of the production of the passport and an admission that Alexandroff came to this country as a member of the Russian navy, was ordered here to become one of the crew of the *Variag*, and came for that express purpose. Under such circumstances, it does not lie in the mouth of the relator to insist that no official documents were produced, since the passport and the admission accompanying its offer show that Alexandroff came here as a member of the proposed crew of the *Variag* (and we have discussed the case upon that assumption)—the question being whether under those circumstances he ought to be

treated as a deserter from a Russian ship of war.

[449] "We are of opinion that his case is within the treaty, and the judgments of both courts below are therefore reversed, and the case remanded to the District Court for the Eastern District of Pennsylvania for further proceedings consistent with this opinion.

Mr. Justice **Peckham** concurred in the opinion, but also thought that the men, among whom was the respondent, came into the country with the expressed permission of the Executive as a part of the Russian navy and as members of the crew of the steamship awaiting completion as a man-of-war; and the Russian government was therefore, upon the principle of comity, entitled to the aid of the government of the United States to accomplish the arrest and detention of a deserter from the ranks of those men it had thus expressly authorized to come in.

Mr. Justice **Gray**, with whom concurred Mr. Chief Justice **Fuller** and Justices **Harlan** and **White**, dissenting:

The Chief Justice, Justices **Harlan** and **White** and myself are unable to concur in the opinion and judgment of the court. The case presents such an important question of international law as to make it fit that the grounds of our opinion should be stated. It is necessary to a proper determination of the case that its precise facts should be borne in mind, and they will therefore be here recapitulated.

This is a writ of certiorari, granted by this court on the application of William R. Tucker, the Russian vice-consul at Philadelphia, to review a judgment of the United States circuit court of appeals for the third circuit on February 25, 1901 (48 C. C. A. 97, 107 Fed. 437), affirming a judgment of the district court for the eastern district of Pennsylvania on July 12, 1900 (103 Fed. 198), discharging on writ of habeas corpus Leo Alexandroff, held in custody under a warrant of commitment issued by a United States commissioner to Robert C. Motherwell, Jr., keeper of the Philadelphia County Prison, subject to the order of the Russian vice-consul at Philadelphia, or of the master of the Russian cruiser Variag, under § 5280 of the Revised Statutes, which is as follows:

[450] "On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are

found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect."

The treaty of the United States with the Emperor of Russia of December 18, 1832, provides, in article 9, as follows:

"The said consuls, vice-consuls, and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges, and officers, and shall in writing demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused. Such *desert-[451] ers when arrested shall be placed at the disposal of the said consuls, vice-consuls, or commercial agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessels to which they belonged, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever. But if not sent back within four months from the day of their arrest, they shall be set at liberty, and shall not be again arrested for the same cause. However, if the deserter should be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which his case shall be depending shall have pronounced its sentence, and such sentence shall have been carried into effect." 8 Stat. at L. 448.

The warrant of commitment in this case was issued by the commissioner on June 1, 1900, on the application of the vice-consul of Russia at Philadelphia, upon the affidavit of Captain Vladimir Behr, stating that he was master of the Russian cruiser Variag, then in the port of Philadelphia, and that Alexandroff was a duly engaged seaman of that vessel, and on or before April 25, 1900, had deserted from her without any intention of returning.

The Variag was built under a contract in writing, dated April 23, 1898, between the William Cramp & Sons Ship & Engine Build-

ing Company of Philadelphia, Pennsylvania, and the Russian Ministry of Marine, by which the Cramp Company agreed to supply for the imperial Russian navy a protected cruiser, built, equipped, armed, and fitted (except the ordnance and torpedo outfit), subject to the approval of a board of inspectors appointed by the Russian Ministry of Marine. That contract contained the following provisions:

"Art. 8. Trials to determine the speed of the vessel shall be made by the contractors, in the presence of the board of inspection, and at the cost of the contractors, who agree to insure the vessel against sea risks and all other risks of every description during the trials, and until such time as the vessel is handed over to the exclusive possession and custody of the Russian Ministry of Marine." [452] And if the mean speed should be less *than 21 knots per hour, or the actual draught of water in any part of the ship should exceed the contract draught by 1 foot, it should be optional with the Russian Ministry of Marine to reject the ship."

"Art. 10. The contractors agree that the vessel to be built as aforesaid, whether finished or unfinished, and all steel, iron, timber, and other materials as may be required by the contractors, and be intended for the construction of the said ship, and which may be brought upon the premises of the contractors, shall immediately thereupon become and be the exclusive property of the Russian Ministry of Marine. The flag of the imperial Russian government shall be hoisted on the said ship whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian Ministry of Marine may at any time appoint an officer or officers to take actual possession of the said ship or material, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid."

"Art. 12. The contractors shall insure and keep insured, against all risks usually insured against, the said vessel, its engines and all fittings and materials, at their own cost, but in the name of, and for the benefit of, the Russian Ministry of Marine, in fire insurance companies previously approved by the board of inspection, and in such an amount or amounts as shall be, from time to time, sufficient to cover and recoup to the imperial Russian government the sum or sums which said government, for the time being, may have paid, or become bound to pay, to the contractors in respect of such vessel." "Notwithstanding anything herein contained, the ship, together with its engines, machinery, and equipment, shall, as between the contractors and the Russian Ministry of Marine, stand, and at all times be, at the risk of the contractors, until the said ship has been accepted by the imperial Russian government, or it has taken actual possession thereof."

"Art. 13. The contractors engage, at their own cost and risk, to launch and deliver the vessel safe and uninjured at Philadelphia, 276

Pennsylvania, and equipped for sea, into the charge of the persons appointed by the imperial Russian government *to receive it in [453] not more than twenty months after the arrival of the board of inspectors at Philadelphia."

By article 18 the Russian Ministry of Marine agreed to pay the price in ten equal instalments, withholding 10 per cent of each instalment until final payment. The instalments were payable at successive periods, the last two being as follows: "9. Ten per cent when steam has been raised in the boilers and the engines turned over under their own steam. 10. Ten per cent when the ship has had a successful trial trip and has been turned over to the imperial Russian government, and simultaneously therewith there shall be paid to the contractors the 10 per cent of each of the previous instalments which shall have been withheld as aforesaid."

Alexandroff entered the Russian navy in 1896, at the age of seventeen, for the term of six years, and was an assistant physician. He was one of fifty-three members of the Russian navy, sent out in a passenger steamship (not a Russian) by the Russian government, under command of an officer, for the purpose of becoming part of the crew of the cruiser *Variag*; and arrived in this country October 14, 1899. The ship was then on the stocks, and was launched in October or November, 1899, and made one trial trip. But in June, 1900, she was still in the custody of the contractors, had not been completed by them, or accepted by the Russian government, and a good many of the contractors' men were still working on her; and only about 80 per cent of her price had been paid. Alexandroff was never on the ship, never signed any paper as a member of her crew, and was never ordered on board of her, either as a seaman or as an assistant physician; but from October, 1899, to April, 1900, lived on shore, with the rest of the men who came with him, had his photograph taken with them, received equipment, support, and wages from the Russian government, and performed the duties required of him as an assistant physician. He left his associates, without leave, at Philadelphia on April 20, 1900, went to New York, and there took up his residence, and on May 24, 1900, made in court a primary declaration of his intention to become a citizen of the United States.

There was introduced in evidence, without objection, a copy *of a letter (the original of which was said to be in the possession of the Russian ambassador at Washington), dated "Treasury Department, Office of the Secretary, Washington, D. C., October 4, 1899," signed by the acting Secretary of the Treasury, and in these terms:

"Sir:—Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for

the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's shipyard in Philadelphia, Pennsylvania. The collector of customs has also been advised that the usual head tax of \$1.00 is not to be collected in this case."

This letter was assumed by the courts below to have been addressed to the Russian ambassador and in answer to a letter from him. But it appears by copies of documents in the Treasury Department, submitted by counsel for the petitioner by leave of this court, that it was in answer to a letter dated September 24, 1899, No. 557, from the naval attaché of the imperial Russian embassy at Washington to the Secretary of the Treasury, requesting that the necessary orders to whom it concerned might be given for "allowing admittance to the United States through the port of New York without examination the detail of one officer and fifty-three regular sailors, imperial Russian navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's shipyard, in Philadelphia, Pennsylvania."

That correspondence also included similar letters between the naval attaché of the Russian embassy and the Secretary of the Treasury of June 22 and 23, 1899, concerning "a detail of one officer and twenty-nine regular sailors for the purpose of partially manning the cruiser" aforesaid.

Together with that correspondence, the petitioner submitted to this court copies of papers from the Department of State, showing the following:

[455] *On December 6, 1900, the Russian ambassador wrote to the Secretary of State, saying that the Russian minister of the navy had just informed him that two hundred and twenty-four sailors of the Russian imperial navy, accompanied by three officers, one doctor and a commissary, had embarked at London on the Rhineland for Philadelphia, and that "two hundred and eleven of them have been sent to complete the crew of the Russian cruiser Variag, and the other thirteen are under orders for the Retvisan, which is being built by the Cramps of Philadelphia," and requesting the Secretary of State "to notify the Treasury Department of the approaching arrival of these sailors, and to request that they may be allowed to land, and that restitution may be made to the superior officer of the tax imposed on emigrants and paid at the time of their embarkation." On December 15, 1900, the Secretary of State answered that the request had been referred to the Secretary of the Treasury, who had replied that the commissioner of immigration at Philadelphia had been directed to facilitate the landing of the seamen and officers referred to, and the collector of customs to refrain from collecting the *per capita* tax from the steamship company; and that said company should be called upon to refund the amount paid to their Liverpool representative in advance for the head tax.

183 U. S.

On December 25 and 28, 1900, a like correspondence took place between the Russian ambassador and the Secretary of State concerning "two hundred and thirteen seamen of the imperial fleet, accompanied by two officers, a monk and a cook," embarked at Liverpool for Philadelphia on the Belgenland, and "sent hither to complete the crew of the imperial cruiser Variag."

In the circuit court of appeals, on October 1, 1900, the attorney of the United States for the eastern district of Pennsylvania, "at the instance of the Executive Department of the government of the United States," filed by leave of court a suggestion, stating the facts as appearing by the record, and praying that Alexandroff be remanded to the custody of the keeper of the county prison at Philadelphia, to await the order of Captain Vladimir Behr, master of the cruiser Variag.

Such being the facts of the case, we proceed to state the principles by which it appears to us to be governed.

*The jurisdiction of every nation within [456] its own territory is absolute and exclusive; by its own consent only can any exception to that jurisdiction exist in favor of a foreign nation; and any authority in its own courts to give effect to such an exception by affirmative action must rest upon express treaty or statute.

In the case of *The Exchange v. M'Faddon*, decided by this court in 1812, nearly ninety years ago, the point adjudged was that "*The Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country." 7 Cranch, 116, 147, 3 L. ed. 287, 297. Chief Justice Marshall, in expounding at large the principles upon which the exemption was founded, began by saying: "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." 7 Cranch,

277

136, 3 L. ed. 293. He then dealt with the principal exceptions: 1st. The exemption from arrest or detention of a foreign sovereign entering the territory of a nation with the license of its sovereign. 2d. The immunity which all civilized nations allow to foreign ministers. 3d. The cession of a portion of the territorial jurisdiction by allowing the troops of a foreign prince to pass through the territory.

The opinion of Chief Justice Marshall in the case of *The Exchange* has ever since been recognized as laying down the principles which govern the subject. His very language has been embodied by Wheaton in his *Elements of International Law*, pt. 2, chap. 2; 8th ed. §§ 96-101. Phillimore, in his *Commentaries on International Law*, 3d ed. 476, 479, says: "Long usage and universal custom entitle every such ship to be considered as a part of the state to which she belongs, and to be exempt from any other jurisdiction." "The privilege is extended, by the reason of the thing, to boats, tenders, and all appurtenances of a ship of war, but it does not cover offenses against the territorial law committed upon shore." And in 1880, Lord Justice Brett (since Lord Esher, M. R.), delivering the judgment of the English court of appeal, dealing with "the reason of the exemption of ships of war and some other ships," said: "The first case to be carefully considered is, and always will be, *The Exchange*." *The Parlement Belge*, L. R. 5 Prob. Div. 197, 208.

In the *Santissima Trinidad*, Mr. Justice Story, speaking for this court, said: "In the case of *The Exchange v. M'Faddon*, 7 Cranch, 116, 3 L. ed. 287, the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction." "It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights." 7 Wheat. 283, 352-354, 5 L. ed. 454, 471, 472.

We find no precedent, either in our own decisions or in the books of international law, for extending the exemption to an uncompleted ship, or to sailors who have never been on board of her, although intended to

become part of her crew when she shall have been completed.

On the contrary, Mr. Hall says that where a ship is bought, or is built and fitted out to order, she is only private property until she is commissioned; and, although invested with minor privileges, such as immunity from liens of mechanics, she is far, if she be a ship of war, from enjoying the full advantages of a public character. And again: "The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew, she is merely property; if members of her crew go outside the ship or her tenders or boats, they are liable in every respect to the territorial jurisdiction." Hall, *International Law*, 4th ed. 169, 205. So Mr. T. J. Lawrence says: "The immunities of which we have been speaking do not follow the members of the ship's company when they land. In their ship and in its boats, which are appurtenant to it and share its privileges, they are exempt from the local jurisdiction; but the moment they set foot on shore they come under the authority of the state, and may be arrested and tried like other foreigners if they commit crimes or create disturbances." *Principles of International Law*, 3d ed. 229.

In *The Exchange*, as has always been recognized by this court, it was treated as well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government, is exempt from the civil and criminal jurisdiction of the place. *Coleman v. Tennessee*, 97 U. S. 509, 515, 24 L. ed. 1118, 1121; *Dow v. Johnson*, 100 U. S. 158, 163, 25 L. ed. 632, 634. "The grant of a free passage," said Chief Justice Marshall, "implies a *waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments, which the government of his army may require." 7 Cranch, 140, 3 L. ed. 294. That rule, waiving the jurisdiction of the United States over a body of men, and allowing them to be governed, disciplined, and punished by their own officers, applies only to an armed force, segregated from the general population of the country, and lawfully passing through or stopping in the country for some definite purpose connected with military operations.

This is no such case. This was a squad of men intended, indeed, at some time in the future, to become part of the crew of a ship of war. But they were not yet part of that crew, and were, for six months before the desertion, quartered on shore in the midst of a large city, and were as yet engaged in performing no military or naval duty, beyond the fact that Alexandroff attended the others when sick. The suggestion of the majority of the court that Alexandroff and

his associates were sent out by the Russian government "to take possession of the Variag" must be founded on the statement (which is all that the record contains on the subject) that they were sent out "for the purpose of becoming part of her crew."

The permission to a foreign nation to pass troops or munitions of war through the United States has been granted by the Executive Department in a few instances, generally by the Secretary of State. 1 Wharton, *International Law Digest*, § 13. And there are cases collected by Mr. Cushing, in 7 *Ops. of Atty. Gen.* 453, in which the President of the United States has for various purposes acted through the Department of the Treasury or some other department within its appropriate jurisdiction. It is not necessary in this case to consider the full extent of the power of the President in such matters.

The request of the representative of Russia on September 24, 1899, was simply for the admission into the United States of "one officer and fifty-three regular sailors imperial Russian navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the [460] Russian *government at Cramp's shipyard in Philadelphia, Pennsylvania." And the response of the Secretary of the Treasury, following the terms of the request, stated that instructions had been given to admit them without examination, and not to collect the head tax of \$1. The other correspondence submitted to this court, and relied on by the petitioner, shows that in June, 1899, the Secretary of the Treasury had given like instructions as to one officer and twenty-nine other sailors; and that, at the request of the Russian ambassador, in December, 1900 (fourteen months after the arrival of Alexandroff and his associates in this country, and eight months after his desertion), the Secretary of State and the Secretary of the Treasury gave precisely similar instructions as to a body of two hundred and eleven seamen, and as to another body of two hundred and thirteen seamen, each sent out to complete the crew of the Variag. It thus appears that Alexandroff and his associates, with the previous detail of thirty persons, together constituted less than one sixth of the intended crew of the Variag.

Moreover, all the letters of the Secretary of the Treasury and of the Secretary of State show nothing more than an admission into the United States without examination, and an exemption from the head tax, of persons intended to become part of the crew of the cruiser Variag. These persons, coming into the United States for a temporary purpose only, were clearly not immigrants, nor liable to the head tax upon immigrants. A like admission and exemption would apply to any civilians employed by the Russian government and coming here temporarily in its service.

It is impossible, therefore, to imply such a waiver of the jurisdiction of the United States over them as in the case of a foreign
183 U. S.

army marching through or stationed in the United States by consent of the government. And even permission to march a foreign armed force through the country does not imply a duty to arrest deserters from that force.

The question in this case is not one of the mere exemption of Alexandroff from the jurisdiction of the government and the courts of the United States. The question is whether the *courts and magistrates of the United States are authorized to exercise affirmative jurisdiction to enforce the control of the Russian authorities over him, after he has escaped from their custody, and to restore him to their control, so that he may be returned to Russia, and be there subjected to such punishment as the laws of that country impose upon deserters.

Nations do not generally, at the present day, agree to deliver up to each other deserters from a military force. But it is usual, in order to prevent the ships of war or the merchant vessels of one country from being rendered unfit for navigation by the desertion of their seamen in the ports of another country, to provide by treaty or convention that the authorities of the latter country, upon the application of a consul of the former, should afford assistance in the arrest and detention, and the return to their ships, of seamen deserting from a vessel of either class. 1 *Ortolan, Diplomatie de la Mer*, 4th ed. 312, 313; 2 *Calvo, Droit International*, 5th ed. §§ 1072, 1073; 1 *Phillimore, International Law*, 3d ed. 547, 685; *Wheaton, International Law*, 8th ed. 178, note; 1 *Moore, Extradition*, chap. 19.

The United States have made from time to time such treaties with many nations (a list of which is in the margin†), containing

- †Austria. May 8, 1848; 9 Stat. at L. 946.
- July 11, 1870; 17 Stat. at L. 828.
- Belgium. November 10, 1845; 8 Stat. at L. 612. December 5, 1868; 16 Stat. at L. 761.
- March 9, 1880; 21 Stat. at L. 781.
- Bolivia. May 13, 1858; 12 Stat. at L. 1020.
- Brazil. December 12, 1828; 8 Stat. at L. 397.
- Central America. December 5, 1825; 8 Stat. at L. 336.
- Chile. May 16, 1832; 8 Stat. at L. 440.
- Colombia. October 3, 1824; 8 Stat. at L. 318.
- Congo. January 24, 1891; 27 Stat. at L. 930.
- Denmark. July 11, 1861; 13 Stat. at L. 606.
- Dominican Republic. February 8, 1867; 15 Stat. at L. 488.
- Ecuador. June 13, 1839; 8 Stat. at L. 548.
- France. November 14, 1788; 8 Stat. at L. 112. June 24, 1822; 8 Stat. at L. 280. February 23, 1853; 10 Stat. at L. 997.
- German Empire. December 11, 1871; 17 Stat. at L. 929.
- Great Britain. June 3, 1892; 27 Stat. at L. 961.
- Greece. December 22, 1837; 8 Stat. at L. 504.
- Guatemala. March 3, 1849; 10 Stat. at L. 887.
- Hanover. May 20, 1840; 8 Stat. at L. 556.
- Hanseatic Republics. June 4, 1828; 8 Stat. at L. 386.
- Hawaiian Islands. December 20, 1849; 9 Stat. at L. 980.

[462]*provisions in almost every instance substantially like that of the treaty with Russia of 1832, except that some of them apply only to merchant vessels.

By the Consular Convention with France of November 14, 1788, before the adoption of the Constitution, consuls and vice-consuls were authorized to cause the arrest of "the captains, officers, mariners, sailors, and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country." 8 Stat. at L. 112. That convention was abrogated by the act of July 7, 1798, chap. 67. 1 Stat. at L. 578. But a similar provision was made by the Convention with France of June 24, 1822.

[463] 8 Stat. at L. 280. And that *provision was carried into effect by the act of May 4, 1826, chap. 36. 4 Stat. at L. 160.

The first general statute on the subject was the act of March 2, 1829, chap. 41 (4 Stat. at L. 359), which, as amended by the act of February 24, 1855 (10 Stat. at L. 614, chap. 123), by allowing United States commissioners to act in the matter, is embodied in § 5280 of the Revised Statutes, under which the application in this case was made, and which applies only to "any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting."

The Variag, at the time of Alexandroff's desertion, was indeed, in one sense, a ship, because she had been launched and was waterborne. And, by the terms of the contract under which she was being built, the legal title in her, as fast as constructed, had vested in the Russian government, so that, without regard to the question whether she was a ship of war, she could not have been subjected to private suit *in rem* in admiralty. *The Parlement Belge*, L. R. 5 Prob. Div. 197. But she had not been completed, and was in the custody of the contractors, and their men were still at work upon her; by the express terms of the contract, she might still be rejected by the Russian government, and remained at the risk of the contractors until that government had accepted her or taken actual possession

of her; and she had not been fully paid for. She was not equipped for sea, and never had any part of her crew on board, and she had never been accepted, or taken actual possession of, by the Russian government. Alexandroff and his associates were a squad of men, sent out six months before by the Russian government for the purpose of becoming part of her crew, and received wages as members of the Russian navy. But they had never become part of an organized crew, or done any naval or military duty, or been on board of her, or been ordered on board of her; for the whole six months they had lived together on shore; and no regular ship's roll, or other official document, was produced showing that they had actually become part of the crew of the Variag.

The treaty with Russia of 1832 speaks of "deserters from the ships of war and merchant vessels of their country;" and § 5280 [464] of the Revised Statutes speaks of persons who have "deserted from a vessel of any such government;" each applying only to those who desert from a ship. Both the treaty and the statute require proof to be made by exhibition of the register of the vessel, ship's roll, or other official document, that the deserter, at the time of his desertion, belonged to, or formed part of, her crew. And the provision of the treaty for the detention of the deserters until "they shall be restored to the vessels to which they belonged, or sent back to their own country by a vessel of the same nation or any other vessel whatsoever," necessarily implies that they belong to a completed vessel upon which they could remain from day to day, and the departure of which may require them to be sent back by another vessel. The object of both treaty and statute, as of the treaties with other nations upon the same subject, was not to encourage shipbuilding for foreign nations in the ports of the United States, or to cover unfinished ships and preparations for manning them when finished; but it was to secure the continued capacity for navigation of ships already completely built, equipped, and manned. Both treaty and statute look to a complete ship, and to an organized crew; and neither can reasonably be applied to a ship which

Hayti. November 3, 1864; 13 Stat. at L. 727.

Italy. February 8, 1868; 15 Stat. at L. 610. May 8, 1878; 20 Stat. at L. 730.

Japan. November 22, 1894; 29 Stat. at L. 852.

Madagascar. February 14, 1867; 15 Stat. at L. 493.

Mecklenburg-Schwerin. December 9, 1847; 9 Stat. at L. 917.

Mexico. April 5, 1831; 8 Stat. at L. 424.

Netherlands. May 23, 1878; 21 Stat. at L. 668.

New Granada. December 12, 1846; 9 Stat. at L. 896. May 4, 1850; 10 Stat. at L. 904.

Oldenburg. March 10, 1847; 9 Stat. at L. 868.

Peru-Bolivia. November 13, 1836; 8 Stat. at L. 494.

Peru. July 26, 1851; 10 Stat. at L. 944. September 6, 1870; 18 Stat. at L. 714. August 31, 1887; 25 Stat. at L. 1460.

Portugal. August 26, 1840; 8 Stat. at L. 566.

Prussia. May 1, 1828; 8 Stat. at L. 382.

Roumania. June 17, 1881; 23 Stat. at L. 714.

Russia. December 18, 1832; 8 Stat. at L. 448.

Salvador. December 6, 1870; 18 Stat. at L. 744.

San Salvador. January 2, 1850; 10 Stat. at L. 897.

Sardinia. November 26, 1838; 8 Stat. at L. 518.

Spain. February 22, 1819; 8 Stat. at L. 262.

Sweden and Norway. July 4, 1827; 8 Stat. at L. 352.

Tonga. October 2, 1886; 25 Stat. at L. 1442.

Two Sicilies. December 1, 1845; 9 Stat. at L. 838. October 1, 1855; 11 Stat. at L. 651.

Venezuela. August 27, 1860; 12 Stat. at L. 1158.

has never been completed, or made ready to receive a crew, or had any roll or list of them, or to men who have never been on board the ship as part of her crew. Moreover, the Russian government, as is admitted, had never accepted or taken possession of the ship, and, by the terms of the contract under which she was building, still had the right to reject her. So long as they had that right, no body of men could be considered as actually part of her crew, whatever they might have been after her acceptance. The evident intent of the statute, as of the treaty, is to afford a remedy for the common case of sailors deserting their ship, on her coming into port, at the risk of leaving her with no sufficient crew to continue her voyage; and not to the case of a ship which has never been completed, or equipped for sea, or to persons collected together on shore for an indefinite period, doing no naval duty, though intended ultimately to become part of her crew.

[465] The various treaties of the United States with foreign nations *apply in a few instances, as in the treaties with Spain of 1819, and with Great Britain of 1892, to merchant vessels only, but, for the most part, as in the treaty with Russia, to both ships of war and merchant vessels. When they apply to both (except in the treaties with Peru), deserters from ships of war are put upon the same footing with deserters from merchant vessels; and no greater authority is given to arrest and surrender in the case of the one than in that of the other. Could it be contended that the authority should be extended to the case of sailors who had been collected together on shore for the purpose of becoming, in the future, part of the crew of a merchantman still in the course of construction, and not yet ready to receive them?

The statutes regulating the contract between the owner of a merchantman and his sailors do not appear to us to have any bearing upon the construction and effect of this treaty. Those statutes relate to seamen who, by their shipping articles, have agreed to render themselves on board at a certain time, and to their right to compensation and liability to punishment, or to forfeiture of wages, after that time. Rev. Stat. §§ 4522, 4524, 4527, 4528, 4558; act of December 21, 1898, chap. 28, §§ 2, 9 (30 Stat. at L. 755, 757). And § 4599 of the Revised Statutes (repealed by § 25 of the act of 1898) provided for the arrest and detention, by police officers, of any seaman, having signed such articles, who "neglects or refuses to join, or deserts from, or refuses to proceed to sea in," his vessel. The clause "neglects or refuses to join" would have been superfluous if legally included in the word "deserts." The treaty contains no such clause.

The treaty, as already stated, requires the fact that the deserter was part of the crew of the vessel to be proved by the exhibition of the register of the vessel, the roll of the crew, or other official document. Attorney General Black was of opinion that an exhibition of the original ship's roll, or a cor-

responding document containing the names of the whole crew, was essential, and could not be supplied by a copy of an extract from the roll, containing the deserter's name; and said: "It might be convenient, in cases like this, to dispense with the production of the original document, and let the rights of the person claimed *as a deserter depend on the mere certificate of a consul; but a written compact between two nations is not to be set aside for a shade or two of convenience more or less." 9 Ops. of Atty. Gen. 96. However that may be, in this case there is no pretense that the Variag had, or was in a condition to have, any roll or list of her crew; and at the hearing it was not admitted that there was any such roll or list, or that Alexandroff was a member of her crew, but only that he was a member of the Russian navy, sent out for the purpose of becoming part of her crew. The treaty cannot be construed as extending to the case of a ship which has never been completed, or ready to receive her crew, or had any roll or list of the crew; or to a small part of the men, ultimately intended to form part of her crew, who have never been such, nor ever been on board, but have remained for six months on shore, doing no naval duty.

Moreover, it being quite clear, and indeed hardly denied, that the Variag, in her existing condition, was not a Russian ship of war exempt from the jurisdiction of the United States and subject to the exclusive jurisdiction of her own country, it would seem necessarily to follow that she was not a ship of war in the sense that the authorities of the United States could take affirmative action to enforce the jurisdiction of that country over her or over the men intended to become part of her crew.

The necessary conclusion is that neither the treaty with Russia of 1832, nor § 5280 of the Revised Statutes, gave any authority to the United States commissioner to issue the warrant of commitment of Alexandroff.

It was argued, however, at the bar, that, if this case did not come within the treaty or the statute, the United States were bound, by the comity of nations, to take active steps for the arrest of Alexandroff, and for his surrender to the Russian authorities. But this position cannot be maintained.

The treaties of the United States with Russia and with most of the nations of the world must be considered as defining and limiting the authority of the government of the United States to take active steps for the arrest and surrender of deserting seamen.

These treaties must be construed so as to carry out, in the *utmost good faith, the stipulations therein made with foreign nations. But neither the executive nor the judiciary of the United States has authority to take affirmative action, beyond the fair scope of the provisions of the treaty, to subject persons within the territory of the United States to the jurisdiction of another nation.

The practice of the Executive Department, from the beginning, shows that such authority does not exist, in the absence of

express treaty or statute. The precedents on the subject are collected in 1 Moore on Extradition, §§ 408-411, and we have examined the archives of the Department of State, to which upon such a subject we are at liberty to refer. *Jones v. United States*, 137 U. S. 202, 216, 34 L. ed. 691, 697, 11 Sup. Ct. Rep. 80; *Underhill v. Hernandez*, 168 U. S. 250, 253, 42 L. ed. 456, 457, 18 Sup. Ct. Rep. 83; *The Paquete Habana*, 175 U. S. 677, 696, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

In 1802, in the administration of President Jefferson, the British Chargé d'Affaires complained to Mr. Madison, Secretary of State, of the refusal of the collector of customs at Norfolk in Virginia to cause a seaman, who had deserted from a British ship of war, to be surrendered, on an application made by her captain, through the British consul at that port. Mr. Madison answered: "It need not be observed to you, sir, that a delivery in such cases is not required by the law of nations, and that in the treaty of 1794 the parties have forborne to extend to such cases the stipulated right to demand their respective citizens and subjects. It follows that the effect of applications in such cases must depend on the local laws existing on each side. It is not known that those in Great Britain contain any provisions for the delivery of seamen deserting from American ships. It is rather presumed that the law would there immediately interpose its defense against a compulsive recovery of deserters. In some of the individual states the law is probably similar to that of Great Britain. In others it is understood that the recovery of seamen deserting from foreign vessels can be effected by legal process." And, after stating that there was no law for their recovery in Virginia, he concluded: "This view of the subject necessarily determines that the President cannot interpose the orders which are wished, however sensible he may be of the beneficial influence which friendly and reciprocal restorations *of seamen could not fail to have on the commerce and confidence which he wishes to see cherished between the two nations." 14 MSS. Domestic Letters, 89, in Department of State.

In 1815, in the administration of President Madison, the British minister having requested the interposition of the government of the United States to cause the delivery of seamen who had deserted from a British ship of war, Mr. Monroe, Secretary of State, answered: "I regret that there is no mode in which this government can interpose to accomplish the object you have in view. Neither the laws of the United States nor the laws of nations have provided for the arrest or detention of deserters from the vessels of a friendly power. It is hoped, however, that this is one of the subjects which may hereafter be satisfactorily arranged by treaty between the two nations." 1 Moore, Extradition, § 408.

In 1846, in President Polk's administration, the British minister applied for the surrender of a seaman who had deserted from a British ship of war, and was serving

on a war vessel of the United States; and Mr. Buchanan, Secretary of State, replied: "Your communication has been submitted to the President; and I am instructed to express his regret that he cannot comply with your request. The case of deserters from the vessels of war of the respective nations is not embraced by the 10th article of the treaty of Washington providing for extradition in certain cases; and without a treaty stipulation to this effect the President does not possess the power to deliver up such deserters. The United States have treaties with several nations which confer upon him this power; but none such exists with Great Britain." 7 MSS. Notes to Great Britain, 147, in Department of State.

In September, 1864, in the administration of President Lincoln, while the United States steamship Iroquois was lying in the Downs, three of her seamen deserted. They were arrested on complaint of the United States consular agent, brought before a police magistrate at Dover, and discharged by him, on the ground that, as they had violated no law of England, there was no authority for their arrest and detention. Upon the matter *being brought by Mr. Adams, the [469] American minister, to the attention of the British government, Lord Russell replied "that there is no law in force in this country by which these deserters could be given up." 1 Moore, Extradition, § 409; Dip. Cor. 1864, pt. 2, 336.

In July, 1864, Lord Lyons, the British minister, submitted to Mr. Seward, Secretary of State, a statement that two apprentices, employed on board the British barque Cuzco, had deserted at Valparaiso and enlisted on a United States ship of war; and asked for an investigation. On December 4, 1864, Mr. Seward communicated the results of the investigation to the British chargé d'affaires; and informed him that, owing to the action of the British government in the case of the deserters from the Iroquois, the United States did not deem themselves under either a legal or a moral obligation to deliver up the deserters from the Cuzco. On February 23, 1865, the British chargé d'affaires, by instructions from his government, replied that it was unable to follow the principle or reason of the resolution of the United States government, and insisted that "it is in the power of the naval officers of the United States (as it would be in that of Her Majesty's naval officers in a like case) to deliver up on the high seas, or in any foreign port, under the instructions of their government, deserters from foreign vessels who may without lawful authority be found on board one of the ships of war of the United States;" but he distinctly admitted and asserted: "But when a foreign deserter is on shore in Great Britain (and Her Majesty's government presume the case would be the same in the United States), the power of Her Majesty's naval officers and of Her Majesty's government itself over him is at an end; he can then only be detained or delivered up for some cause authorized by the law of the land." The case

was not further pursued. 1 Moore, Extra-dition, § 409, and note.

The earliest treaty between the United States and Great Britain on the subject is that of June 3, 1892, which applies only to merchant seamen, being limited to "seamen who may desert from any ship belonging to a citizen or subject of their respective countries." 27 Stat. at L. 961.

[470] The first treaty with Denmark on the subject is that of July 11, 1881, concerning "deserters from the ships of war and merchant vessels *of their country." 13 Stat. at L. 606. In 1853, in the administration of President Pierce, on a question of the arrest of a deserter from a Danish ship and his discharge by the authorities in New York (the treaties between the United States and Denmark not then containing any stipulation for the restoration of deserting seamen), Mr. Cushing, as Attorney General, gave an opinion to Mr. Marcy, Secretary of State, that without such a treaty the executive or judicial authorities of the United States had no power to arrest, detain, and deliver up a Danish mariner on the demand of the consul or other agents of Denmark, and said: "The summary arrest and delivery up of deserters from the service of other nations, like the surrender of fugitives from their criminal justice, when found in the territory of a country into which they have escaped or fled, is not a duty absolutely enjoined by the law of nations, but a subject of special convention. So, also, are the authority and jurisdiction of consuls and commercial agents in regard to demanding and superintending the arrest, detention, and surrender, either of deserters from service or fugitives from justice." 6 Ops. of Atty. Gen. 148, 154.

This uninterrupted course of action of the Executive Department, beginning almost a century ago, must be considered as conclusively establishing that, independently of a treaty, no international obligation exists to surrender foreign seamen who have deserted in this country.

It is hardly necessary to add that the suggestion of the district attorney can have no effect, other than to call the attention of the court to the facts of the record. The question whether those facts justified the commitment of the prisoner by the United States commissioner is a question to be decided, not by the Executive Department or by any of its officers, but by the courts of justice.

According to our view of the facts, and for the reasons and upon the authorities above stated, we are of opinion that the commissioner had no authority to commit the prisoner, that his imprisonment was unlawful, and that he is entitled to be discharged.

183 U. S.

*FLORIDA CENTRAL & PENINSULAR [471]
RAILROAD COMPANY, *Plff. in Err.*,
v.

WILLIAM H. REYNOLDS, as Comptroller of the State of Florida, and John A. Pierce, as Sheriff of Leon County.

(See S. C. Reporter's ed. 471-483.)

Equal protection of the laws—assessment of railroad property for omitted taxes.

Railroad companies are not denied the equal protection of the laws by Fla. Laws 1885, chap. 3558, requiring the comptroller to assess the taxes for 1879, 1880, and 1881 upon such railroad property as had escaped taxation for such years, without providing for the assessment of taxes for those years on other property not previously assessed therefor, general legislation having provided that railroad property should be assessed by the comptroller and real estate by the county treasurer.

[No. 183.]

Argued November 5, 6, 1901. Decided January 6, 1902.

IN ERROR to the Supreme Court of the State of Florida to review a decision which effected the dismissal of a bill to restrain the collection of taxes. *Affirmed.*

See same case below, 28 So. 861.

Statement by Mr. Justice **Brewer**:

The Constitution of Florida of 1868, art. 16, § 24, as amended by art. 11 of the amendments of 1875, is as follows:

"The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such property be held and used exclusively for religious, educational, or charitable purposes."

Sec. 26, chap. 3413, of the Laws of Florida, 1883, reads:

"If any assessor, when making his assessments, shall discover that any land in his county was omitted in the assessment roll of either or all of the three previous years, and was then liable to taxation, he shall, in addition to the assessment of such land for that year, assess the same separately for such year or years that may have been so omitted, at the just value thereof in such year, noting distinctly the year when such omission occurred; and such assessment shall have the same force and effect as it would have had if made in the year the same was omitted, and taxes shall be levied and collected thereon in like manner and together with the taxes of the year in which the

NOTE.—As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

As to the validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note, and *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

assessment is made; but no lands shall be assessed for more than three years' arrears of taxes, and all lands shall be subject to such taxes omitted to be assessed, into whosoever hands they may come."

In 1885 this statute was passed:

[472] *"Sec. 1. That in all cases in which any railroad or the properties thereto belonging or appertaining in this state, in the tax years commencing March 1, 1879, 1880, and 1881, or any of such years, were not assessed for taxes for such years, it shall be the duty of the comptroller to cause the same, or so much thereof, as were not assessed, to be assessed for state and county taxes, and 20 per centum of the taxes so assessed for said years and now unpaid shall be collected at the same time the taxes for the year 1885 shall be assessed and collected, and each year thereafter an additional 20 per centum of said taxes shall be collected at the same time and in the same manner as the taxes for such year are collected, until the whole amount of said unpaid taxes for the years 1879, 1880, and 1881 are paid.

"The taxes to be assessed under this act shall be the same in amount as they would have been had they been assessed in such years or any of them as to which there was a failure to assess." Laws of Florida 1885, chap. 3558.

This statute was followed in 1891 by one in these words:

"Sec. 1. That the state and county taxes assessed by the comptroller of the state of Florida, upon any railroads and the properties thereof in said state, for the years 1879, 1880, and 1881, under and in pursuance of 'An Act to Provide for the Assessment and Collection of Taxes on Railroads and the Properties Thereof for the Years 1879, 1880, and 1881, as to Which There Was no Assessment,' but which have not been collected, shall be collected, and the payment thereof enforced at the same times and in the same manner as is now or may hereafter be provided by law for the collection and the enforcement of the payment of taxes assessed upon the railroads and the properties thereof in the state of Florida." Laws of Florida, 1891, chap. 4073.

The assessment of railroad property in Florida was not made by the county assessors, but by the comptroller of the state. Acts State of Florida, 1879, chap. 3099, §§ 45, 46.

The plaintiff is a corporation organized under the laws of Florida on November 17, 1888, and was the owner of several lines of railway which, on May 1, 1889, it acquired from the Florida Railway & Navigation Company, under foreclosure proceedings.

[473] The *Florida Railway & Navigation Company was organized on February 29, 1884, by the consolidation of several companies, and on July 1 of that year it placed upon its properties a trust deed to secure the payment of \$10,000,000 bonds.

This bill was filed November 2, 1892, in the circuit court of the second judicial circuit of Florida, in and for the county of Leon. Its purpose was to restrain the col-

lection of certain taxes, and to recover other taxes paid under protest. After three appeals to the supreme court of the state (35 Fla. 625, 17 So. 902, 39 Fla. 243, 22 So. 697, 28 So. 861), the final outcome of the litigation was a decree dismissing the plaintiff's bill *in toto*.

Messrs. Frederic D. McKenney and Wayne MacVeagh argued the cause, and, with *Messrs. Thomas L. Clarke and John A. Henderson*, filed a brief for plaintiff in error:

Corporations are "persons" within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Guthrie*, 14th Amend. U. S. p. 120; *San Bernardino County v. Southern P. R. Co.* 118 U. S. 417, 30 L. ed. 125, 6 Sup. Ct. Rep. 1144.

The attempt of the legislature of Florida by the act of 1885 (chap. 3558) to levy taxes for prior years upon railroad property, to the exclusion of other real properties owned by individuals, which had also escaped taxation for such years, was an unlawful discrimination, grossly unjust and oppressive.

Railroad Tax Case, 8 Sawy. 238, 13 Fed. 722.

Property of the same kind and in the same condition cannot be divided into different classes for purposes of taxation and taxed by a different rule because it belongs to different owners, whether natural persons or corporations.

Northern P. R. Co. v. Walker, 47 Fed. 681.

Mr. William B. Lamar argued the cause, and, with *Mr. George H. Lamar*, filed a brief for defendant in error:

It is within the power of the Florida legislature, in the exercise of the taxing power of the state, to pass the statute of 1885, assessing lines of railroad companies for years past in which they were liable for taxation, but as to which they had escaped assessment and taxation.

Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876; *Albee v. May*, 2 Paine, 74, Fed. Cas. No. 134; *State, Bonney, Prosecutor, v. Reed*, 31 N. J. L. 133; *Stockdale v. Atlantic Ins. Co.* 20 Wall. 323, 22 L. ed. 348; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Re Short*, 16 Pa. 63; *Black, Constitutional Prohibition*, §§ 170, 172; *Bay v. Gage*, 36 Barb. 447; *Perry County v. Selma, M. & M. R. Co.* 65 Ala. 391, 58 Ala. 546; *Tallman v. Jancsville*, 17 Wis. 71; *North Carolina R. Co. v. Alamance*, 82 N. C. 259; *Burroughs, Taxn.* 483.

The decision of a state court upon a matter of general law within the state cannot be set aside or reversed by this court.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 608, 8 Sup. Ct. Rep. 741; *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414; *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *De Saussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 10 Sup. Ct. Rep. 1023.

[473] *Mr. Justice **Brewer** delivered the opinion of the court:

No question is presented concerning the claim for the taxes paid under protest, counsel for plaintiff stating in their brief that "the sole relief sought in this court is to obtain a reversal of the decree of the state supreme court, in so far as it reversed the decree of the circuit court enjoining the sale of complainant's lines of railroad for the taxes assessed for the years 1879, 1880, and 1881, such taxes amounting to \$96,181.69;" and in respect to this matter they sum up their contention in these words:

"By the law of 1885 the state attempted to authorize the assessment of taxes for 1879-1881, but only upon property belonging to railroad companies, though it appears from the record that other properties of like class, *i. e.*, real estate belonging to individuals and owners, not railroad companies, had not been assessed for taxes for such years.

[474] *"It surely cannot be 'due process of law' for the state of Florida in 1885 to arbitrarily impose a burden theretofore unheard of upon security holders who in 1884 had invested their money upon the faith of a title then clear of such burden.

"It surely cannot be less than a denial of the equal protection of the laws for the state of Florida in 1885 to impose burdens theretofore unheard of upon the property of railroad companies which under the laws of Florida is real estate, while permitting other real estate, otherwise owned, to escape such burdens."

The decision of the supreme court of the state establishes that these proceedings are not in conflict with the Constitution of Florida. The single question, therefore, to consider, is whether there is anything in the Federal Constitution which forbids a state to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provision for collecting the taxes for the same years on other property. It will be perceived that there was no new levy of taxes. No act of the legislature was passed imposing an additional burden upon the property of the state in general, or upon any particular property, but the case is one in which, general levies having been made for the years named, certain property which ought to have paid taxes under them—and thus contributed its share of the expenses

of the state—failed to do so, and the effort is to compel that property to discharge its obligation. The objection is not that the property ought not during those years to have paid its proportion of the taxes, but that it ought not now to be compelled to pay such proportion, because certain other property was similarly situated, and no effort is made to compel payment from it.

The fault, if fault there be, is one of omission rather than commission. The act of the legislature is not a mandate to a single officer, charged with the duty of assessing all property, to assess certain property, and to omit to assess the rest; but the general legislation having provided that railroad property should be assessed by the comptroller and real estate by county assessors, the act simply directed the comptroller to discharge the *duties of assessment as to the [475] property committed to his care, and omitted any direction to the county assessors. This omission, it is contended, makes the act unconstitutional. In other words, the legislature may not pass an act directing one officer to discharge his duty unless it couples therewith a direction to other officers charged with kindred duty to perform theirs. It would seem to follow that if the legislature had on the same day passed another act with like command to the county assessors, the two acts together would be constitutional, though each standing alone would not be; and as the time of its passage is not generally of the essence of a statute, it would also seem to follow that if the legislature should to-day pass an act directing the county assessors to assess delinquent real estate for those years, this late enactment would give constitutional vitality to that passed years ago. How far can this theory of constitutionality be sustained?

It must be remembered that "taxes are not debts in the ordinary sense of that term;" that they are "the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government and for all public needs." Cooley, *Taxn.* 1st ed. pp. 13 and 1. They are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not canceled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the state may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the state, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation.

No question of bona fide purchase arises, for it was held by the supreme court that, inasmuch as no assessment of this railroad property had been made during the years named, and no lien thereon for taxes established, a bona fide purchaser would have taken it free from any liability for such taxes; but it was also held that the present owner was not a bona fide purchaser. and this he-

ing a local matter the decision is conclusive upon this court.

[476] *The question how far the provisions of the 14th Amendment interfere with a state's system of taxation has been more than once before this court. It was very carefully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, and the general rule thus stated by Mr. Justice Bradley on page 237, L. ed. p. 895, Sup. Ct. Rep. p. 535:

"The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products. It may tax real estate and personal property in a different manner. It may tax visible property only, and not tax securities for payment of money. It may allow deductions for indebtedness, or not allow them. . . . We think that we are safe in saying that the 14th Amendment was not intended to compel the state to adopt an iron rule of equal taxation."

It is well known that the states vary materially in their systems of taxation. Each determines for itself what in its judgment is best for the interests of its people. In some there are general exemptions of particular classes of property, such as property used for religious, educational, and benevolent purposes. Some, in order to encourage certain industries, such as manufacturing, make either general or special exemptions. Some think it for their best interest to derive their revenues from personal property, corporations, and licenses, and exempt real estate. In some contracts for exemption are authorized by the state Constitution; in others they are forbidden. Now, considering the great diversity in these systems, it would obviously have worked a marked revolution if the 1st section of the 14th Amendment had been construed as compelling a cast-iron rule of equal taxation. It was not intended, as held in the case quoted from, and also in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, to restrain the legislature from any proper and legitimate classification, both as respects property for taxation

[477] and the methods of assessment and taxation. Doubtless it would prohibit a state from selecting some obnoxious person, and casting upon his property the sole burden of taxation, or a burden differing from that cast upon others whose property was similarly situated; but it does not prevent a state from exercising its judgment as to the property to be taxed and the modes of taxation, providing all property similarly situated is treated in the same way.

Besides those just cited, other cases in

this court affirm the same propositions. In *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888, a special act of the state of Delaware imposing a tax of 3 per cent upon the net earnings or income received by railroad and canal companies from all sources was sustained, the court saying (p. 231, L. ed. p. 896):

"The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

In *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, a tax upon the corporate franchise or business of corporations, graded according to the dividends declared by the corporation, was sustained, the court, on p. 606, L. ed. p. 1031, Sup. Ct. Rep. p. 597, referring in these words to the objection that the tax was in conflict with the 14th Amendment.

"But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed the greater part of all legislation is special either in the extent to which it operates or the objects sought to be obtained *by it. And [478] when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies, and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. *Barbier v. Connolly*, 113 U. S. 29, 32, 28 L. ed. 924, 925, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 709, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 209, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32, 32 L. ed. 585, 587, 9 Sup. Ct. Rep. 207."

In *Giozza v. Tiernans*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721, a difference in the amount of license required from parties

carrying on different kinds of business was the ground of attack upon a state statute, but the statute was sustained, and in respect to the 14th Amendment it was said (p. 662, L. ed. p. 602, Sup. Ct. Rep. p. 723):

"Nor in respect of taxation was the amendment intended to compel the state to adopt an iron rule of equality, to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250. And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577."

In *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925, a discrimination in the laws of West Virginia as to the matter of forfeiture in tax proceedings between the owners of tracts of less than 1,000 acres and those owning larger tracts was challenged, but the court overruled the contention, saying (p. 435, L. ed. p. 226, Sup. Ct. Rep. p. 937):

[479] "Another point made by the plaintiff in error is that the *provision of the Constitution of Virginia exempting tracts of less than 1,000 acres from forfeiture is a discrimination against the owners of tracts containing 1,000 acres or more, which amounts to a denial to citizens or landowners of the latter class of the equal protection of the laws. We do not concur in this view. The evil intended to be remedied by the Constitution and laws of West Virginia was the persistent failure of those who owned or claimed to own large tracts of lands patented in the last century or early in the present century to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the tract was a small one, the probability was that it was actually occupied by some one, and its extent or boundary could be readily ascertained for purposes of assessment and taxation. We can well understand why one policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be prescribed as to small tracts. The judiciary should be very reluctant to interfere with the taxing systems of a state, and should never do so unless that which the state attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is re-

pugnant to the clause of the 14th Amendment forbidding a denial of the equal protection of the laws."

See also *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340. Text-books affirm the same doctrine. Burroughs, Taxn. § 56, says: "The rule is that the legislature may select the subjects of taxation in their discretion;" and in Cooley, Taxn. chap. 6, p. 124, it is said: "There is no imperative requirement that taxation shall be equal. . . . The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation. This is legislative, and the legislative conclusion in the premises must be accepted as proper and final."

Gilman v. Sheboygan, 2 Black, 510, 17 L. ed. 305, is not in conflict *with these views. [480] True, in that case a tax levied for a special purpose by the city was adjudged void on the ground that it was levied exclusively on real property, but the decision was placed upon a conflict with the Constitution of the state as interpreted by its supreme court. In other words, the supreme court of the state having in several cases held that such a discrimination avoided a tax, this court simply followed those decisions, saying (p. 518, L. ed. p. 309) that it considered itself "bound in cases like this to follow the settled adjudications of the highest state court giving constructions to the Constitution and laws of the state."

In the light of these decisions, if the state of Florida had deemed it for the best interests of its people to encourage the building of railroads by exempting their property from taxation, such exemption could not have been adjudged in conflict with the 14th Amendment, even though thereby the burden of taxation upon other property in the state was largely increased. Indeed that was the policy of the state prior to the Constitution of 1868. And, conversely, if the state had subjected railroads to taxation, while exempting some other class of property, it would be difficult to find anything in the 14th Amendment to overthrow its action. The mere fact that such legislation may operate with harshness is not of itself sufficient to justify the court in declaring it unconstitutional. These matters of classification are of state policy, to be determined by the state; and the Federal government is not charged with the duty of supervising its action.

If the state, as has been seen, has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation. We must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it. It may have found that the railroad delinquent tax was large, and the delinquent tax on other property was small, and not worth the trouble of special provision there-

for. If taxes are to be regarded as mere debts, then the effort of the state to collect from one debtor is not *prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution. In *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83, legislation of Minnesota for the collection of delinquent taxes on real estate was challenged because of a lack of similar legislation in respect to personal property, but the challenge was overruled, the court saying (p. 539, L. ed. p. 252, Sup. Ct. Rep. p. 88): "This statute rests on the assumption that, generally speaking, all property subject to taxation has been reached, and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the legislature, in view of the probabilities of changes in the title or situs of personal property, might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the supreme court of the state."

Our conclusion is that, so far as the Federal Constitution is concerned, the legislature of Florida had the power to compel the collection of delinquent taxes from the railroad companies for the years 1879, 1880, and 1881, even though it made no provision for the collection of delinquent taxes for those years on other property. *The judgment, therefore, of the Supreme Court of Florida is affirmed.*

Mr. Justice **Brown** dissenting:

I have no doubt whatever of the validity of the act of the legislature of Florida of 1883 requiring the assessor, upon discovering that any land in his county was omitted from the assessment roll of the three previous years, to assess the same *for such years, since this was a provision applicable to all real estate in his county omitted from the assessment rolls for such years. But the act of 1885 did not proceed upon this basis. It arbitrarily selects railroad properties from all other species of property, and

requires their assessment for another three years prior to the three covered by the act of 1883, and thereby, as it seems to me, denies them the equal protection of the laws. Under the act of 1883 *all* owners of real property omitted from the assessment rolls of the three previous years were put upon an equality, and made debtors to the state for the taxes of those years; but to segregate railroads from all other delinquent property, and tax them for another three years, as is done by the act of 1885, seems to me to open the statutes to the criticism of the court, wherein it is said: "Doubtless it" (the 14th Amendment) "would prohibit a state from selecting some obnoxious person, and casting upon his property the sole burden of taxation or a burden differing from that cast upon others whose property was similarly situated."

It appears quite immaterial that under the act of 1883 the property was to be assessed by the county assessors, and in the act of 1885 by the state comptroller. The wrong done to the railway company is not in the selection of an agent to collect the taxes, but in the selection of a specially odious tax, namely for antecedent years, and imposing it upon one class of delinquents alone. If, for instance, a license tax varying in amount were imposed upon a dozen different occupations, and by another act subsequently passed were made retroactive for three years, could the legislature by still another act, made applicable only to those employed in one out of these twelve occupations, make such act retroactive for another three years, without denying to those engaged in that occupation the equal protection of the laws?

I do not wish to be understood as saying that the state may not impose a specific and even a discriminating tax upon railways, but after the liability to the state of all real property owners has once been established, and all placed upon the same footing, I do not think a particular species of property can be arbitrarily taken and subjected to a discriminating tax for a *series[483] of years, during which, and upon the ground that, the state officers had neglected their duty. If state railway taxes may be made retroactive for three years, and again for another three years, I see no reason why this method of taxation may not be continued indefinitely so long as any property remains from which it may be collected. This kind of discrimination seems to be measurable only by the rapacity of the legislature.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood, *Appts.*,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood, *Appts.*,
v.
LOUISVILLE, HENDERSON, & ST. LOUIS RAILWAY COMPANY.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood, *Appts.*,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood, *Appts.*,
v.
SOUTHERN RAILWAY COMPANY in Kentucky.

CHARLES C. McCHORD, James F. Dempsey, and John C. Wood, *Appts.*,
v.
CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 483-502.)

Railroad commission—amendment of statute—question of repeal—injunction against action by commission.

1. No repeal of the provisions of Ky. Gen. Stat. 1894, § 819, that prosecution by indictment of railroad companies for charging unlawful rates shall be had only on recommendation or request of the railroad commission, and also for an action in the name of the commonwealth on information filed by the board of railroad commissioners, was effected by Ky. act March 10, 1900, providing for the fixing of rates by such commission, although, while repeating many of the provisions of the section, it omitted these provisions.
2. An injunction against action by the Kentucky railroad commission cannot be had on suit of railroad companies before any rates are fixed by the commission, as the duty of enforcing its rates rests on the commission, and the remedy of the railroad companies by the ordinary processes of law is adequate.

[Nos. 141-145.]

Argued January 7, 8, 1901. Ordered for reargument March 25, 1901. Reargued November 11, 12, 1901. Decided January 6, 1902.

NOTE.—On repeal of prior statutes—see notes to *Titusville Iron Works v. Keystone Oil Co.* (Pa.) 1 L. R. A. 362; *Evansville v. State ex rel. Blend* (Ind.) 4 L. R. A. 93; *State v. Massey* (N. C.) 4 L. R. A. 308; *United States v. 356 Caddies of Tobacco*, 20 L. ed. U. S. 235, and *Hart & H. Mfg. Co. v. Anchor Electric Co.* 38 C. C. A. 136.

As to injunction to restrain a threatened wrong—see note to *Gardner v. Stroeveer* (Cal.) 6 L. R. A. 90.

183 U. S. U. S., Book 46.

APPEALS from decrees of the Circuit Court of the United States for the District of Kentucky granting injunctions against railroad commissioners to prevent them from taking action under a Kentucky statute. *Reversed*, with direction to dismiss.

See same case below, 103 Fed. 216.

Statement by Mr. Chief Justice Fuller:

*These are appeals from the final decrees [483] of the circuit court of the United States for the district of Kentucky, perpetually enjoining *Charles C. McChord and others, [484] railroad commissioners of the state of Kentucky, from doing any of the things required by, or from taking any action whatever against complainants under, a certain act of the general assembly of the commonwealth of Kentucky, approved March 10, 1900, which is entitled and reads as follows:

"An Act to Prevent Railroad Companies or Corporations Owning and Operating a Line or Lines of Railroad, and its Officers, Agents, and Employees, from Charging, Collecting, or Receiving Extortionate Freight or Passenger Rates in this Commonwealth, and to Further Increase and Define the Duties and Powers of the Railroad Commission in Reference Thereto, and Prescribing the Manner of Enforcing the Provisions of this Act and Penalties for the Violations of its Provisions.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting, or receiving extortionate freight or passenger rates over its line or lines of railroad in this commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected, or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employee of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments, or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is or has been guilty of extortion, said commission shall make and fix a just and reasonable rate, toll, or compensation which said railroad company or corporation may charge, collect, or receive for like services thereafter rendered. The rate, toll, or compensation so fixed by the commission shall be entered and be an order on the record book of their office, and signed by the commission, and a copy thereof *mailed to an officer, agent, or employee of [485] the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days there-

after, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent, or employee thereof charge, collect, or receive a greater or higher rate, toll, or compensation for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent, or employee shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than \$500 nor more than \$1,000, and upon a second conviction, in any sum not less than \$1,000 nor more than \$2,000, and for third and succeeding convictions, in any sum not less than \$2,000 nor more than \$5,000.

"Sec. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent, or employee shall have jurisdiction in all prosecutions against said officer, agent, or employee.

"Sec. 3. Prosecutions under this act shall be by indictment.

"Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"Sec. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the state, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

All the bills sought the same relief, and their averments, excepting those in respect of alleged contracts with the state in relation to rates set up in the bills of the Louisville & Nashville Railroad Company and of the Cincinnati, New Orleans, & Texas Pacific Railway Company, were in substance the same.

[486] *The act of March 10, 1900, was set out in full, its provisions recapitulated, and complainants' view of the legal effect thereof given. The 3d paragraph was: "All of your orator's rates charged, collected, or received within the state of Kentucky are just and reasonable, and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skillful manner."

It was then averred that it was the duty of the railroad commission to see that the laws relating to all railroads, except street, were faithfully executed, and to exercise a general supervision over the railroads of the state; that its functions were administrative; that it was not established as a court; and that under the state Constitu-

tion it could not be permitted to exercise judicial powers. That all common carriers were subject only to the requirement that their rates should be just and reasonable, and they were in case of controversy entitled to have the judgment of the courts on that question; but that the act referred to singled out railroad corporations, and deprived them of any opportunity to have a judicial determination of the reasonableness of their rates when disputed, substituted the nonjudicial determination of the railroad commission, and subjected them to penalties, there being no infliction of penalties provided as to other common carriers. That if defendants be permitted to proceed under the act, each complainant "will be compelled to charge the rates fixed by them, without any opportunity for a judicial investigation and determination as to their reasonableness, and it will thus be deprived of the lawful use of its property, and, in substance and effect, of its property itself, without due process of law, and will also be denied the equal protection of the laws, in violation of § 1 of article 14 of the Amendments to the Constitution of the United States."

It was further averred that the act was in conflict with clause 3 of § 8 of article 1 of the Constitution of the United States, giving Congress the exclusive power to regulate commerce among the states, and with the acts of Congress in that behalf.

*The bills then continued:

[487]

"And defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroads in the state of Kentucky, for the purpose of considering whether or not they shall be altered and reduced in accordance with the terms of said act, and are giving it out in speeches and interviews that they intend to proceed at once under said act, and unless restrained by the order of this court defendants will proceed at once to hear and determine complaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove set out, and is therefore null and void; and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter at pleasure modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the state of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense, and though merely assisting your orator to maintain its constitutional

rights, will be indicted, prosecuted, and heavily fined, to the great demoralization of the public service which your orator is bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's contract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great and irreparable wrong and injury, and to a vast multiplicity of prosecutions and actions in the courts of said state."

The cases were disposed of on demurrer.

The Constitution of the state of Kentucky provided:

[488] "§ 209. Railroad commission—Number—Qualifications — *Powers—Election—Term of office—Removal of.—A commission is hereby established, to be known as 'The Railroad Commission,' which shall be composed of three commissioners. During the session of the general assembly which convenes in December, 1891, and before the 1st day of June, 1892, the governor shall appoint, by and with the advice and consent of the senate, said three commissioners, one from each superior court district as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The commissioners so appointed shall continue in office during the term of the present governor, and until their successors are elected and qualified. At the regular election in 1895, and every four years thereafter, the commissioners shall be elected, one in each superior court district, by the qualified voters thereof, at the same time and for the same term as the governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year next preceding his election. Any vacancy in this office shall be filled as provided in § 152 of this Constitution. The general assembly may, from time to time, change said districts so as to equalize the population thereof, and may, if deemed expedient, require that the commissioners be all elected by the qualified voters of the state at large. And if so required, one commissioner shall be from each district. No person in the service of any railroad or common carrier, company, or corporation, or of any firm or association conducting business as a common carrier, or in anywise peculiarly interested in such company, corporation, firm, or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the railroad commissioners shall be regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation as now conferred, prescribed, and allowed by law to the existing railroad commissioners. *The general assembly may, for cause, address any of said commissioners out of office by similar pro-

[489] 183 U. S.

ceedings as in the case of judges of the court of appeals; and the general assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said commissioners, and to impose proper penalties therefor."

"§ 218. Penalty for charging more for short than long haul—Power of commission.—It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance; *provided*, That upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this state may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state may be relieved from the operations of this section."

The following are sections of the General Laws of Kentucky of 1894:

"§ 816. Extortion—What is.—If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this state, it shall be guilty of extortion.

"§ 817. Discrimination—What is.—If any corporation engaged in operating a railroad in this state shall, directly or indirectly, by any special rate, rebate, drawback, or other device, *charge, demand, collect, or receive [490] from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

"§ 818. Preference or advantage forbidden—Rules defining same—Quantity of freight.—It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation, or locality, or any particular description of traf-

fic, to any undue or unreasonable prejudice or disadvantage. . . .

"§ 819. Penalty in damages for extortion, discrimination, preference—Jurisdiction—Duty of commission—Limitation.—Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than \$500 nor more than \$1,000; and upon a second conviction, in any sum not less than \$500 nor more than \$2,000; and upon a third conviction, in any sum not less than \$2,000 nor more than \$5,000. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court, shall have jurisdiction of the offense, which shall be prosecuted by indictment or by action in the name of the commonwealth, upon information filed by the board of railroad commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the railroad commission, filed in the court having jurisdiction of the offense; *and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed or the cause of action shall have accrued.

"§ 820. Long and short haul over same road—Penalty—Jurisdiction of courts—Duty of commission.—If any person owning or operating a railroad in this state, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance, such person shall for each offense be guilty of a misdemeanor, and fined not less than \$100 nor more than \$500, to be recovered by indictment in the Franklin circuit court or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, the railroad or carrier shall

not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission *shall [492] use proper efforts to see that such company or carrier is indicted and prosecuted.

"§ 821. Three commissioners—Duties.—There is established a department in the state government to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the state. Each of said commissioners is authorized to administer oaths, and two of them shall constitute a quorum."

"§ 826. Rates from foreign points to be examined by commission—Duty of commission.—Said commission shall examine all through freight rates from points out of this state to points into this state; and whenever they find that a through rate charged into or out of this state is excessive or unreasonable or discriminating in its nature, they shall call the attention of the railroad officials in this state to the fact, and to urge them of the propriety of changing such rates. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission and appeal to it for relief, and they shall receive upon application the services of the attorney general of this state and into the condition, management, and all other matters concerning the business of railroads in this state, so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporations, their officers and employees, comply with the laws of the state; and whenever it shall come to their knowledge or they shall have reason to believe that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violations.

"§ 827. Examination of officers and employees by commission—Penalty for contempt.—They shall have the power to examine under oath any person, or the directors, officers, agents, and employees of any railroad corporation doing business in this state, concerning the management of its affairs, and to obtain information pursuant to this law; and shall have power to issue *sub-[493] pœnas for the attendance of witnesses, and

to administer oaths; and any person who shall neglect or refuse to obey the process of subpoenas issued by said commission, or who, being in attendance, shall refuse to testify, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished for each offense by a fine of not less than \$50 nor more than \$100, or by imprisonment not less than ten nor more than fifty days, or both, in the discretion of the jury.

"§ 828. Penalty for failing to make required reports or obstructing commission—Jurisdiction of courts.—Each officer, agent, or employee failing or refusing to make under oath any report required by the commission within the time required, or failing or refusing to answer fully, under oath, if required, any inquiry propounded by the commission, or who shall in any way hinder or obstruct the commission in the discharge of its duty, shall be guilty of a misdemeanor, and shall be fined for each offense not less than \$500 nor more than \$1,000; and it shall be the duty of the commission to prosecute the person offending; and the Franklin circuit court, or the circuit court of any county through which the railroad runs, the officer, agent, or employee of which has violated the provisions of this section, shall have jurisdiction of such prosecution; and it shall be the duty of the commonwealth's attorney to prosecute all indictments, actions, and proceedings under this law.

"§ 829. Complaints against companies—Award of commission—Proceedings upon.—The commission shall hear and determine complaints under §§ 816, 817, 818. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all the evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard in the office of the clerk of the circuit court of the county which, under the Code of Practice, would have juris-

[494] diction *of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded, the case shall be tried in all respects as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable diligence; the judgment and proceedings
183 U. S.

thereon shall be the same as in other ordinary cases."

Messrs. David W. Baird, Robert J. Breckinridge, and Lewis McQuown argued the cause, and, with *Messrs. Aaron Kohn and Zack Phelps*, filed a brief for appellants:

Jurisdiction of equity is moved only by property rights.

Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

A suit against a state officer to enjoin the execution of a state law, when he is not specifically charged with the execution thereof other than by virtue of a general duty, is a suit against the state.

Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

The making of a rate is a legislative function.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 494, 42 L. ed. 251, 17 Sup. Ct. Rep. 896; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

There is no distinction between the exercise of the function directly by the legislature or mediately through a commission.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 580, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 664, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

Injunction does not lie against the exercise of a legislative function.

Cooley, Const. Lim. 55, 153; *State ex rel. Johnson v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *State ex rel. Anderson v. Boone County Ct.* 50 Mo. 317, 11 Am. Rep. 415; *Patterson v. Barlow*, 60 Pa. 54; *Works, Courts and their Jurisdiction*, 183, 186; *United States ex rel. Goodrich v. Guthrie*, 17 How. 284, 15 L. ed. 102; *Brashear v. Mason*, 6 How. 92, 12 L. ed. 357; *Decatur v. Paulding*, 14 Pet. 497, 10 L. ed. 559;

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437.

Injunction does not lie against the making of a rate, or against a commission before the rate is made.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 367, 38 L. ed. 1016, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. Rep. 888, 4 Inters. Com. Rep. 835, 64 Fed. 165; *Higginson v. Chicago, B. & Q. R. Co.* 100 Fed. 235, 102 Fed. 197; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Trammell v. Dinsmore*, 42 C. C. A. 623, 102 Fed. 800; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236, 87 Fed. 21; *Western U. Teleg. Co. v. Myatt*, 98 Fed. 335; *State ex rel. Godard v. Johnson*, 61 Kan. 803, 49 L. R. A. 662, 60 Pac. 1068; *Tilley v. Savannah, F. & W. R. Co.* 4 Woods, 446, 5 Fed. 658; *Storrs v. Pensacola & A. R. Co.* 29 Fla. 617, 11 So. 227; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 378, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679.

Messrs. **David W. Baird** and **Lewis McQuown** also argued the cause on reargument, and, with Messrs. *Robert J. Breckinridge* and *Aaron Kohn*, filed an additional brief for appellants:

The rate fixed by the commission is not a judgment establishing guilt and inflicting penalties, but is simply a law establishing rates, made after full and satisfactory investigation.

Southern P. Co. v. Railroad Comrs. 78 Fed. 260; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The action of the commission being, in law, the act of the legislature by deputation merely, an injunction will not be granted to restrain the exercise of the function to make rates, because this would be an interference with the legislative power of the state.

New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *Alpers v. San Francisco*, 12 Sawy. 631, 32 Fed. 503.

The Kentucky commission has the duty to enforce the rate after it has made it.

Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 129; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236.

Injunction does not lie on the ground of mere fears.

Lake Erie & W. R. Co. v. Fremont, 34 C. 294

C. A. 625, 92 Fed. 735; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236; *Ryan v. Williams*, 100 Fed. 172; *Erie R. Co. v. Erie & W. Valley R. Co.* 100 Fed. 808.

After the Kentucky commission shall have made a rate, the question of the reasonableness of that rate or its constitutionality will become a pure question of law.

South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; *Post v. Kendall County*, 105 U. S. 667, 26 L. ed. 1204; *Gardner v. The Collector*, 6 Wall. 499, *sub nom. Gardner v. Barney*, 18 L. ed. 890; *Wilkes County v. Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; 1 Thompson, Trials, § 1053; *Cooley, Const. Lim.* 6th ed. 162, 163; 19 Am. & Eng. Enc. Law, pp. 634, 639, 645; *Lyons v. Woods*, 153 U. S. 663, 38 L. ed. 859, 14 Sup. Ct. Rep. 959; *Nesbit v. People*, 19 Colo. 450, 36 Pac. 224; *State v. Searcy*, 39 Mo. App. 393; *Comstock v. Tracey*, 46 Fed. 170; *Creager v. Hooper*, 83 Md. 504, 35 Atl. 161; *Jones v. United States*, 137 U. S. 216, 34 L. ed. 697, 11 Sup. Ct. Rep. 80; *State v. Wagner*, 61 Me. 178; *Gard v. Calhoun*, 6 Manle & S. 69; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 3 L. R. A. 733, 5 So. 633; 1 Elliott, Railroads, § 202; 2 Wood, Railroads, § 297, p. 1198.

Messrs. **Walker D. Hines**, **James P. Helm**, and **Alexander Pope Humphrey** argued the cause, and, with Messrs. *Edward Colston*, *W. H. Wadsworth*, and *A. M. J. Cochran*, filed a brief for appellees:

A court of equity has jurisdiction of these actions.

Union P. R. Co. v. Cheyenne, 113 U. S. 516, *sub nom. Union P. R. Co. v. Ryan*, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601; *Smyth v. Ames*, 169 U. S. 516, 42 L. ed. 838, 18 Sup. Ct. Rep. 418; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 882; *Clyde v. Richmond & D. R. Co.* 57 Fed. 436; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 238; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 177, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Cotting v. Kansas City Stock-Yards Co.* 79 Fed. 680; *Bank of Kentucky v. Stone*, 88 Fed. 390.

Messrs. *W. H. Wadsworth* and *A. M. J. Cochran* filed a separate brief for appellees:

A railroad commission may be enjoined from fixing rates where it has no power to make such rates.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

A suit against a railroad commission to prevent an enforcement of rates fixed because unreasonable is not a suit against the state.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, 183 U. S.

560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Messrs. *James P. Helm, Helm Bruce, Thomas Kennedy Helm, H. W. Bruce, and Walker D. Hines*, also filed a brief for appellee, the Louisville & N. R. Co.

[494] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the decrees the railroad commission of the commonwealth of Kentucky was permanently restrained from proceeding under the act of March 10, 1900, which was alleged and held to be unconstitutional.

[495] Conceding that the mere fact that a duly enacted law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, it is contended that ground of equity jurisdiction existed here in the want of adequate *remedy by the ordinary processes of law for the threatened consequences of the exercise of the power to fix rates in multiplicity of suits and irreparable injury.

It is insisted that according to the terms of the act the order of the commission fixing the rate, toll, or compensation which the railroad companies may charge is self-executing, and that no duty to enforce it is imposed on the commission; that the companies are shut up by the act to the final determination of the commission that they have charged more than a just and reasonable rate; and that on the trial of indictments for failure to observe the rates made by the commission the courts cannot entertain any inquiry as to the reasonableness of the rates so fixed, because such inquiry is unwarranted by the statute, and because such an investigation would be illusory and worthless; and that, even if the question of constitutionality could be raised in defense, yet that if such order be permitted to be entered of record and notified as provided, the companies, if they do not comply, will be at once exposed to innumerable prosecutions, and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute is upheld.

However all this may be, we think it is not to be doubted that these bills cannot be maintained if it appear that the commission is charged with the duty of enforcing the orders it may enter fixing rates. The objection that before this is done the commission is required to exercise judicial functions in determining that the companies have charged or received more than a just and reasonable rate goes to the validity of the act. The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction.

It is true that in *Railroad Commission Cases*, 116 U. S. 307, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, the suit was brought to enjoin the railroad commission of Mississippi from proceeding under the 183 U. S.

provisions of a certain statute therein mentioned against a railroad company, but the question of jurisdiction does not seem to have been raised. The case was considered on its merits, and the bill directed *to be dismissed. Mr. Chief Justice Waite, speaking for the court, among other things, said: "As yet the commissioners have done nothing. There is, certainly, much they may do in regulating charges within the state, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

In *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 482, 41 L. ed. 518, 524, 17 Sup. Ct. Rep. 161, 165, the general rule was stated and applied, and Mr. Justice Harlan, who delivered the opinion of the court, said: "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks."

The rule was also applied by Mr. Justice Field in *Alpers v. San Francisco*, 32 Fed. 502, where complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the city. Mr. Justice Field said: "This no one will question as applied to the power of the legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. . . . The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, *in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

In *Southern Pac. Co. v. California Railroad Comrs.* 78 Fed. 236, the law of California provided that the commissioners might "enforce their decisions, and correct abuses through the medium of the courts;" and, in substance, that after the rate was made by the commission, a copy of the order should be served on the corporation affected thereby, and that twenty days thereafter the rate should take effect. A bill was filed before the twenty days had expired; and Mr. Justice McKenna, then Circuit Judge, held that it was the duty of the commissioners to enforce the rate, and that an injunction would lie. The railroad commission had made an order reducing the grain rates of the company 8 per cent, and had passed a resolution declaring that its general charges were 25 per cent too high, and that "this board proceed at once to adopt a revised schedule of rates in accordance herewith, in order that the same may be in force before January 1, 1896." The court enjoined the enforcement of the 8 per cent reduction, which had already been made, but declined to restrain the 25 per cent reduction, because no decisive action had been taken.

Reading the various sections of the General Statutes of Kentucky, set forth in the statement preceding this opinion, as *in pari materia* with the act of March 10, 1900, which should be done, since they are parts of one system, having the same general objects in view, we think it apparent that the duty devolves on the commission to enforce the rates it may fix under the latter act. By § 816 extortion was defined to be charging more than a just and reasonable rate. Section 817 defined unjust discrimination, and § 818 forbade undue or unreasonable preference.

[498] Section 819 denounced the same penalties on conviction of "the offense of extortion, or of unjust discrimination, or of unreasonable preference, and provided for prosecution by indictment, or by action in the name of the commonwealth, on information filed by the board of railroad commissioners; that the railroad companies should be liable in damages to the party aggrieved; and also that prosecution by indictment should only be had on the recommendation or request of the railroad commission.

By § 829 the commission was empowered to hear and determine complaints under §§ 816, 817, and 818, and to enforce their awards in the courts.

The duty was imposed on the commission to initiate indictments under § 820 for charging greater compensation, in the aggregate, for a shorter than for a longer haul.

Section 821 made it the duty of the commission to see that the laws relating to railroads should be faithfully executed, and to exercise a general supervision over the railroads of the state.

So that unless the act of March 10, 1900, operated to repeal the provisions of the prior law, by withdrawing from the commission the duty of enforcing the rates it

might fix, it was its duty so to do, and indictments were to be found at its instance.

Section 816 read thus: "If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track or upon any track it has control of or the right to use in this state, it shall be guilty of extortion."

In *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 129, this section was considered. The court held that the section could not be enforced as a penal statute for want of certainty, and said:

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.

*"The criminality of the carrier's act,[499] therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

"That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

The court referred to and quoted from *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247; and *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443, in which it was held under a similar statute that the want of certainty in lack of reference to a standard under its 1st section was obviated by its 8th section providing for the making by the railroad and warehouse commissioners of schedules of reasonable and maximum rates, which, being done, the supreme court of Illinois said: "There will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed."

Such being the state of the law, the act of March 10, 1900, was passed.

The mischief to be cured in respect of extortion, as defined by § 816, was the want of certainty, and the remedy provided was

the fixing of the rates by the railroad commission.

In so providing, the act, while repeating many of the provisions of § 819, did, indeed, omit reference to an action by way of information and to liability in damages, and it [500] also *omitted the provision that indictments should be made only on the recommendation or request of the railroad commission; but it does not therefore follow that it was the legislative intention, without any expression thereof in terms, to repeal so important a provision.

Was the provision repealed by necessary implication? "We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it [the prior law]; for they may be merely affirmative, or cumulative, or auxiliary." Story, J., *Wood v. United States*, 16 Pet. 362, 10 L. ed. 995.

Repeals by implication are not favored, and are only allowed to the extent that repugnancy exists, and, in order to give an act not clearly intended as a substitute for an earlier one the effect of repealing it, the implication of the intention to do so must necessarily flow from the language used, bearing in mind the necessity and occasion of the law. And where it is plain that the new law is in aid of the purposes of the old law, the latter will not be held to be abrogated except so far as there is palpable inconsistency.

We do not think that it was intended to repeal the provision of § 819 requiring indictments to be found only on the recommendation or request of the commission, and still less that it was intended to circumscribe in this particular the general duty of the commission to see that the laws relating to railroads should be faithfully executed.

Dealing as we are with the statutes of Kentucky, we are gratified to find these views confirmed by the court of appeals of that commonwealth, in *Illinois C. R. Co. v. Com.* decided October 25, 1901, its opinion having been furnished us at the close of the argument, and since reported in 23 Ky. L. Rep. 1159, 64 S. W. 975.

In that case the railroad company was indicted under § 820, and fined for charging more for a shorter than a longer haul. The indictment was returned before the railroad commission had determined whether the company should be exonerated as provided by that section. The judgment was reversed, and Hobson, J., speaking for the court, said:

[501] "In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offense, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the offense and providing for its punishment, for by the next section (Ky. Stat. 183 U. S.

§ 821) it is made the duty of the commission 'to see that the laws relating to all railroads, except street, are faithfully executed;' and under this provision it would be the duty of the commission to see to violations of the preceding section. . . . From the section as a whole it is clear that the legislature had in mind providing for the exoneration of the railroad from its provisions in proper cases, and exempting the carrier from criminal liability to this extent. It therefore provided for an investigation by the railroad commission, a determination by it whether it deemed it proper to exonerate the railroad, and for the enforcement of its decision by indictment by the grand jury in case the railroad was not exonerated. To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The legislature had no such result in mind, but clearly aimed to secure to the carrier a hearing on this question.

"The long and short haul matter is only another form of undue discrimination and preference, which are provided for by § 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see Gen. Stat. 1021), which was in force at the time of the adoption of the Constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the state should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the state should find indictments."

The 4th section of the act of the general assembly of *Kentucky of April 6, 1882 [502] (Acts 1881, p. 66, chap. 790), entitled "An Act to Prevent Extortion and Discrimination in the Transportation of Freight and Passengers by Railroad Corporations, and in Aid of That Purpose to Establish a Board of Railroad Commissioners, and Define its Powers and Duties," set forth in the edition of the Kentucky Statutes of 1887, p. 1021, and referred to by the court, provided for the infliction of penalties on railroad companies convicted of extortion or unlawful discrimination, and that the offender should be "prosecuted by indictment or by action in the name of the commonwealth, upon information filed by the board of railroad commissioners;" and also that the companies should be liable in damages to the parties aggrieved. The act of March 10, 1900, does not appear to have been intended to change the settled legislative policy that indictments should be found on the recommendation of the commission.

The result of these considerations is that the duty of enforcing its rates rests on the commission, and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition, before the rates are fixed at all. Whether after they are determined their enforcement can

be restrained is a question not arising for decision on this record, and we are not called on to dispose of other contentions of grave importance which were pressed in argument as if now requiring adjudication.

Decrees reversed and cases remanded to the Circuit Court, with a direction to sustain the demurrers and dismiss the bills.

[503]*LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plff. in Err.*,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 503-519.)

Constitutional law—due process of law—equal protection of the laws—charging more for shorter than for longer haul—interference with interstate commerce.

1. The construction put by the Kentucky court of appeals upon the provisions of Ky. Const. § 218, by which a different effect is given to it than to similar language in the interstate commerce law, is binding upon the Supreme Court of the United States in a case governed by the state Constitution.
2. The equal protection of the laws is not denied to a railroad company by Ky. Const. § 218, and Ky. Gen. Stat. 1894, § 820, which prohibit the companies from charging more for a shorter than for a longer haul, except by permission of the railroad commission in special cases after investigation.
3. The guaranty of due process of law by the Federal Constitution is not violated by Ky. Const. § 218, and Ky. Gen. Stat. 1894, § 820, giving a railroad commission power to make exceptions in particular cases, after investigation, from the general prohibition of greater rates for shorter than for longer hauls. Such commission is not to be deemed a mere administrative body, but it is a constitutional tribunal, the decisions of which are made conclusive, and not reviewable by the courts.
4. A railroad company accepting its charter subject to the provisions of Ky. Const. § 218, prohibiting greater charges for shorter than for longer hauls, except when permitted by the railroad commission, is as much subject to the provisions for exoneration from that prohibition as to the prohibition itself, and cannot claim that it has any implied contract exemption from these provisions by virtue of its charter and the consequent right to charge reasonable rates for its service.

NOTE.—On the construction and effect of state laws and Constitutions and state decisions in regard to the same—see note to *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 755, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to state regulation of commerce—see notes

5. Any interference with interstate commerce by the enforcement of state laws prohibiting a greater charge for shorter than for longer hauls is too remote and indirect to be regarded as an unconstitutional interference with interstate commerce.

[No. 7.]

Argued November 9, 1900. Ordered for Re-argument March 25, 1901. Reargued November 8, 11, 1901. Decided January 6, 1902.

IN ERROR to the Court of Appeals of the State of Kentucky to review a decision affirming a judgment of conviction on an indictment against a railroad company for charging unlawful rates. *Affirmed.*

See same case below, 21 Ky. L. Rep. 232, 51 S. W. 164, 1012.

Statement by Mr. Justice Shiras:

At the January term, 1895, of the Marion county circuit court of the state of Kentucky, an indictment was found against the Louisville & Nashville Railroad Company, a corporation of the state of Kentucky, for an alleged violation of § 218 of the Constitution of the state, and § 820 of the Kentucky Statutes, in charging more for the transportation of coal from Altamont, Kentucky, to Lebanon, Kentucky, than to Louisville and Elizabethtown, Kentucky, over railroads which the company were operating under its charter. The indictment alleged that it was filed upon the recommendation of the state railroad commission. The trial resulted in a judgment of conviction and a fine of \$300, which, on appeal, was, on May 20, 1899, affirmed by the court of appeals. [21 Ky. L. Rep. 232, 51 S. W. 164, 1012.] From that judgment of the court of appeals a writ of error was allowed by the chief justice of that court on June 28, 1899, and the case was brought to this court.

Mr. William Lindsay argued the cause, and, with Messrs. Walker D. Hines and H. W. Bruce, filed a brief for plaintiff in error:

The existence of actual competition of controlling force in respect to traffic important in amount makes out a dissimilarity of circumstances and conditions, entitling

to *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041, and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

That state laws cannot regulate interstate commerce—see *Norfolk & W. R. Co. v. Com.* (Va.) 13 L. R. A. 107, and note.

On what constitutes a regulation or restraint upon interstate commerce—see note to *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

As to state laws interfering with interstate or foreign commerce—see note to *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

On legislative power to fix tolls, rates, or prices—see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177.

the carrier to charge less for the longer than for the shorter haul, without any necessity for application to the commission.

Re Southern R. & S. S. Co. 1 Inters. Com. Rep. 278; *Missouri P. R. Co. v. Texas & P. R. Co.* 4 Inters. Com. Rep. 434, 31 Fed. 862; *Ex parte Koehler*, 1 Inters. Com. Rep. 317, 31 Fed. 315; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

Ky. Const. § 218, amounts to an arbitrary and wholly unreasonable interference with perfectly legitimate business.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

Viewed either as an effort to cut down the short-haul rates to the level of the long-haul rates, or as an effort to increase the long-haul rates to the level of the short-haul rates and thereby destroy the competitive business, § 218, as construed by the court of appeals, is not a proper exercise of the police power, but is an unwarrantable interference with the constitutional rights of carriers.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Ex parte Koehler*, 11 Sawy. 37, 23 Fed. 529.

It is manifestly unconstitutional to intrust the dispensation of the right to engage in clearly legitimate traffic to a mere administrative tribunal without any rules by which it may be guided, without specifying any conditions upon which the carrier shall be entitled to enjoy such legitimate traffic, and absolutely free to give its consent or withhold its consent at its own pleasure and will, in any and all cases without judicial review or control.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Pac. 245; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L. R. A. 621, 60 N. W. 156; *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 N. E. 312; *State v. Mahner*, 43 La. 496, 9 So. 480; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

If competitive traffic is legitimate traffic which railroad companies are entitled to

enjoy, subject only to reasonable and just regulations, the mere fact that such traffic is only a part, and not the whole, of the railroad company's traffic, gives the state no greater right to impose arbitrary and unjust prohibitions or regulations in regard to it than it would have with respect to the whole traffic of the railroad company.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343.

In a number of instances statutes have been declared void, not because they absolutely prohibited lawful trades, but simply because they hampered such trades by prohibiting without adequate reason certain desirable, but by no means essential, incidents of conducting them.

Ruhrat v. People, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 46 Atl. 234; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 22 Atl. 4; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916.

The railroad company is entitled to a judicial determination as to rates prescribed for it by a commission.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Mr. Walker D. Hines argued the cause and filed a brief for plaintiff in error on reargument:

The law-making power of the state is not the final judge as to whether its enactments have such reasonable relation to the promotion of the public welfare as to justify them as an exercise of the police power.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

This court will assume to inquire whether a state enactment has a reasonable relation to the promotion of the public welfare, and will base its determination as to the constitutionality of the enactment under consideration upon the result of its inquiry.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

A prohibition which absolutely ignores the element of competition has no tendency to prevent either extortion or unjust discrimination.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

Mr. H. W. Rives submitted the cause for defendant in error:

The court will not question the construction of the Kentucky Constitution as declared by the court of appeals of Kentucky.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Nor will it undertake to correct any supposed error of that court in applying a valid constitutional or statutory provision to the facts of the case before it.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

If the state had power to enact the law the courts must enforce it whatever may be

the individual views of the court as to the wisdom of such law or as to the soundness of the public policy indicated by the legislature.

Brass v. North Dakota ex rel. Stoescer, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857.

Common carriers are given extraordinary privileges, including the right to subject private property for their uses, primarily for the benefit of the public, and whenever they cannot be profitably operated without oppressing the public they should cease to operate at all.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

Under its police power the people in their sovereign capacity or the legislature as their representatives may deal with the charter of a railway corporation so far as it is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Equal protection of the law is provided by legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control, and in the exertion of such power the legislature is vested with a large discretion which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

Where the people of a state in the exercise of their inherent powers of sovereignty adopt a constitution by which they distribute powers of government among various tribunals created by them, the only restriction upon their power in that regard is that the government so formed shall be republican. They may commit to a single tribunal the exercise of administrative, judicial, and ministerial functions, and may modify, or even deny, the right of trial by jury without violating that provision of the Federal Constitution requiring due process of law.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Murray v. Louisiana*, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights

as those maxims prescribe for the class of cases to which the one in question belongs.

Cooley, Const. Lim. 356; 357; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 240, 41 L. ed. 986, 17 Sup. Ct. Rep. 581; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110.

In the case at bar there can be no question as to equal protection of the law, for no discrimination is made against any railroad company, and there is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110.

The enactment is a valid exercise of the police power of the state, and does not attempt to abridge the right of any railroad company to fix and charge a body of rates that would produce sufficient revenue to maintain its road and equipments and pay a reasonable income on the value of the property.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 589, 41 L. ed. 563, 17 Sup. Ct. Rep. 198.

A railroad company is not exempt from legislative regulations by the state because of any charter contract under which it has acquired an indefeasible right to exercise its own discretion in the management of its business.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

No set of representatives selected by the people at any time to perform the duty of protecting those rights and exercising the power of sovereignty can delegate by contract that duty to others, nor cede the powers of sovereignty to individuals or corporations under any pretext, or for any consideration.

Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

The power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 338, 1191.

Exemption from future general legislation either by a constitutional provision or by an act of the legislature cannot be deemed to exist, unless it is given expressly or unless it follows by an implication equally clear with express words.

Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34.

By the consolidation of the Louisville & Nashville Railroad Company with other companies and the acquisition of new lines of road a new corporation was created which does not possess the immunity from taxation granted to the original company.

St. Louis, I. M. & S. R. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Atlantic & G. R. Co. v. Georgia*, 98 U.

S. 359, 25 L. ed. 185; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357.

Mr. H. W. Rives also argued the cause for defendant in error on reargument.

[504] **Mr. Justice Shiras* delivered the opinion of the court:

This case is here on a writ of error to a judgment of the court of appeals of the state of Kentucky, affirming a judgment of the circuit court of Marion county, Kentucky, sentencing the Louisville & Nashville Railroad Company to a fine of \$300 for an alleged violation of a statute of that state which declares, among other things, that it shall be unlawful for any person or corporation owning or operating a railroad in the state to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for longer distance, over the same line, in the same direction, the shorter being included in the longer distance.

This statute is based upon § 218 of the Constitution of the state of Kentucky, adopted in 1891. The statute, which is § 820 of the Kentucky Statutes, and § 218 of the Constitution, are set forth in full in the report of the case of *McChord v. Louisville & N. R. Co.* 183 U. S. 483, *ante*, 289, 22 Sup. Ct. Rep. 165, and cognate cases, recently decided by this court, and need not be here copied at length.

Those cases were here on appeal from final decrees of the circuit court of the United States for the district of Kentucky, enjoining the railroad commission of the state from enforcing against the complainants, of which the Louisville & Nashville Railroad Company, the plaintiff in error in the present case, was one, the provisions of an act of the commonwealth of Kentucky approved March 10, 1900, entitled, "An Act to Prevent Railroad Companies or Corporations Owning and Operating a Line or Lines of Railroad, and its Officers, Agents, and Employees, from Charging, Collecting, or Receiving Extortionate Freight or Passenger Rates in This Commonwealth, and to Further Increase and Define the Duties and Powers of the Railroad Commission in Reference [505] thereto, *and Prescribing the Manner of Enforcing the Provisions of This Act and Penalties for the Violation of its Provisions."

The occasion of the passage of this act of March 10, 1900, was a decision of the court of appeals of Kentucky holding that § 816, which declared that any railroad company which should charge and collect more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in that state was guilty of extortion, could not be enforced as a penal statute for want of certainty. *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L. R. A. 209, 35 S. W. 129.

The effort was made in the circuit court of the United States, and successfully, to have it held that by the said act of March 10, 1900, § 819, in so far as it provided an

action by way of information, and to liability in damages, and that indictments should be made only on the recommendation or request of the railroad commission, was repealed by necessary implication; and that, accordingly, the order of the commission, fixing the rate, toll, or compensation they may charge, was self-executing, and that no duty to enforce it was imposed on the commission; that the railroad companies were shut up by the act to the final determination of the commission that they have charged more than a just and reasonable rate; that on the trial of indictments for failure to observe the rates made by the commission, the courts cannot entertain any inquiry as to the reasonableness of rates so fixed, because such inquiry is unwarranted by the statute, and therefore illusory and worthless; and that, even if the question of constitutionality could be raised in defense, yet that, if the order of the commission were permitted to be entered of record, the companies, if they did not comply, would be at once exposed to innumerable prosecutions and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute was upheld.

It was, however, held by this court that it was not the intent or effect of the act of March 10, 1900, to repeal those provisions of § 819 requiring indictments to be found only on the recommendation of the commission, nor to circumscribe, *in this particular, the [506] general duty of the commission to see that the law relating to railroads should be faithfully executed. This view of the meaning and effect of the legislation was that taken by the court of appeals of Kentucky in the case of *Illinois C. R. Co. v. Com.*, decided while the appeals from the decrees of the circuit court of the United States were pending in this court. In that case the railroad company was indicted under § 820, and fined for charging more for a shorter than a longer haul. The indictment was returned before the railroad commission had determined whether the railroad company should be exonerated as provided in that section, and the court of appeals held that "to allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. . . . The long and short haul matter is only another form of undue discrimination and preference, which are provided for by § 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see Gen. Stat. p. 1021), which was in force at the time of the adoption of the Constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the state should be looked to in these matters, and that the railroad commission must first determine them before the general

juries of the state should find indictments." [23 Ky. L. Rep. 1162, 64 S. W. 977.]

The conclusion reached by this court, therefore, was that the duty of enforcing its rates rests on the commission, and that there was no basis for interposition by a court of equity before the rates were fixed at all; and that whether, after the rates have been determined by the commission, their enforcement could be restrained, was a question not necessarily presented for decision in those cases; and, accordingly, the decrees of the circuit court were reversed with a direction to sustain the demurrer and dismiss the bills.

[507] In the case now in hand the indictment was found, not in advance of any action by the railroad commission, but on its *recommendation. Hence the question of the validity of the provisions of the Constitution and laws of the state of Kentucky under which these proceedings were had is properly before us. Of course, our consideration of it must be restricted to its Federal aspect; in other words, we are to inquire whether the state enactments, constitutional and statutory, in the particulars involved in this controversy, and under the construction given them by the court of appeals, are in conflict with the 14th Amendment of the Constitution of the United States.

At the trial of the indictment it was not seriously disputed that the defendant company had, at the time and place alleged, charged and received for the carriage and transportation of coal over its line of road a greater compensation for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, without having been authorized by the railroad commission so to charge, and after the commission, upon investigation, had refused so to do.

But certain facts which were alleged to show that the circumstances and conditions under which the charges in question were made and received were not substantially similar with those ordinarily obtaining, and thus to show that the charges objected to were just and reasonable, were offered in evidence by the railroad company, and excluded from the jury by the trial court, which gave to the jury what amounted, in legal effect, to a peremptory instruction to find the defendant company guilty as indicted. The jury accordingly returned a verdict of guilty, fixing the fine at \$300, for which judgment was rendered, and an appeal was taken by the defendant company from that judgment to the court of appeals.

[508] It was contended in the courts below and here that as § 218 of the Constitution of the state of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the Interstate Commerce Act, it should be assumed that it was the intention of the constitutional convention of Kentucky to adopt the construction put upon that provision in the interstate commerce law by the *Federal courts; and that as

those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside of the state.

Such contention might seem reasonably to have been urged in the state courts, but, as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments to be that found in them by the state courts. The prevailing view in the court of appeals was thus expressed by Judge Hobson:

"Appellant transported coal from Altamont to Louisville at \$1.00 per ton, and to Elizabethtown at \$1.30 per ton, while it charged \$1.55 per ton from Altamont to Lebanon, an intermediate station on its line of road. Complaint being made to the railroad commission, it investigated the matter and made an order in writing declining to exonerate appellant from the operation of the provisions of § 820, and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court, as provided in the statute. The case was tried, and appellant having been adjudged guilty, it prosecuted this appeal to reverse the judgment imposing a fine upon it of \$300.

"Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio river on boats, and that at Elizabethtown it came in competition with western Kentucky coal brought there by the Illinois Central Railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to noncompetitive points like Lebanon were reasonable, and were unaffected by the reductions referred to, which were necessary for the coal to be handled in those markets at all. The evidence offered by it to *sus- [509] tain this contention was excluded by the court below on the trial, on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of § 218 of the Constitution. It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not in another, and we are referred to numerous decisions of the Federal courts so holding. On the other hand, it is contended for the state that to adopt this construction is to emasculate the section and deprive it of all practical operation and effect.

"The precise question thus presented was determined by this court in the case of

Louisville & N. R. Co. v. Com. 20 Ky. L. Rep. 1380, 43 L. R. A. 541, 46 S. W. 707, where the construction of the section adopted by appellee was sustained. We are urged to overrule that case; but it was fully considered, and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation." [21 Ky. L. Rep. 234, 51 S. W. 165.]

In order fully to understand the position of the court of appeals it may be well to quote a portion of the opinion of that court in the case of *Louisville & N. R. Co. v. Com.* 20 Ky. L. Rep. 1380, 43 L. R. A. 541, 46 S. W. 707, referred to in the court's opinion in the present case:

"The railroad commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from operation of the section. In our opinion the court has not jurisdiction to either compel the railroad commission, upon application of the common carrier or those interested in particular industries or callings, to suspend or relax operation of § 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit such suspension or relaxation in special cases. While the commission is thus, and to that extent, free from judicial interposition, it cannot of course nullify, or, except in special cases, [510] at all suspend operation of, § 128; *and though the railroad commission be invested with this unusual power, it must be treated as a constitutional power with which the court cannot interfere."

With the meaning thus attributed to § 218 of the Constitution, it is strenuously contended on behalf of the plaintiff in error "that said section has no reasonable relation to securing for the public reasonable rates or the prevention of extortion or undercharges, or the promotion of the safety, health, convenience, or proper protection to the public; but that it amounts to an arbitrary and wholly unreasonable interference with perfectly legitimate business, and is therefore in conflict with the 14th Amendment of the Constitution of the United States; and since the railroad company has built its railroads in the state of Kentucky, upon the faith of a charter granted it by the state authorizing it to operate those railroads, it has a contract right to engage in such legitimate railroad business, and any such arbitrary interference therewith as results from such a construction of § 218 would impair the obligation of that contract."

To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretense of regulating fares and freights, a state cannot require a railroad corporation to carry

persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and that in so far as it is thus deprived, while other *persons are [511] permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. *Railroad Commission Cases*, 116 U. S. 345, sub nom. *Stone v. Farmers' Loan & T. Co.* 29 L. ed. 649, 6 Sup. Ct. Rep. 334, 388, 1191; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared, in the present case, that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the Federal courts to interfere with the legislative department of the state government when acting within the scope of its admitted powers is always the exercise of a delicate power,—one that should not be resorted to unless the reason for doing so is clear and unmistakable.

As we understand the condition of the statutes of Kentucky, there was at the time when this case was tried in the circuit court of Marion county, and when the court of appeals disposed of it, no power in the railroad commission to fix or establish rates or tolls which the railroad companies were bound to accept. Such power, however, was given to the commission by the act of March 10, 1900; and it was to restrain the railroad commission from taking action under that act that bills in equity were filed by the Louisville & Nashville Railroad Company

and other railroad companies in the circuit court of the United States. But in the present case we have only to do with the question of the validity of the action of the railroad commission's proceeding under § 218 of the Constitution and § 820 of the statutes, which prescribe uniformity of rates for all distances, long or short, and make penal disregard of such uniformity by railroad companies, except when *authorized by the commission to charge less for longer than for shorter distances. As we have seen, this court held, on the appeals from the circuit court of the United States, that it was not competent for courts of equity to interfere with the action of the commission in respect to fixing rates before the rates were fixed at all, and when it could not appear whether the companies would have any reason to complain of them.

Our present duty is to consider only the objections to the validity of the long and short haul clauses in the Constitution and the statutes.

It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of Federal courts when they are asked to interpose in a controversy between a state and its citizens.

This court, then, is not concerned with the wisdom of the people of Kentucky when they declared in their Constitution that it should be unlawful for any person or corporation owning or operating a railroad in that state to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. Nor, as we have already seen, is it for us to say that the court of appeals of Kentucky erred in so construing that enactment as to forbid a railroad company from justifying a voluntary disregard of its command by claiming that competition between its road and other modes of transportation created substantially dissimilar circumstances and conditions.

It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the state to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the state, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, *deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws.

When the citizens of Kentucky voluntarily seek and obtain a grant from the state of a charter to build and maintain a public highway in the form of a railroad, it would

seem to be evident that it takes, holds, and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. It may be that in a given case a railroad company may be able to show that the state has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the states. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. But apart from such contentions, and looking only at the case of a company voluntarily formed to carry on business wholly within a state, we are unable to see how such a company can successfully contend that it can be exempted by the courts from the operation of the Constitution of the state.

It is said that, while it is true that railroad companies receive their rights to exist and to maintain their roads from the state, yet that their ownership of such roads is *property*, and, as such, is protected from arbitrary interference by the state. But, though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the state. We do not wish to be understood as intimating that if, hereafter, the railroad commission should fix and establish rates of a confiscatory character, the company would be without the protection which courts of equity have heretofore given in cases of that description. What we now say is that a state corporation voluntarily formed cannot exempt itself from the control reserved to itself by the state by its Constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal courts, in respect to the long and short haul clause in the state Constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection *that the provision in question[514] denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another; and the remedy adopted by the state was to declare such preferences illegal, and to prohibit any person, corporation, or common carrier from resorting to them. That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the state desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the state, are strongly urged on behalf of the plaintiff in error; but however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point

of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands.

It is further contended that the indictment and proceedings in this case were void because of the nature of the proviso in § 218 of the Constitution. That proviso is in the following words: "Provided that, upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this state, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this state, may be relieved from the operations of this section."

The argument is that, "even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet, where the law does not do so, but recognizes that there may be legitimate traffic which could thereby be interfered with, it is unconstitutional to intrust the dispensation of the [515] right to engage *in such legitimate traffic to a mere administrative tribunal, without any rules by which it may be guided, without specifying any conditions upon which the carriers shall be entitled to enjoy such legitimate traffic, and absolutely free to give or withhold its consent at its own pleasure or will, in any and all cases, without judicial review or control."

But if it be competent for the state, as this argument supposes, to wholly forbid, in every case and by every carrier, the charging of more for a short than a long haul, it is not easy to see why the state may not permit such charges through the action of a tribunal authorized to investigate the subject and to award relief in cases deemed proper. Such a provision is *ex gratia*, and in the direction of exonerating the carrier from what the argument concedes to be a lawful limitation. Such an exercise of discretion by the railroad commission would be no more arbitrary than if the Constitution had authorized the legislature to allow in special cases a greater charge for the shorter than for the longer distance, and to prescribe the extent of such excess. We are not prepared to accept the view that the railroad commission, in acting under § 218, is merely an administrative body, and as such subject to judicial review. It is rather a constitutional tribunal, empowered, upon the application of the carrier, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the commission. If he does not choose to do so, he will continue to operate his railroad
183 U. S. U. S., Book 46.

under and subject to the constitutional prohibition. If he elects to resort to the commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment *upon which the appraisers have proceeded. If there are charges of fraud or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void. *Shoemaker v. United States*, 147 U. S. 282, 305, 37 L. ed. 170, 187, 13 Sup. Ct. Rep. 361.

The plaintiff in error did not choose to avail itself of the right to apply for relief to the railroad commission, perhaps for the reason that doing so might be regarded as an acquiescence in or waiver of the right to object to the validity of the proviso.

However this may be, it is difficult to see how a Federal question is presented by the apprehensions which the plaintiff may entertain that a resort to the commission might be futile. As already said, the railroad company must be deemed to have accepted its grant, subject to the provisions of the Constitution; and this presumption is as applicable to the method provided for exoneration from the prohibition as to the prohibition itself.

We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the state in its Constitution. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Railroad Commission Cases*, 116 U. S. 307, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

We are next to inquire whether the plaintiff in error has been exonerated from these constitutional conditions and regulations by a valid contract subsisting between it and the state.

We do not understand that the counsel for the plaintiff in error claims that, by any provision of its charter, power was given to the company to fix its own rates of charge, or to discriminate in its rates between different places on its line of railroad, and that the constitutional prohibition as to the long and short haul, subsequently enacted, operates, if enforced, as a withdrawal or defeat of that power.

No right, in express terms or by necessary implication, is pointed in the company's charter granting to the Louisville & Nashville Railroad Company the privilege of discriminating in its tariff of tolls or charges in favor of longer over shorter distance [517] points. *On February 14, 1856, there was passed a general act reserving to the state an unlimited power to amend all charters and amendments thereafter granted. Ky. Laws 1855-6, chap. 148. It is true that an amendment to plaintiff in error's charter was granted by an act passed February 28, 1860, by § 1 of which the board of directors were granted authority, "in their adjustment of a tariff for freight and passengers, to make discrimination in favor of freights and passage for long over short distances." But it does not seem to be contended that by this amendment of 1860 an irrevocable contract was effected between the state and the company, which could not be affected by a subsequent constitutional enactment. It is scarcely necessary to argue or to cite authority for the proposition that a contract of exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be deemed to exist unless it is given expressly, or unless it follows by an implication equally clear with express words.

But what is claimed is that a railroad company, by mere force of its legal organization and the construction of its road, has a necessarily implied power to fix reasonable rates, and especially has the right to differ rates when competition exists from rates applicable where there is no competition. Such rights, it is said, are essential to enable the company to engage in perfectly legitimate business, and hence that an interference therewith, even by a constitutional enactment, not only deprives the company of its property, or the reasonable use of it, but also impairs the obligation of the contract implied in the grant of its charter.

So far as the question of an implied contract is concerned, we perceive no distinction between the case of a railroad company incorporated before and that of one incorporated after the constitutional enactment in question. As it has been said of the one so it may be said of the other, that the charter is taken and held subject to the power of the state to regulate and control the grant in the interest of the public.

In *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34, it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted [518] such *a contract between the state and the company as exempted the latter from the operation of the subsequently adopted Constitution of Pennsylvania; that a constitutional provision, as applied to the company, in respect to cases afterwards arising, did

not impair the obligation of any contract between it and the state; and that the company took its charter subject to the general law of the state and to such changes as might be made in such general law, and subject to future constitutional provision and future general legislation, since there was no prior contract with it exempting it from such enactments.

The same principle was announced in *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; and in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

In the absence, then, of any express prior contract between the state and the company, exempting the latter from future constitutional enactments, and without conceding that even such a contract would avail to relieve the company from constitutional changes in the exercise of the general police power of the state, it is sufficient to say that we do not find in § 218 of the Constitution of Kentucky any impairment of an existing contract between the state and the plaintiff in error.

The final contention, that § 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long.

It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state.

It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference *with the [519] commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state. *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 439, 39 L. ed. 1043, 1045, 15 Sup. Ct. Rep. 896; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

A discussion of this subject will be found in the opinion of this court in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 701, 40 L. ed. 859, 16 Sup. Ct. Rep. 714, where the same conclusion was reached.

The judgment of the Court of Appeals is affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY *et al.*, Appts.,

v.

UNITED STATES, Appellee.

UNITED STATES, Appt.,

v.

SOUTHERN PACIFIC RAILROAD COMPANY *et al.*, Appellees.

(See S. C. Reporter's ed. 519-535.)

Railroad land grants—conflicting grants—res judicata.

- Each of two separate railroad companies to whom by the same act or by acts of the same date grants of land are made, in so far as the limits of their grants conflict by crossing or lapping, takes an equal undivided moiety of the lands within the conflict, and neither acquiesces all by priority of location or priority of construction.
- The construction by the Southern Pacific Railroad Company of a railroad from San Francisco to the eastern boundary line of California, along the route approved by the joint resolution of January 28, 1870, as authorized by the act of July 27, 1866, making a land grant in aid of its projected line to connect with the Atlantic & Pacific Railroad at such point near the boundary line of California as was deemed most suitable for a railroad to San Francisco, entitles it to an equal undivided moiety in all the alternate sections within the place or granted limits of such road so far as they conflict with the limits of the grant to the Atlantic & Pacific Railroad by that act.
- A determination in a suit to quiet title by the United States against the Southern Pacific Railroad Company, that such railroad, claiming under the grant of March 3, 1871, took no title to lands within the conflicting place limits of the grant to it under that act and of that made to the Atlantic & Pacific Railroad Company by act of July 27, 1866, inasmuch as the latter road had filed an approved map of definite location, is not a bar to a claim in another suit between the same parties that the Southern Pacific Railroad Company by virtue of the construction of a railroad under the said act of July 27, 1866, had an equal undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to it and to the Atlantic & Pacific Railroad Company by that act, such lands not being the same as those involved in the prior suit.

[Nos. 18 and 24.]

Argued January 29, 30, 1901. Decided January 6, 1902.

CROSS APPEALS from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree affirming a decree of the Circuit Court for the Southern District of California in favor of the United

States in a suit to quiet title to land. *Reversed.*

See same case below, 38 C. C. A. 619, 98 Fed. 27.

The facts are stated in the opinion.

Mr. Joseph H. Call argued the cause and filed a brief for the United States:

The essence of estoppel by judgment being that there has been a judicial determination of the facts, the question always is, Has there been such determination? and not, Upon what evidence, or by what means, was it reached?

Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 690, 39 L. ed. 862, 15 Sup. Ct. Rep. 733.

A final adjudication may be had, even in a case where the defendant has defaulted.

Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

A person, although not a formal party of record in an action, if represented in such litigation, is bound by the judgment to the same extent as if a party of record; and a judgment against a trustee or one acting in a representative capacity binds the *cestui que trust*.

Woods v. Woodson, 40 C. C. A. 525, 100 Fed. 515; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Corcoran v. Chesapeake & O. Canal Co.* 94 U. S. 741, 24 L. ed. 190; *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25 L. ed. 757; *Maloy v. Duden*, 30 C. C. A. 137, 57 U. S. App. 161, 86 Fed. 402; *Sanders v. Peck*, 30 C. C. A. 530, 59 U. S. App. 248, 87 Fed. 61.

No rights attached in the Southern Pacific Railroad on filing its map of general route.

See *Re Southern P. R. Co.* 25 Land Dec. 223; *Southern P. R. Co. v. McWharther*, 14 Land Dec. 610; *Morgan v. Southern P. R. Co.* 11 Land Dec. 582.

The Southern Pacific grant, governed by the act of 1866, requires by § 6 a map of general route, and by § 3 one of definite location, and the former confers no rights to lands.

United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The route laid down in the charter of the Southern Pacific company must be read into the congressional act making the land grant to that company, as it is conclusively presumed that Congress had such line of route in contemplation.

Denver & R. G. R. Co. v. Alling, 99 U. S.

NOTE.—As to land grants to railroad—see note to *Kansas P. R. Co. v. Atchison*, T. & S. F. R. Co. 28 L. ed. U. S. 794.

On conclusiveness of judgments generally—see notes to *Sharon v. Terry* (C. C. N. D. Cal.) 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank* (Neb.) 3 L. R. A. 142; *Wiese v. San Francisco* 183 U. S.

Musical Fund Soc. (Cal.) 7 L. R. A. 577; *Morrill v. Morrill* (Or.) 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street Rail Co. v. Wharton*, 38 L. ed. U. S. 429, and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

463, 25 L. ed. 438; *Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co.* 160 U. S. 77, 40 L. ed. 346, 16 Sup. Ct. Rep. 231.

Where the termini of a land-grant-aided railroad are mentioned in an act of Congress, the railroad must be constructed upon the shortest practicable route; and if there is an unnecessary deviation it will be rejected.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *United States v. Northern P. R. Co.* 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598.

The grant of 1870 cannot be antedated as of the date of the act of July 27, 1866.

United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States v. Northern P. R. Co.* 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598.

The general-route location gave no right to any tract of land, and the right of disposal remained with the government.

Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364; *United States v. Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671.

Lands reserved by executive orders, when the map of definite location is filed, cannot be operated upon by the grant subsequently made.

Wileox v. Jackson ex dem. M'Connel, 13 Pet. 498, 10 L. ed. 264; *Northern P. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205; *Wolcott v. Des Moines Nav. & R. Co.* 5 Wall. 681, 18 L. ed. 689; *Wolsey v. Chapman*, 101 U. S. 756, 25 L. ed. 915; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 374, 35 L. ed. 771, 12 Sup. Ct. Rep. 13; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020.

The fact that the Atlantic & Pacific company claimed these lands as a part of its grant by virtue of what it claimed were maps of definite location, which claim was made effective from the year 1872, when the maps were filed, down to the forfeiture of the grant in 1886, would in itself operate to exclude these lands from the grants.

Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; *Menotti v. Dillon*, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945.

Lands set apart and reserved by Congress, or by other competent authority, cannot be taken or operated upon by any subsequent grant.

Wilcox v. Jackson ex dem. M'Connel, 13 Pet. 513, 10 L. ed. 271; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 374, 35 L. ed. 771, 12 Sup. Ct. Rep. 13; *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; *Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17; *Chicago, M. & St. P. R. Co. v. United States*, 159 U. S. 372, 40 L. ed. 185, 16 Sup. Ct. Rep. 26; *Northern P. R. Co. v. Musser-Sauntry Land, Logging, & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205.

Lands within the forfeited Atlantic & Pacific grant cannot be selected as indemnity by the Southern Pacific company.

Re Southern P. R. Co. 6 Land Dec. 816; *Moore v. Kellogg*, 17 Land Dec. 391; *Southern P. R. Co. v. Moore*, 11 Land Dec. 534; *Re Southern P. R. Co.* 15 Land Dec. 460; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 374, 35 L. ed. 771, 12 Sup. Ct. Rep. 13.

The indemnity lands of the Atlantic & Pacific railroad appertain to the grant to that company, and were not operated upon by any grant to the Southern Pacific company.

United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The Atlantic & Pacific indemnity lands set apart and reserved in 1872 cannot be taken by the Southern Pacific under its grants of 1871 or 1870.

Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Northern P. R. Co. v. Musser-Sauntry Land, Logging, & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205; *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020; *Spencer v. McDougal*, 159 U. S. 62, 40 L. ed. 76, 15 Sup. Ct. Rep. 1026; *Chicago, M. & St. P. R. Co. v. United States*, 159 U. S. 372, 40 L. ed. 185, 16 Sup. Ct. Rep. 26.

Messrs. Maxwell Evarts and L. E. Payson argued the cause and filed a brief for the Southern Pacific Railroad Company:

The Southern Pacific Railroad Company is entitled to a moiety of the conflicting place lands granted to it and the Atlantic & Pacific Railroad Company under the act of 1866.

Sioux City & St. P. R. Co. v. United States, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17; *Donahue v. Lake Superior Ship Canal R. & Iron Co.* 155 U. S. 386, 39 L. ed. 194, 15 Sup. Ct. Rep. 115; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Re Southern P. R. Co.* 6 Land Dec. 349.

The failure to assert a defense in an action does not preclude the party from setting it up in a subsequent action between the

same parties if the matter in controversy in the subsequent action is different from that involved in the first action.

Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204; *Nesbit v. Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

The act of the state legislature of April 4, 1870, was entirely unnecessary, and the franchise to build the road was fully conferred on the Southern Pacific by the act of Congress of July 27, 1866.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

The Southern Pacific Railroad Company is entitled to all lands within the place limits of its main-line grant, which also fall within the indemnity limits of the Atlantic & Pacific grant.

Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co. 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Re Chicago, St. P. M. & O. R. Co.* 11 Land Dec. 607.

The Southern Pacific Railroad Company is entitled to select as indemnity under its main-line grant lands within the indemnity limits of that grant, notwithstanding that such lands are also within the indemnity limits of the Atlantic & Pacific grant.

St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334.

The title to indemnity lands remained in the United States until selection and approval.

New Orleans P. R. Co. v. Parker, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654.

The Southern Pacific Railroad Company is entitled to select from the place and indemnity lands of the Atlantic & Pacific grant which have been actually restored to the public domain by the act of 1886, any lands which are within its own indemnity limits, whether under its main or branch line grant, to supply losses within its main and branch line place limits.

Ryan v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305; *Re Alabama & C. R. Co.* 20 Land Dec. 408; *Re Southern P. R. Co.* 26 Land Dec. 452.

The status of lands within indemnity limits at the time of selection determines entirely the right of the railroad thereto.

Allers v. Northern P. R. Co. 9 Land Dec. 452; *Northern P. R. Co. v. Halvorson*, 10 Land Dec. 15; *Missouri, K. & T. R. Co. v. Beal*, 10 Land Dec. 504; *Northern P. R. Co.* 183 U. S.

Moling, 11 Land Dec. 138; *Hensley v. Missouri, K. & T. R. Co.* 12 Land Dec. 19; *Northern P. R. Co. v. Bass*, 13 Land Dec. 201; *Hastings & D. R. Co. v. St. Paul, M. & M. R. Co.* 13 Land Dec. 535; *St. Paul, M. & M. R. Co. v. Munz*, 17 Land Dec. 288; *South & North Ala. R. Co. v. Hall*, 22 Land Dec. 273; *Southern P. R. Co. v. McKinley*, 22 Land Dec. 493.

*Mr. Justice **Brewer** delivered the opinion of the court: [520]

On May 14, 1894, the United States filed in the circuit court for the southern district of California a bill of complaint against the Southern Pacific Railroad Company (hereinafter called the Southern Pacific) and others, seeking to have certain patents canceled and their title quieted to a large body of land, including those described in said patents. Upon pleading and proofs a decree was entered in favor of the United States on June 6, 1898, quieting their title to most of the lands described in the bill. 86 Fed. 962. Cross appeals were taken from such decree to the circuit court of appeals for the ninth circuit, by which court the decree was affirmed on October 2, 1899. 38 C. C. A. 619, 98 Fed. 27. From such decree of affirmance both parties have appealed to this court.

The lands in controversy were within the grant made July 27, 1866 (14 Stat. at L. 292, chap. 278), to the Atlantic & Pacific Railroad Company (hereinafter called the Atlantic & Pacific), in aid of its projected line from Springfield, Missouri, to the Pacific ocean, and were situated along that line between the eastern boundary of California and the Pacific ocean. The Southern Pacific claims title to these lands by virtue of the 18th section of that act and its proceedings thereunder, had with the express approval of Congress.

Litigation has heretofore been had between the United States and the Southern Pacific in reference to lands along the line of the *Atlantic & Pacific, the result of [521] which litigation will be found in the following decisions of this court: *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *United States v. Colton Marble & Lime Co.* and *United States v. Southern P. R. Co.* 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163, and *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18. Those decisions are claimed by the government to be controlling of this case on the principle of *res judicata*.

There are therefore two distinct questions presented for our consideration: First, whether the Southern Pacific took any title to these lands by virtue of the act of 1866 or subsequent legislation; and, second, Do the prior decisions of this court control the determination of this case?

With reference to the first question a further statement of facts is necessary. The act of 1866 chartered the Atlantic & Pacific, empowered it to build a railroad from Springfield, in Missouri, to the Pacific

ocean, the description of the latter part of the route being in these words:

"Thence along the 35th parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

By the 3d section a grant of lands was made to said company in these words:

"Sec. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other [522] claims or rights, at the time the line* of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers."

The company filed its map of definite location in 1872, but never did any work in the way of constructing that part of its road from the Colorado river, that being the eastern boundary of California, to the Pacific ocean. On July 6, 1886, Congress passed an act forfeiting the lands granted to the Atlantic & Pacific, so far as they were adjacent to and conterminous with the uncompleted portions of the road. 24 Stat. at L. 123, chap. 637. By this act the interest of the Atlantic & Pacific in public lands in the state of California was divested and restored to the United States.

On December 2, 1865, the Southern Pacific was incorporated under the laws of California, "for the purpose of constructing, owning, and maintaining a railroad from some point on the bay of San Francisco, in the state of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego to the town of San Diego, in said state, thence eastward through the said county of San Diego to the eastern line of the state of California, there to connect with a contemplated railroad from said eastern line of

the state of California to the Mississippi river."

Section 18 of the act of 1866 reads as follows:

"*And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; *and in consideration thereof, to [523] aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

On January 3, 1867, the Southern Pacific filed in the Interior Department a map of a route from San Francisco *via* Mojave to Needles, on the Colorado river. This line from Mojave to Needles is on the same general course and contiguous to that adopted by the Atlantic & Pacific. The Secretary of the Interior refused to accept or approve the map on the ground that this particular part of the line was not authorized by the charter of the Southern Pacific. On April 4, 1870, the legislature of California passed the following act:

"Whereas, by the provisions of a certain act of Congress of the United States of America, entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from San Francisco to the Eastern Line of the State of California,' approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers, and authority were vested in and conferred upon, the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of Congress, and all other acts of Congress now in force, or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and assigns, are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power, and privileges hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said act of Congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges, franchises, power, and authority *conferred upon, granted to, or [524] vested in said company by the said acts of

Congress and any act of Congress which may be hereafter enacted." Cal. Stat. 1869, 1870, p. 883.

And on June 28, 1870, Congress passed the following joint resolution (16 Stat. at L. 382):

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the 3d day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land contiguous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the 3d section of said act."

Along this general line the Southern Pacific constructed its road, as California said, in reference to the grant made to the Southern Pacific by § 18 of the act of Congress of July 27, 1866, that it "hereby consents to said act;" and as Congress, by its resolution, approved the route selected by the Southern Pacific as a route authorized by that act, no one can question that the construction of the road was under such circumstances as entitle the company to the benefit of the grant made by said 18th section of the act of 1866.

[525] *By the act of 1866 Congress made grants of land to two different companies, by the 3d section, to the Atlantic & Pacific, and by the 18th section, to the Southern Pacific. The settled rule of construction is that where by the same act, or by acts of the same date, grants of land are made to two separate companies, in so far as the limits of their grants conflict by crossing or lapping, each company takes an equal, undivided moiety of the lands within the conflict. Neither acquires all by priority of location or priority of construction. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Donahue* 183 U. S.

v. Lake Superior Ship Canal, R. & Iron Co. 155 U. S. 386, 39 L. ed. 194, 15 Sup. Ct. Rep. 115; *Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17.

The question as to the two grants under this act of 1866 was presented to Mr. Justice Lamar, at that time Secretary of the Interior; and his ruling to the same effect appears in a letter of instructions to the acting Commissioner of the General Land Office on November 25, 1887. 6 Land Dec. 349. In that letter he said:

"The Southern Pacific Company located its main line January 3, 1867, and by the terms of the grant its right immediately attached to every odd section of land not of the character excepted by the grant, and within the 10-mile limit, subject, however, to be divested to the extent of a half interest in every such odd section that might fall within the common limits of both roads, after the filing of the map of definite location by the Atlantic & Pacific Company.

"The Atlantic & Pacific Company filed its map of definite location April 11, 1872, and April 16, 1874, showing that the primary or granted limits of said road overlapped and conflicted with the primary or granted limits of a portion of the Southern Pacific road. As to the lands falling within the granted limits of both roads, the filing of the map of definite location by the Atlantic & Pacific Company, showing such conflict, immediately divested the Southern Pacific Company of the right and title to a half interest in all such odd sections; and from that moment and by that act the two companies became entitled to equal, undivided moieties in such sections, without regard to the *priority of location of the line of the [526] road or priority of construction; the right of each company relating back to the date of the grant. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790."

As against this, it is contended that Congress could not have intended a road running from the western to the eastern border of California, parallel and contiguous to the Atlantic & Pacific road; that it must have intended a connection between the two roads on the western boundary or border of the state,—especially in view of the fact that the charter of the Southern Pacific contemplated only a line along the western part of the state from San Francisco to San Diego. Whatever doubts there might be in respect to this matter are removed by the action taken by the Southern Pacific and the resolution of June 28, 1870. The railroad company assumed that it had a right under the act of 1866 to locate a line to the eastern boundary of California, and did locate such a line, and filed a map thereof with the Secretary of the Interior; and Congress, by the joint resolution of June 28 in effect accepted and approved that line, and declared that the railroad

company might construct its road on the route indicated on that map.

Neither is the date of this resolution the time at which the rights of the railroad company arose, as is contended by counsel. No new land grant was contemplated; no substitution of one grant for another, or of one line for another. The obvious purpose was to accept the line proffered by the road as the line intended by the act of 1866, and the grant made by the act of 1866 was recognized as rightfully to be used in aid of the construction of a road along the line suggested by the company.

Neither is it material whether the line indicated on the map filed is to be taken as a line of general route or of definite location, for in fact the road was constructed along that line, "as near as may be," in the language of the resolution, and the road has been accepted by the government.

Neither does the fact that the line of road contemplated by the Southern Pacific's charter, at the time of the passage of the act of 1866, was along the western border of [527] the state, prevent *the operation of the grant. It is well settled that Congress has power to grant to a corporation created by a state additional franchises—at least franchises of a similar nature. *Sinking Fund Cases*, 99 U. S. 700, 727, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496, 504; *Pacific Railroad Removal Cases*, 115 U. S. 1, 15, *sub nom. Union P. R. Co. v. Myers*, 29 L. ed. 319, 324. 5 Sup. Ct. Rep. 1113; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *United States v. Stanford*, 161 U. S. 412, 431, 40 L. ed. 751, 759, 16 Sup. Ct. Rep. 576; *Central P. R. Co. v. California*, 162 U. S. 91, 118, 123, 40 L. ed. 903, 912, 914, 16 Sup. Ct. Rep. 766.

In *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, this very grant was before the court; and Mr. Justice Bradley, on page 44, L. ed. p. 159, Inters. Com. Rep. p. 162, Sup. Ct. Rep. p. 1083, having therefore narrated the facts in reference to various charters and grants, said:

"An examination of the acts referred to in these findings shows that Congress authorized the Southern Pacific Railroad Company to connect with the Atlantic & Pacific Railroad, at such point near the boundary line of the state of California as it should deem most suitable for a railroad line to San Francisco; and, to aid in the construction of such a railroad line, Congress declared that the company should have similar grants of land, and should be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific. Like powers were also given to the Southern Pacific Railroad Company to construct a line of railroad from Tehachapa pass, by way of Los Angeles, to the Texas Pacific road at the Colorado river (Fort Yuma). The Southern Pacific Company was not authorized by its original charter to extend its railroad to the Colorado river, as we already know by other cases brought

before us, and as appears by the act of the state legislature passed April 4, 1870, which assumed to authorize the company to change the line of its railroad so as to reach the eastern boundary line of the state; thus duplicating the power given to it by the act of Congress. See the state act quoted in 118 U. S. 399, 30 L. ed. 118, 6 Sup. Ct. Rep. 1133. This state legislation was probably procured to remove all doubts with regard to the company's power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by Congress, and that franchise was accepted, and the roads have been constructed in conformity thereto."

We are of the opinion, therefore, that Mr. Secretary Lamar *was right in his conclu-[528] sion that both the grant to the Southern Pacific and that to the Atlantic & Pacific took effect; and being by the same act, so far as there was a conflict, the two companies took equal, undivided moieties of the land.

We pass, therefore, to a consideration of the second question: Do prior decisions of this court control the determination of this case? *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *United States v. Colton Marble & Lime Co. and United States v. Southern P. R. Co.* 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163, and *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, are referred to. Those cases were brought by the United States against the Southern Pacific to quiet title to certain lands (but not the lands in controversy here) along the line of the Atlantic & Pacific within the state of California. In the last of these three cases the principle of *res judicata* was invoked and held applicable; and the title of the government to the lands involved was sustained on the ground that the question in controversy had been finally determined in the prior suits. In the opinion filed there was much discussion in respect to *res judicata*; and it was said, on page 48, L. ed. p. 376, Sup. Ct. Rep. p. 27:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

See also *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396, 42 L. ed. 202, 210, 17 Sup. Ct. Rep. 905, 913, in which the rule was thus stated:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has

under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.”

[529] *It becomes, therefore, important to determine what was decided in the prior cases; and in order to a clear understanding these additional facts must be borne in mind: On March 3, 1871, Congress passed an act (16 Stat. at L. 573, chap. 122) to incorporate the Texas & Pacific Railroad Company, the 23d section of which reads:

“That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company.”

On April 3, 1871, the Southern Pacific filed a map of a route from Tehachapa pass southward by way of Los Angeles, to connect with the Texas & Pacific Railroad at the Colorado river, and subsequently constructed a road on such line. This line crossed that of the Atlantic & Pacific, the general course of the former being north and south, and of the latter east and west. The grants, therefore, to the Atlantic & Pacific by the act of July 27, 1866, and that to the Southern Pacific by the act of March 3, 1871, came in conflict at and near the place of intersection of their lines. The lands in controversy in those suits were lands within the granted limits of both companies at the place of conflict. It was so distinctly stated in the opening of the opinion in the first case referred to:

“The question to be considered is not as to the validity of the grant to the Southern Pacific Company, but only as to its extent. It may be conceded that the company took title to lands generally along its line, from Tehachapa pass to its junction with the Texas Pacific; and the contention of the government is here limited to those lands

[530] only which lie within *the granted limits of both the Atlantic & Pacific and the Southern Pacific Companies, at the crossing of their lines, as definitely located.” p. 592, L. ed. 1096, Sup. Ct. Rep. p. 155.

Both grants were grants *in præsenti*, and when the maps of definite location were filed and approved, the grants took effect by relation as of the dates of the acts. Hence, if each company filed a map of definite location, the title of the Atlantic & Pacific, relating back to the year 1866, was anterior and superior to that of the Southern Pacific of date 1871; and all the lands within the conflict passed to the Atlantic & Pacific, 183 U. S.

rather than to the Southern Pacific. To avoid the effect of this conclusion,—a conclusion resting upon well-settled principles of public-land law,—the Southern Pacific contended that no map of definite location was ever filed by the Atlantic & Pacific, or approved by the Secretary of the Interior; but after a full examination of the facts this court held otherwise, summing up its conclusions in these words:

“Our conclusions therefore are that a valid and sufficient map of definite location of its route from the Colorado river to the Pacific ocean was filed by the Atlantic & Pacific Company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic & Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886: that by that act of forfeiture the title of the Atlantic & Pacific was retaken by the general government, and retaken for its own benefit, and not that of the Southern Pacific Company; and that the latter company has no title of any kind to these lands.” p. 607, L. ed. p. 1101, Sup. Ct. Rep. p. 160.

So, in the opinion in the last of the three cases, is this statement of the facts and question:

“The principal contention of the United States is that the lands in dispute are in the same category in every respect with those in controversy in *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152, and *United States v. Cotton Marble & Lime Co.* and *United States v. Southern P. R. Co.* 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163; and that, so far as the question of title is concerned, the judgments in those cases have conclusively determined, as *between the United States and [531] Southern Pacific Railroad Company and its privies, the essential facts upon which the government rests its present claim.

“Stated in another form, the United States insists that in the former cases the controlling matter in issue was, whether certain maps filed by the Atlantic & Pacific Railroad Company in 1872, and which were accepted by the Land Department as sufficiently designating that company’s line of road under the act of Congress of July 27, 1866, chap. 278 (14 Stat. at L. 292), were valid maps of *definite location*; the United States contending in those cases that they were, and the Southern Pacific Railroad Company contending that they were not, maps of that character; that that issue was determined in favor of the United States; and that, as the lands now in dispute are within the limits of the line of road so designated, it is not open to the Southern Pacific Railroad Company, in this proceeding, to question the former determination that such maps sufficiently identified the lands granted to the Atlantic & Pacific Railroad Company by the act of 1866, and were therefore valid maps of definite location.” p. 25, L. ed. p. 368, Sup. Ct. Rep. p. 18.

And again on page 29, L. ed. p. 370, Sup.

Ct. Rep. p. 20, after a quotation of the 23d section of the act of March 3, 1871, is this declaration:

"The Southern Pacific Railroad Company constructed the road thus contemplated, and claims that the lands here in dispute passed to it under the above act of 1871."

So also on page 46, L. ed. p. 376, Sup. Ct. Rep. p. 26:

"The lands now in controversy are situated opposite to and are conterminous with the first, second, and fourth sections of the Southern Pacific Railroad, as constructed between 1873 and 1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the 23d section of the Texas & Pacific act of March 3, 1871."

And on page 61, L. ed. p. 381, Sup. Ct. Rep. p. 32, the conclusion was summed up in these words:

"For the reasons stated, we are of opinion that it must be taken in this case to have been conclusively adjudicated in the former cases, as between the United States and the Southern Pacific Railroad Company—

[532] *"1. That the maps filed by the Atlantic & Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866;

"2. That upon the acceptance of those maps by the Land Department the rights of that company in the lands so granted attached, by relation as of the date of the act of 1866; and

"3. That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain without the Southern Pacific Railroad Company's having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain.

"These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; for, as all the lands here in controversy are embraced by the maps of 1872, and therefore appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below."

Obviously the fact settled by the decisions in those cases was the filing by the Atlantic & Pacific of an approved map of definite location. Upon that the controversy hinged. Such a map having been filed, the title of the Atlantic & Pacific vested as of the date of the act of July 27, 1866; and inasmuch as the Southern Pacific claimed only by a grant of date March 3, 1871, it took no title. This which is apparent from the foregoing quotations is emphasized by the full discussions in the opinions, as well as by the allegations in the pleadings upon which the

cases were tried. That fact, having been determined, must be taken in the present suit as not open to dispute. The Atlantic & Pacific did file a sufficient map of definite location of its line from the Colorado river to the Pacific ocean, and such map was approved by the Secretary of the Interior. Its title, therefore, to the land within the limits of the grant in California, took effect as of date July 27, 1866. No claim of right *or [533] title arising only in 1871, and created by an act of that date, could affect its title.

But it was not adjudged in those cases either that the Southern Pacific had no title to any real estate by virtue of the act of 1866, or that if there was any real estate to which it had any claim or right by virtue of that act, such claim was not of equal force with that of the Atlantic & Pacific. The general statement at the close of the quotation from 146 U. S. 607, 36 L. ed. 1101, 13 Sup. Ct. Rep. 160, "that the latter company has no title of any kind to these lands," and the similar statement in ¶ 3 of the quotation from 168 U. S. 61, 42 L. ed. 381, 18 Sup. Ct. Rep. 32, are to be taken as applicable only to the facts presented, and cannot be construed as announcing any determination as to matters and questions not appearing in the records. Of course the decrees that were rendered in those cases are conclusive of the title to the property involved in them, no matter what claims or rights either party may have had and failed to produce; but as to property which was not involved in those suits they are conclusive only as to the matters which were actually litigated and determined. "On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action." *Cromwell v. Sac County*, 94 U. S. 351-356, 24 L. ed. 195-199. "The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided." *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683-687, 39 L. ed. 859-861, 15 Sup. Ct. Rep. 733-735. The question here presented was not determined in the prior cases, and is whether the Southern Pacific acquired any title to lands other than those involved in those suits by virtue of the act of 1866; and that question, as we have seen, must be answered in the affirmative. Nor is this a mere technical difference between those cases and this. Counsel for the railroad company call the line from Mojave southward *via* Los Angeles, to connect with the Texas & Pacific, a "branch line," and that eastward from Mojave to Needles, to connect with the Atlantic & Pacific, a "main line;" *but by whatever name these two lines [534] are called, they were built under the authority of two different statutes, the line from Mojave southward *via* Los Angeles under the authority of the act of Congress of

March 3, 1871,—an act which in terms authorized the building of a road from a point at or near Tehachapa pass, which is in the vicinity of Mojave, southward by way of Los Angeles, to connect with the Texas & Pacific, and gave no authority to build a line eastward from Mojave to connect with the Atlantic and Pacific,—the line from Mojave eastward, under the act of 1866, which authorized the Southern Pacific to connect with the Atlantic & Pacific at or near the boundary of the state. The route which was selected by the company for this line was approved by Congress as authorized by the act of 1866. Hence the one line was built under the authority of the act of 1871, and the other under the authority of the act of 1866.

Our conclusions therefore are that the United States, having become by the forfeiture act of July 6, 1886, repossessed of all the rights and interests of the Atlantic & Pacific in this grant within the limits of California, hold an equal, undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to the Atlantic & Pacific and of that made to the Southern Pacific by the act of July 27, 1866; and that the Southern Pacific holds the other equal, undivided moiety therein. The United States and the Southern Pacific being, therefore, tenants in common of a large body of lands, a partition is necessary. It was suggested by Secretary Lamar, in the letter heretofore referred to, that the Southern Pacific take only every other alternate odd-numbered section. We see no impropriety in such mode of partition, though, under the case as it stands, we can make no order to that effect. In whatever way partition may be made, equity requires that the lands which the Southern Pacific has assumed to sell, and which were excepted by the circuit court from the decree in favor of the United States, and in respect to which they took their cross appeal, must be among those set off to the Southern Pacific, and thus the title of the purchasers be perfected. It is needless, therefore, to consider the merits of the cross appeal of the United States.

[535] *It is also unnecessary to determine the rights of the Southern Pacific to lands outside the limits of conflict. It having been adjudged that the Southern Pacific, by the construction of its road eastward from Mojave to Needles, became entitled to the benefit of the grant made by the 18th section of the act of 1866, the adjustment of the grant is properly to be had in the Land Department, subject, of course, if necessary, to further contests in the courts.

The decree of the Circuit Court of Appeals of the Ninth Circuit, affirming the decree of the Circuit Court for the Southern District of California, will be reversed, and the case remanded to the Circuit Court, with instructions to enter a decree quieting the title of the United States to an equal undivided moiety in all alternate sections within the place or granted limits of the Atlantic & Pacific in California, so far as those

183 U. S.

limits conflict with the like limits of the Southern Pacific, excepting therefrom those lands in respect to which there has been some prior adjudication, and to dismiss the bill as to all other lands without prejudice to any future suit or action.

UNITED STATES TRUST COMPANY OF
NEW YORK *et al.*, *Appts.*,

v.

TERRITORY OF NEW MEXICO.

TERRITORY OF NEW MEXICO, *Appt.*,

v.

UNITED STATES TRUST COMPANY
OF NEW YORK *et al.*

(See S. C. Reporter's ed. 535-545.)

Appeal—effect of reversal of decree of dismissal—agreed statement of facts—sale under foreclosure—liability for delinquent taxes—when claim filed in time—finding of fact—penalty not enforced when not claimed in pleading—interest.

1. The reversal by the Supreme Court of the United States of an order which dismissed a petition claiming a lien for taxes, on the ground that it presented no claim against the property or the parties, is an adjudication that upon the face of the petition a valid claim was presented, and is conclusive of such *prima facie* validity, not only as against objections which were in fact made, but also as against those which might have been made.
2. An agreed statement of facts certified by a territorial supreme court as a statement of facts under the act of April 7, 1874, brings nothing before the Supreme Court of the United States for consideration, where, instead of stating the ultimate facts, it contains a narrative of facts, transcripts of records, and the testimony which certain witnesses would have given if they had been produced and sworn.
3. A claim of a lien for, and payment by the receiver of railroad property of, delinquent taxes on such property sold under decree of foreclosure, is in time, where the intervening petition making such claim was filed and the final adjudication establishing such lien made within the time expressly named in the decree of foreclosure for the presentment of any claims for allowance, although such petition was filed after the confirmation of the sale, but while the property was still in the possession of the receiver, and the latter had

NOTE.—On conclusiveness of judgments generally—see notes to *Sharon v. Terry* (C. C. N. D. Cal.) 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank* (Neb.) 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 577; *Morrill v. Morrill* (Or.) 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street Rail Co. v. Wharton*, 38 L. ed. U. S. 429, and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

As to review by United States Supreme Court of judgment on agreed statement—see note to *Stimpson v. Baltimore & S. R. Co.* 13 L. ed. 442.

As to review by the United States Supreme Court of territorial decisions—see note to *Miners' Bank v. State ex rel. District Prosecuting Attorney*, 13 L. ed. U. S. 867.

been discharged before such final adjudication.

4. The grantees of the purchasers of property at a sale under foreclosure cannot claim that they were misled in any way as to their liability for unpaid taxes where, by the terms of the decree, the sale was to be made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgages foreclosed, and on the confirmation of the sale, and before they took title from the purchasers at such sale, the order specifically included within the obligations which must be assumed any taxes which might "finally be adjudged to be a lien on the property."
5. A proceeding to establish a tax lien is reinstated in the trial court as of the date of an order therein dismissing the petition on the ground that it presented no claim against the property or the parties, by the reversal of such order by the Supreme Court of the United States.
6. A finding by the trial court in a proceeding to establish a tax lien upon railroad property, as to the number of miles of railroad subject to taxation, when approved by the supreme court of the territory, is conclusive upon the Supreme Court of the United States as to such fact.
7. The penalty of 25 per cent imposed by N. M. Comp. Laws 1897, § 4035, upon any person who fails to render a true list of his property for taxation, will not be enforced in a proceeding to establish a lien for unpaid taxes, where no such penalty is claimed in the petition.
8. Interest on unpaid taxes prior to a decree establishing liability therefor, in an action to collect such taxes, is properly refused where the assessment was made in gross upon 60.7 miles of railroad, only 55 miles of which were subject to taxation, since under such circumstances the owners were justified in contesting their liability to such assessment and taxation in gross, and until there was an identification of the property subject to taxation, and a determination of the amount of taxes due, it would have been inequitable to charge penalties for nonpayment.

[Nos. 181, 182.]

Argued October 30, 31, 1901. Decided January 6, 1902.

CCROSS APPEALS from the Supreme Court of the Territory of New Mexico to review a decision modifying a decree of the District Court of the Second Judicial District establishing a tax lien. *Affirmed.* See same case below, 62 Pac. 987.

Statement by Mr. Justice **Brewer**:

[536] *On July 16, 1895, the United States Trust Company of New York filed its bill in the office of the clerk of the district court of the second judicial district of the territory of New Mexico, praying foreclosure of a mortgage given by the Atlantic & Pacific Railroad Company. On January 10, 1896, Charles W. Smith was appointed receiver. On April 10, 1896, a decree of foreclosure was entered. The decree provided that the purchaser or purchasers, and his or their successors or assigns, should, as part consideration and purchase price of the property purchased, and in addition to the sum bid, pay—

"any indebtedness and obligations or liabilities which shall have been legally contracted or incurred by the receiver before delivery or possession of the property sold, including the receiver's notes or certificates hereinbefore mentioned, and also any indebtedness and liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to said first mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage, and directing payment thereof, provided that suit be brought for the enforcement of such indebtedness, obligation, or liability within the period allowed by any statute of limitations applicable thereto.

"Any such claim for indebtedness, obligations, or liabilities which shall not have been presented in writing to the receiver *or filed [537] with the clerk of this court prior to the time of delivery of possession of such property shall be presented for allowance, and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance. The receiver shall publish such notice at least once a week for the period of six weeks, in one or more newspapers published in Albuquerque, New Mexico, Prescott, Arizona, and Los Angeles, California, upon the request of any purchaser or purchasers after delivery of the possession of the property to them; and any such claims which shall not be so presented or filed within the period of six months after the first publication of such notice shall not be enforceable against said receiver nor against the property sold, nor against the purchaser or purchasers, his or their successors or assigns."

On May 3, 1897, a sale was made under the decree to A. F. Walker, R. Somers Hayes, and Victor Morawetz. On May 4 the sale was confirmed. The order of confirmation contained substantially the same provisions respecting payment of obligations as the decree, and added, "including also any taxes which may finally be adjudged to be a lien upon the property sold under the decree aforesaid."

According to an affidavit filed in the case this clause was entered at the suggestion of counsel for the territory, and upon notice in open court of his intention to present a claim for the taxes hereinafter referred to. On June 22, 1897, the purchasers conveyed the property to the Santa Fe Pacific Railroad Company, and on July 1, 1897, the receiver delivered possession of the property. On October 4, 1898, he was by order of the court discharged as receiver. He failed to give the notice required by the decree for the purpose of cutting off claims against the property, and on application of the Santa Fe Pacific Railroad Company, the grantee of the purchasers, on December 19, 1898, an order was entered directing the clerk of the court to publish the notice, and a notice was published that on or before October 23, 1899, all

claims against the receiver must be presented or they would be barred. On June 10, 1897, after the confirmation of the sale, but while [538] the property was in possession *of the receiver, the territory of New Mexico, by leave, filed an intervening petition claiming a lien for and payment by the receiver of certain taxes upon part of the railroad property in the county of Valencia. To this petition the trust company and receiver, on June 23, 1897, filed joint and several pleas. On the same day, without passing upon the sufficiency of the pleas, the court ordered the intervening petition dismissed on the ground that the "matters and things thereinset up" were "not sufficient to entitle the said intervening petitioner to the relief sought by its petition." On appeal to the supreme court of the territory this order of dismissal was affirmed. From such decision the territory appealed to this court, which upon the first hearing affirmed the rulings below (172 U. S. 171, 186, 43 L. ed. 407, 412, 19 Sup. Ct. Rep. 128), but on a petition for rehearing reversed the order and remanded the case for further proceedings. 174 U. S. 545, 43 L. ed. 1079, 19 Sup. Ct. Rep. 784.

The mandate having been returned and presented to the trial court on August 4, 1899, proceedings were there had which culminated, on October 5, 1899, in a finding that the territory was entitled to a tax lien upon a portion of the railroad property for \$74,168.70, and a decree establishing such lien. From this decree both parties appealed to the supreme court of the territory, which, on August 23, 1900, modified the decree by reducing the amount to \$61,922.73, and awarding interest at the rate of 6 per cent per annum from October 5, 1899, the date of the decree in the district court. 62 Pac. 987. From this decision both parties have appealed to this court.

A statement of facts agreed to by the parties was filed in the district court, and upon this statement the decree was founded. This agreed statement contains a narrative of facts, transcripts of records and the testimony which certain witnesses would have given if they had been produced and sworn. This statement of facts was incorporated in the record transmitted to the supreme court of the territory, and is the only portion of the record showing the facts presented on the hearing in the district court. After the decision by the supreme court of the territory, both parties having signified an intention to appeal to this court, the territory applied [539] for a statement of facts in *accordance with the act of Congress of date April 7, 1874, in reference to practice in territorial courts and appeals therefrom (18 Stat. at L. 27, chap. 80), which application was resisted by the counsel for the trust company and the receiver on the ground that the case had been tried in the court below upon an agreed statement of facts, whereupon the supreme court made this entry of record:

"Being willing and desirous that the respective parties be allowed to get their appeals before the Supreme Court of the United States in such shape as their counsel deem
183 U. S.

proper, the court hereby certifies for use upon the appeal of the said The United States Trust Company of New York and C. W. Smith, receiver, that this case was tried in the court below upon an agreed statement of facts, which agreed statement of facts was made part of the record in the district court and part of the record upon appeal to this court, and is to be a part of the record on appeal to the Supreme Court of the United States; that the said agreed statement sets out the facts of this case which were heard or considered by this court upon said appeal, and the same is hereby adopted by this court as its statement of such facts for use upon the appeal aforesaid, without here repeating the same.

"And the court further certifies for use upon the appeal of the said territory of New Mexico, in accordance with the prayer of the said appellant, the following statement of facts."

Following this was a special statement of facts, certified to under the hand of the Chief Justice.

Mr. C. N. Sterry argued the cause, and, with *Messrs. E. D. Kenna* and *Robert Dunlap*, filed a brief for the trust company:

While a petition in intervention need not be formal, but may be brief, yet it should exhibit all the material facts which are relied upon for the specific relief invoked, embodying, either by a recital or by reference, so much of the record in the original suit in which the petition is filed as is essential to show a right to the particular relief demanded by the petition.

Empire Distilling Co. v. McNulta, 23 C. C. A. 415, 46 U. S. App. 578, 77 Fed. 703; *Beach*, Modern Eq. Pr. ¶ 579.

When this case was reinstated upon the docket of the district court (upon the mandate of the supreme court of the territory), the district court, having parted with the possession of the property upon which the taxes were claimed to have been levied, having disposed of all the funds that it ever had possession of in the foreclosure suit, and having finally discharged its receiver, should, of its own motion, have dismissed the intervening petition.

Bond v. State, 68 Miss. 648, 9 So. 353; *Brown v. Gay*, 76 Tex. 444, 13 S. W. 472; *Fordyce v. Du Bose*, 87 Tex. 78, 26 S. W. 1050; *Texas & P. R. Co. v. Watson* (Tex. Civ. App.) 24 S. W. 952; *New York & W. U. Telg. Co. v. Jewett*, 115 N. Y. 166, 21 N. E. 1036. See also *McNulta v. Lockridge*, 137 Ill. 281, 27 N. E. 452; *Farmers' Loan & T. Co. v. Central R. Co.* 7 Fed. 539; *High, Receivers*, 2d ed. § 398b.

Ordinarily an intervening petition cannot be filed after final judgment or decree, since the court then loses jurisdiction, except to enforce such judgment or decree.

Meadows v. Goff, 90 Ky. 540, 14 S. W. 535; 11 Enc. Pl. & Pr. p. 503, note 5.

The purchase of the property upon its sale under the decree of foreclosure, the confirmation of such purchase, and the conveyance of the property to the purchasers,

created a contract between the purchasers and the court as to the method and manner in which the unknown liabilities assumed by the purchasers as part of the purchase price were to be enforced, and the court was powerless to change the terms of such contract without the consent of the purchasers.

Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; *Davis v. Mercantile Trust Co.* 152 U. S. 594, 38 L. ed. 565, 14 Sup. Ct. Rep. 693; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 30 Fed. 332; *Fidelity Ins. Trust & S. D. Co. v. Norfolk & W. R. Co.* 88 Fed. 820; *Chicago & O. R. Co. v. McCammon*, 10 C. C. A. 50, 18 U. S. App. 628, 709, 61 Fed. 774; *Houston & T. C. R. Co. v. Crawford*, 88 Tex. 277, 28 L. R. A. 761, 31 S. W. 176. See also *Central Trust Co. v. St. Louis, A. & T. R. Co.* 59 Fed. 385; *Farmers' Loan & T. Co. v. Central R. Co.* 7 Fed. 540.

There is no lien on real estate for taxes, except by force of statute, and a statute creating such lien must be strictly construed. Such statutory lien cannot be enlarged by construction.

Heine v. Levee Comrs. 19 Wall. 655, 22 L. ed. 223; *Lyon v. Alley*, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; *Cooley, Taxn.* p. 305; *Miller v. Anderson*, 1 S. D. 539, 11 L. R. A. 317, 47 N. W. 957. See also *Creighton v. Manson*, 27 Cal. 614; *State, Maeknet, Prosecutor, v. Newark*, 42 N. J. L. 38; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *Garrettson v. Scofield*, 44 Iowa, 37; *Otoe County v. Mathews*, 18 Neb. 466, 25 N. W. 618; *Meyer v. Burritt*, 60 Conn. 122, 22 Atl. 501; *New England Loan & T. Co. v. Young*, 81 Iowa, 738, 10 L. R. A. 478, 39 N. W. 116, 46 N. W. 1103; *Philadelphia v. Greble*, 38 Pa. 339; *Cabin Creek Bd. of Edu. v. Old Dominion Iron, Min. & Mfg. Co.* 18 W. Va. 441; *Kentucky C. R. Co. v. Com.* 92 Ky. 64, 17 S. W. 196; *Tousey v. Post*, 91 Mich. 631, 52 N. W. 57; *Anderson v. State*, 23 Miss. 459.

There was no statute in New Mexico requiring or making these taxes, when levied, relate back to any previous time or date, and, whether rightfully levied by the collector, or not, they could only become due on the 1st of January, 1898.

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 534, 40 L. ed. 250, 16 Sup. Ct. Rep. 83.

An agreed statement of facts made part of the record in a case tried by a court without a jury is the equivalent of a special verdict, and constitutes a sufficient compliance with U. S. Rev. Stat. §§ 649 and 700, which, in their requirements, are substantially equivalent to the act of April 7, 1874.

Wayne County v. Kennicott, 103 U. S. 554, 26 L. ed. 486; *Lehn v. Dickson*, 148 U. S. 73, 37 L. ed. 373, 13 Sup. Ct. Rep. 481.

The adoption by the supreme court of the territory of findings made by the district court would be a sufficient statement of the facts of the case, within the meaning of the act of Congress approved April 7, 1874.

Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421; *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct.

Rep. 282. See also, to the same effect, *Apache County v. Barth*, 177 U. S. 540, 44 L. ed. 879, 20 Sup. Ct. Rep. 718.

Any admission in the pleas originally filed to the intervening petition could not be used for any purpose by either party except upon the hearing of the pleas either upon argument or upon issue joined.

United States v. California & O. Land Co. 148 U. S. 40, 37 L. ed. 359, 13 Sup. Ct. Rep. 458; *Farley v. Kittson*, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534.

The territory was not entitled to recover any interest upon the taxes alleged to have been levied. The interest fixed by the statute quoted was and is in the nature of a penalty.

Litchfield v. Webster County, 101 U. S. 779, 25 L. ed. 927; *Cooley, Taxn.* 2d ed. pp. 456, 457.

It could not possibly attach in any event until the taxes themselves were levied. While the property was being administered in the hands of the court as an insolvent property, interest could not be allowed or collected on account of the failure to pay any taxes.

Thomas v. Western Car Co. 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824; *Grand Trunk R. Co. v. Central Vermont R. Co.* 90 Fed. 163; *Grand Trunk R. Co. v. Central Vermont R. Co.* 91 Fed. 570.

Until the amount of legal taxes was definitely ascertained, the owners of this property had no opportunity of paying such taxes, and were therefore not in default in not paying; hence the claim for back interest is not a valid one.

Lake Shore & M. S. R. Co. v. People, 46 Mich. 193, 9 N. W. 249; *Redwood County v. Winona & St. P. Land Co.* 40 Minn. 513, 41 N. W. 465.

Mr. F. W. Clancy argued the cause and filed a brief for the Territory:

An assessment of property is void, when the valid portion, if any, of the tax cannot be separated, but not so where it is separable.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

Courts of equity regard substance, and not form; and even at law a case will not be reversed where "the result is right, although the manner of reaching it may have been wrong."

First Nat. Bank v. Home Sav. Bank, 21 Wall. 301, 22 L. ed. 560; *Allis v. Northwestern Mut. L. Ins. Co.* 97 U. S. 145, 24 L. ed. 1008; *Gregg v. Moss*, 14 Wall. 569, 20 L. ed. 742; *Cannon v. Pratt*, 99 U. S. 623, 25 L. ed. 448; *Hornbuckle v. Stafford*, 111 U. S. 394, 28 L. ed. 470, 4 Sup. Ct. Rep. 515.

The taxes are liens on the property from the dates of the levies in the several years, respectively.

Peters v. Myers, 22 Wis. 602.

The admission in the pleas filed to the intervening petition, that 58 miles of right of way was not through government land, but land which belonged to private parties, and

was acquired by the railroad company under an act of Congress, estops defendants to raise the question as to the amount and character of that part of the road.

Davis v. Wakelee, 156 U. S. 689, 39 L. ed. 584, 15 Sup. Ct. Rep. 555; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 268, 24 L. ed. 696.

[539] *Mr. Justice **Brewer** delivered the opinion of the court:

The district court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this court of such order is an

[540] adjudication *that upon the fact of the petition a valid claim was presented, and is conclusive of such prima facie validity, not merely against objections which were in fact made, but also against those which might have been made. *Cromwell v. Sac County*, 94 U. S. 351, 352, 24 L. ed. 195, 197; *Nesbit v. Independent Dist.* 144 U. S. 610, 618, 36 L. ed. 562, 565, 12 Sup. Ct. Rep. 746. We start in this inquiry then with the adjudicated fact that upon the face of the intervening petition was presented a valid claim for the taxes therein specified.

The case was heard in the district court upon an agreed statement of facts, which was thereafter certified by the supreme court of the territory as a statement of facts under the act of April 7, 1874. We have had several occasions to consider the effect of an agreement of the parties as to the facts. See *Wilson v. Merchants' Loan & T. Co.* 183 U. S. 121, ante, 113, 22 Sup. Ct. Rep. 55, and cases cited in the opinion. An agreed statement of facts may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law, if such agreed statement is of the ultimate facts, but if it be merely a recital of testimony or evidential facts, it brings nothing before an appellate court for consideration. The same rule obtains in cases of appeals from territorial courts under the act of 1874. That act in terms provides that—

"On appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below." *Stringfellow v. Cain*, 99 U. S. 610, 25 L. ed. 421; *Idaho & O. Land Improv. Co. v. Bradbury*, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177.

Tested by the various authorities just cited, the certified statement of facts is insufficient, and presents nothing for our examination. This disposes of most of the questions discussed by counsel.

When the mandate from this court was filed in the district court, a motion to dismiss and also pleas in abatement and in bar were successively filed, argued, and overruled. We shall not attempt to notice in detail the various matters presented in the motion and pleas. It will be sufficient to state our conclusions upon the important questions.

[541] *There was no invalidity in the fact of additional assessments. Indeed the claim in the petition was wholly for taxes based upon 183 U. S.

additional assessments for prior years, and when this court adjudged that that petition upon its face showed a tax claim against the property, it was an adjudication in favor of the validity of such additional assessments.

The filing of the intervening petition and the final adjudication thereon were in time. It is true the petition was not filed until after the sale had been confirmed and the master's deed executed, and that by the decree of confirmation the receiver was directed to then turn over the property to the purchasers. It may be also conceded as generally true that a retention by a receiver, after the time for the delivery of the property in his hands, is as agent of the purchasers. *Very v. Watkins*, 23 How. 469, 474, 16 L. ed. 522, 523. But the filing of the petition, as well as the mandate from this court, was within the time expressly named in the decree, as follows:

"Any such claim for indebtedness, obligations, or liabilities which shall not have been presented in writing to the receiver, or filed with the clerk of this court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance."

Indeed the petition was filed while the property was still in the hands of the receiver, and that would seem to bring the action of the intervener within the terms of the 1st clause of the quotation just made. At any rate, everything in the district court, even its final adjudication, was before October 23, 1899, the time fixed in the notice for the cutting off of claims against the property given at the instance of the grantee of the purchasers, to wit, the Santa Fe Pacific Railroad Company. That the receiver had been discharged before such mandate was filed or final proceedings had is immaterial, as the grantee of the purchaser (the present owner of the property) had made itself a party to the record by coming in and praying for the publication of a notice to cut off claims.

Neither can the Santa Fe Company claim that it was misled *in any way as to its liability for these taxes, for not only by the terms of the decree was the sale to be made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgages foreclosed, but also, on the confirmation of the sale and before it took title from the purchasers at such sale, the order specifically included within the obligations which must be assumed any taxes which might "finally be adjudged to be a lien upon the property."

No order was necessary for retaking possession. By the terms of the decree the court, although the actual possession was surrendered, retained a constructive control which it could enforce whenever its orders were not complied with, and the present proceeding was to establish that the property was subject to these taxes. The proceeding was initiated, not only when there was a qualified control, but also an actual possession.

sion of the property, and no subsequent orders of the court put an end to its jurisdiction to proceed to an inquiry as to the validity of the tax lien. The reversal of the order of dismissal by this court reinstated the proceeding in the trial court as of the date of the order of dismissal. If the decree is not complied with by the present owners of the property, it may then become necessary to order a retaking of possession.

While the description in the intervening petition of the property sought to be subjected to the taxes may be indefinite, the property is sufficiently described in the decree, and it must be assumed that the testimony warranted the description.

These are all the matters we deem it necessary to notice, and are of opinion that in the record, so far as we are at liberty to examine it, is disclosed no error prejudicial to the rights of the appellants.

On its cross appeal the territory, which had obtained a properly certified statement of facts sufficient for the questions it presents, contends that it was entitled to recover the amount of the tax upon 60.7 miles of road, as fixed by the assessments, whereas the court found that there were only 55.5 miles subject to taxation, and made the award upon the basis of assessments upon that extent of road. It insists that the assessments were conclusive of the amount due [543] because no appeals to correct *them were taken, as permitted by law. It further says that in any event the statement made in the pleas and sworn to by the solicitor for the trust company and the receiver, "that about 58 miles of said right of way in said county and territory was and is through land which was not government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress," should be held conclusive as to the number of miles subject to taxation. The trial court found, as stated, that there were 55.5 miles so subject. This finding was approved by the supreme court, and is conclusive upon us as to the fact; and if in truth there were only so many miles of road subject to taxation, it would be inequitable to adjudge a greater liability, for that would be enforcing taxes upon property which was not subject to taxation.

Again, it is contended that the territory was entitled to a 25 per cent penalty under § 4035 of the Compiled Laws of New Mexico, 1897, which reads:

"If any person liable to taxation shall fail to render a true list of his property as required by the preceding three sections the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of 25 per cent thereof, which shall be assessed and collected as a part of the taxes of such person."

It is enough to say that no such penalty was claimed in the intervening petition. Penalties are not favored in equity, and seldom will a chancellor enforce penalties in

favor of a party who does not ask for them. Again, by the terms of the section the penalty is to be "assessed and collected as a part of the taxes," and the record shows no assessment of the penalty.

A final contention is in respect to interest. Section 4066 of the Compiled Laws provides:

"On the 1st day of January in each year half of the unpaid taxes for the year last past, and on the 1st day of July in each year the remaining half of the unpaid taxes for the year last past, shall become delinquent, and shall draw interest at the *rate of 25 per cent per annum, but the collector shall continue to receive payments of the same after the 1st day of January and July until the day of sale." [544]

The district court ignored the provisions of this section, and allowed interest at the rate of 6 per cent per annum from the times the taxes became delinquent in the several years. The supreme court modified this, and allowed interest only from October 5, 1899, the date of the decision in the district court. In 1899 the legislature passed a new statute in reference to taxes. Chap. 22, p. 47, Laws of New Mexico, 1899. By § 10 of that act § 4066 of the Compiled Laws was in terms amended, and, in lieu of the 25 per cent, different and graded penalties were enforced. By § 34 of that act "the time for the payment of all taxes now delinquent is hereby extended to May 1, 1899, and when the same may be in litigation at the date of the passage of this act until such litigation be determined." Other provisions of this section, taken in connection with a statute passed at the same session of the legislature (chap. 52, p. 106, Laws 1899), referred to by the supreme court of the territory in its opinion, may render it doubtful whether the legislature intended to remove the penalty of 25 per cent interest in respect to this property; for such interest in tax proceedings is in the nature of a penalty. Yet, irrespective of this statutory question, we are of opinion that there was no error in refusing to enforce this charge against the property. The assessment was made in gross upon 60.7 miles of road, without specification of the particular miles, other than that they were "embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company." The finding of the court shows that no such length of railroad was subject to taxation, but only 55.5 miles, and those were specified and described. The owners of the road were therefore justified in contesting their liability to such assessment and taxation in gross, and until there was an identification of the property subject to taxation and a determination of the amount of taxes due, it would be inequitable to charge penalties for nonpayment. *Lake Shore & M. S. R. Co. v. *People*, [545] 46 Mich. 195, 211, 9 N. W. 249; *Redwood County v. Winona & St. P. Land Co.* 40 Minn. 512, 522, 41 N. W. 465. This is not a suit brought by a property holder to restrain the collection of taxes, in which case it would

be incumbent upon him to pay, or tender, the amount conceded to be due, but one in which the authorities are the moving party seeking to collect taxes, and in which the liability *in toto* is denied, and the property subject to taxation not fully identified or the amount of taxes determined until the final judgment.

Viewing the proceedings from an equitable standpoint, we see no error in refusing interest prior to the decree. *The decree of the Supreme Court of New Mexico is affirmed.* each party to pay the costs of its appeal to this court.

WILDER'S STEAMSHIP COMPANY, *Petitioner.*

(See S. C. Reporter's ed. 545-552.)

Appeals from the supreme court of Hawaii.

1. No right of appeal to the United States circuit court of appeals from a decree of the supreme court of the territory of Hawaii, in a case of admiralty pending in the courts of Hawaii when the act of April 30, 1900, providing a government of the territory of Hawaii, took effect, was given by § 86 of that act, establishing in the territory a district court of the United States with the powers of a circuit court, and allowing appeals therefrom to the circuit court of appeals, but restricting appeals from the territorial courts of Hawaii to cases in which appeals are allowable to the courts of the United States from the courts of the several states.
2. No order of the Supreme Court of the United States assigning the territory of Hawaii to a judicial circuit under the act of March 3, 1891, can give a right of appeal inconsistent with the provision of act of April 30, 1900, § 86, restricting appeals from the court of the territory of Hawaii to cases in which appeals are allowable to the courts of the United States from the courts of the several states.

[No. 9, Original.]

Submitted May 13, 1901. Decided January 6, 1902.

PETITION for a writ of mandamus to the United States Circuit Court of Appeals for the Ninth Circuit to entertain an appeal from the Supreme Court of the Territory of Hawaii. *Dismissed.*

Statement by Mr. Justice **Gray**:

This was a petition by the Wilder's Steamship Company, a corporation organized and existing under the laws of the Territory of Hawaii, for a writ of mandamus to the United States circuit court of appeals for the ninth circuit to entertain an appeal from the supreme court of the territory of Hawaii.

On December 27, 1899, the steamer *Claudine*, one of the petitioner's steamships, came into collision with the barkentine *William Carson*. On February 5, 1900, the owners of the *William Carson* and of her cargo filed a libel in admiralty against the
183 U. S. U. S., Book 46.

steamship company in the circuit court of the first judicial circuit of the Republic of Hawaii. On May 7, 1900, that court *re[n]dered a decree against the steamship company in the sum of \$55,000, upon the ground that the collision was caused by the fault of the steamship company, with no fault or negligence on the part of those in charge of the *William Carson*. From that decree an appeal was taken to the supreme court of the Republic of Hawaii, as provided by the then existing law of the Republic. On November 9, 1900, the cause having come on regularly to be heard before the supreme court of the territory of Hawaii, the decree was affirmed by that court. On the same day, an appeal was claimed from that court to the United States circuit court of appeals for the ninth circuit, but was denied, for want of jurisdiction, by the supreme court of the territory on November 7, 1900, and by the circuit court of appeals on April 1, 1901. 13 Hawaii, 174; 47 C. C. A. 243, 108 Fed. 113.

On March 5, 1901, the steamship company presented to this court a petition praying that an order, under § 15 of the act of March 3, 1891 [26 Stat. at L. 826], chap. 517, assigning the territory of Hawaii to the ninth circuit, might be made *nunc pro tunc* as of June 15, 1900, the date at which the act of Congress of April 30, 1900 [31 Stat. at L. 141], chap. 339, entitled "An Act to Provide a Government for the Territory of Hawaii," took effect.

On April 12, 1901, the petitioner filed in this court a petition praying for a similar order, and further praying that a writ of mandamus might issue to the United States circuit court of appeals for the ninth circuit to set aside its order denying the appeal, and to entertain the cause.

On April 15, 1901, this court "ordered that the territory of Hawaii be, and it is hereby, assigned to the ninth judicial circuit under § 15 of the judiciary act of March 3, 1891," gave leave to file this petition for a writ of mandamus, and awarded a rule to show cause, returnable on May 13.

On May 3, after that order, the petitioner presented to the circuit court of appeals for the ninth circuit another petition for the allowance of an appeal from the decree of the supreme court of the territory of Hawaii; and that petition was denied.

On May 13, the circuit court of appeals for the ninth circuit *made a return, that [547] upon the facts stated in the petition it had not jurisdiction of the appeal; that the question whether it had such jurisdiction came before it for adjudication and was judicially determined; and that its decision in the matter constituted a final judgment, properly subject to review in this court by writ of certiorari.

The case was submitted to this court upon the petition for a mandamus, the return thereto, and a motion of the petitioner to file in evidence its petition of May 3 to the circuit court of appeals and the disallowance thereof.

The Republic of Hawaii, before its annex-
21 **321**

ation to the United States, had a fully organized government. The judicial system consisted of courts of original and appellate jurisdiction, whose powers were defined by the Constitution and statutes of the Republic. The circuit courts were the courts of general original jurisdiction, and had power to determine all civil causes in admiralty. In such causes, as well as in other cases, the supreme court had appellate jurisdiction, and its decrees, by express provision of the Constitution, were made "final and conclusive." Constitution of Hawaii, arts. 82-86; Ballou's Civil Laws of Hawaii, 1897, §§ 1105, 1136, 1144, 1145, 1164, 1430, 1433, 1434.

By the Joint Resolution of the Congress of the United States of July 7, 1898, resolution 55, the Hawaiian islands were annexed to the United States, and it was provided that "until Congress shall provide for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned;" and that "the municipal legislation of the Hawaiian islands," "not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." 30 Stat. at L. 750.

[548] On July 8, 1898, "in the exercise of the power thus conferred *upon him by the Joint Resolution, the President hereby directs that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies." Letter of Secretary of State to Minister Sewall; Report 305, H. R. 56th Congr. 1st sess. p. 3.

On August 12, 1898, the sovereignty of the Hawaiian islands was transferred to the United States. The act of Congress of April 30, 1900, chap. 339, entitled "An Act to Provide a Government for the Territory of Hawaii," which by its terms took effect June 15, 1900, declared in § 1 that the phrase "the laws of Hawaii," as therein used, should mean the Constitution and laws of the Republic of Hawaii in force at the date of that transfer; and in § 2 that the islands so acquired should be known as the territory of Hawaii; and contained the following provisions:

"Sec. 5. The Constitution and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States."

"Sec. 6. The laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act

shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

Section 7 repealed the Constitution and various laws of the Republic of Hawaii, including those on maritime matters. 31 Stat. at L. 141, 142, chap. 339.

"Sec. 10. All rights of action, suits at law and in equity, prosecutions and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed." "All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings, then pending in the courts of the Republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the territory of Hawaii; *and all [549] process issued and sentences imposed before this act takes effect shall be as valid as if issued or imposed in the name of the territory of Hawaii." 31 Stat. at L. 143, chap. 339.

"Sec. 81. The judicial power of the territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided."

"Sec. 83. The laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature." 31 Stat. at L. 157, chap. 339.

"Sec. 86. There shall be established in said territory a district court to consist of one judge, who shall reside therein and be called the district judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney, and a marshal of the United States for the said district, and said judge, attorney, and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as

[550]

provided by law; and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states, shall govern in such matters and proceedings as between the courts of the United States and the courts of the territory of Hawaii." 31 Stat. at L. 158, chap. 339.

Mr. Duane E. Fox submitted the cause for petitioner. *Messrs. Kinney, Ballou, & McClanahan* and *Nathan H. Frank* were with him on the brief:

Under the Constitution of the United States admiralty cases are a class distinct and separate from all others.

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 515, 7 L. ed. 256.

As regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one.

Wilmot v. Mudge, 103 U. S. 217, 26 L. ed. 536; *Rosencrans v. United States*, 165 U. S. 262, 41 L. ed. 710, 17 Sup. Ct. Rep. 302; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *Wood v. United States*, 16 Pet. 362, 10 L. ed. 995; *South Carolina v. Stoll*, 17 Wall. 430, 21 L. ed. 650.

The right of appeal in admiralty cases, conferred by the express provision of the court of appeals act, was not taken away by § 10 of the act of 1900.

See *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

There is no necessary repugnance between § 86 of the act of 1900 and § 15 of the circuit court of appeals act, with reference to appeals in admiralty cases.

Shute v. Keyser, 149 U. S. 649, 37 L. ed. 884, 13 Sup. Ct. Rep. 960; *Folsom v. United States*, 160 U. S. 121, 40 L. ed. 363, 16 Sup. Ct. Rep. 222.

Mandamus lies where an inferior court refuses to take jurisdiction when by law it ought to do so.

Parker, Petitioner, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708; *Ex parte Jordan*, 94 U. S. 248, 24 L. ed. 123.

Messrs. Charles Page, Edward McCutchen, C. H. Lindley, Henry Eickhoff, and Paul Neumann submitted the cause for respondents:

The word "state" as used in § 86 of the act of April 30, 1900, should be construed in its narrow sense.

Hepburn v. Ellzey, 2 Cranch, 445, 2 L. ed. 332; *New Orleans v. Winter*, 1 Wheat. 91, 4 L. ed. 44; *Scott v. Jones*, 5 How. 343, 12 L. ed. 181.

Congress may apportion the jurisdiction of the territorial courts in any way it pleases, and allow such appeals as it sees fit. It is not for a court to supplement these provisions at its pleasure.

Rosencrans v. United States, 165 U. S. 183 U. S.

257, 41 L. ed. 708, 17 Sup. Ct. Rep. 302; *Folsom v. United States*, 160 U. S. 121, 40 L. ed. 363, 16 Sup. Ct. Rep. 222.

The determination by the circuit court of appeals of the ninth circuit that it had no jurisdiction of this appeal was a judicial determination which cannot be reviewed by mandamus.

Re Nininger, 150 U. S. 150, 37 L. ed. 1034, 14 Sup. Ct. Rep. 50; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; *Ex parte Brown*, 116 U. S. 401, 29 L. ed. 676, 6 Sup. Ct. Rep. 387; *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; *Re Morrison*, 147 U. S. 14, *sub nom. Morrison v. United States Dist. Ct.* 37 L. ed. 60, 13 Sup. Ct. Rep. 246; *Ex parte Baltimore & O. R. Co.* 108 U. S. 566, 27 L. ed. 812, 2 Sup. Ct. Rep. 876.

***Mr. Justice Gray**, after stating the case [550] as above, delivered the opinion of the court:

We are of opinion that the appeal from the supreme court of the territory of Hawaii to the United States circuit court of appeals for the ninth circuit was rightly disallowed.

The libel in admiralty was originally brought, and a decree made, in a court of the Republic of Hawaii having jurisdiction of the cause, and an appeal from that decree was duly taken to the supreme court of Hawaii, as provided by the then existing law of the Republic. While the appeal was lawfully pending in the courts of Hawaii, Congress, by the act of April 30, 1900, chap. 339, provided a government for the territory of Hawaii, establishing therein a supreme court and other courts, and enacting, in § 10, that "all actions at law, suits in equity, and other proceedings, then pending in the courts of the Republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the territory of Hawaii." This appeal in admiralty was one of the "other proceedings" then pending in the courts of the Republic of Hawaii, which were "to be carried on to final judgment and execution in the corresponding courts of the territory of Hawaii." On November 9, 1900, the cause having come on regularly to be heard before the supreme court of the territory, in accordance with the act of Congress, the decree below was affirmed; and on the same day an appeal from the decree of affirmance was claimed to the United States circuit court of appeals for the ninth circuit.

The act of Congress of 1900 contains no provision authorizing *such an appeal. The [551] petitioner refers to § 86 of that act, which established in the territory a district court of the United States with the powers of a circuit court of the United States. But that court is given no appellate jurisdiction. The provision allowing writs of error and appeals from that court to the circuit court of appeals for the ninth judicial circuit does not touch appeals from the supreme court of the territory of Hawaii. And the remaining clause as to appeals, writs of er-

ror, removals of causes, and other matters and proceedings between the courts of the United States and the courts of the territory of Hawaii provides that they shall be governed, not by the laws applicable to other territories, but by the laws of the United States as to such matters and proceedings "as between the courts of the United States and the courts of the several states." Congress may have considered that, owing to the great distance of the territory of Hawaii from the continent, the appellate jurisdiction over that territory should be more restricted than over other territories, and should extend only, as in the case of the several states, to judgments against a right claimed under the Constitution, laws, or treaties of the United States. But whatever may have been the reasons which influenced Congress, its language is too plain to be misunderstood. Cases in admiralty, brought after the act of 1900 took effect, must, of course, be brought in the district court of the United States, and subject to the right of appeal therein provided to the circuit court of appeals for the ninth circuit. But as to cases in admiralty pending in the courts of Hawaii when the act took effect, there is no special provision, and they therefore remain, like other civil cases, to be finally determined in the courts of the territory of Hawaii, under the general provision of § 10. In cases in admiralty, as in all other cases pending in the courts of Hawaii at that time, it was within the discretionary power of Congress to provide that they should remain within the jurisdiction and determination of the courts of the territory; and it has clearly so provided as to pending suits of all classes. The fact that in a state cases in admiralty cannot be brought in its courts, but only in the courts of the United States, affords no reason for implying that Congress, without any language expressing *such an intention, meant to vest in any court of the United States either original or appellate jurisdiction in cases in admiralty pending in the courts of Hawaii when this act of Congress took effect.

[552] Reliance is placed by the petitioner on § 15 of the act of March 3, 1891, chap. 517 (long before the annexation of Hawaii), establishing circuit courts of appeals, which provides that "the circuit court of appeal, in cases in which the judgments of the circuit courts of appeal are made final by this act" (which include cases in admiralty), "shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits." 26 Stat. at L. 830. But on November 9, 1900, when this appeal to the circuit court of appeals for the ninth circuit was claimed from the supreme court of the

territory of Hawaii, as well as on April 12, 1901, when this petition for a writ of mandamus was filed, this court had made no order assigning the territory of Hawaii to any judicial circuit. The order made by this court on April 15, 1901, assigning the territory of Hawaii to the ninth judicial circuit, was not, as this petitioner requested, made as of a former day, but took effect only from its date. And no order of this court, assigning the territory of Hawaii to a judicial circuit under the act of 1891, can give a right of appeal inconsistent with the provision of § 86 of the later act of 1900 restricting such appeals to cases in which by the laws of the United States they are allowable to the courts of the United States from the courts of the several states.

Petition dismissed.

*CHARLES H. NUTTING, *Plff. in Err.*, [553]
v.
COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 553-558.)

Constitutional law—right of insurance broker to contract insurance without the state.

U. S. Const. 14th Amend. is not violated by the prohibition of Mass. Stat. 1894, chap. 522, § 98, against negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in Massachusetts, under which a licensed insurance broker who, as local agent of New York insurance brokers, secured authority from a Boston shipbuilder to place insurance upon a vessel in process of construction in a Boston shipyard, may be convicted of a violation of this section, where he delivered to such builder a policy of insurance on such vessel, issued by an insurance company not admitted to do business in Massachusetts, which he had received by mail from the New York brokers.

[No. 32.]

Argued November 20, 21, 1901. Decided January 13, 1902.

IN ERROR to the Superior Court of the State of Massachusetts to review a conviction of negotiating unlawful insurance with a foreign insurance company not admitted to do business in that state. *Affirmed.*

Statement by Mr. Justice Gray:

This was an indictment on the statute of Massachusetts of 1894, chap. 522, § 98, for negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in Massachusetts.

Section 98 of that act is as follows: "Any

NOTE.—As to constitutionality of statutes restricting contracts and business—see note to State v. Loomis (Mo.) 21 L. R. A. 789.

person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine of not less than \$100 nor more than \$500 dollars for each offense."

[554] The act, in § 3, provides that "it shall be unlawful for any company to make any contract of insurance upon or concerning *any property or interests or lives in this commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act;" and that "all contracts of insurance on property, lives, or interests in this commonwealth shall be deemed to be made therein." And in §§ 77-82 it prescribes the conditions with which foreign insurance companies must comply before they can do business in Massachusetts, requiring each company, among other things, to appoint the insurance commissioner its attorney, upon whom process in any suit against it may be served; to appoint some resident of Massachusetts as its agent; to obtain from the insurance commissioner a certificate that it has complied with the laws of Massachusetts, and is authorized to make contracts of insurance; and, if incorporated or associated under the laws of any government other than the United States or one of the states, to deposit with the treasurer of Massachusetts or the financial officer of some other state a sum equal to the capital required of like companies, to be held in trust for the benefit of all the company's policyholders and creditors in the United States.

At the trial in the superior court, the parties agreed upon the following facts: The defendant was a citizen of Massachusetts and a licensed insurance broker in Boston, and, at some time prior to November 18, 1898, solicited from one William McKie, a shipbuilder in Boston, and likewise a citizen of Massachusetts, the business of procuring insurance upon a vessel then in process of construction in his Boston shipyard; and, as agent for Johnson & Higgins, average adjusters and insurance brokers having an office in Boston in charge of the defendant, and their principal place of business in New York, secured the authority of McKie to the placing of a contract of insurance for £4,124 upon the vessel. Thereupon the defendant transmitted an order for the insurance to Johnson & Higgins in New York, and they at once wrote to their Liverpool agents, John D. Tyson & Company, to procure the aforesaid insurance. Accordingly, Tyson & Company procured a policy from the London Lloyds, to be delivered *to Tyson & Company, in Liverpool, dated November 18, 1898, for a year from November 16, 1898, on the aforesaid vessel, for the sum of £4,124, the policy running in favor of Johnson & Higgins, "on account of whom it may concern, as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain." Tyson & Company, at the time of receiving the policy, paid the premiums thereon for account of Johnson & Higgins, and received a commission upon the insurance from Lloyds for themselves and for Johnson & Higgins. Tyson & Company sent the policy to Johnson & Higgins in New York; they, after indorsing it, forwarded it by mail to the defendant in Boston; and he, on November 18, 1898, sent it by mail to McKie. The policy was procured from the London Lloyds in the usual course of the business of the defendant, of Johnson & Higgins, and of Tyson & Company. None of them were agents of the London Lloyds, except in so far as the facts agreed constituted them agents. The London Lloyds were individual insurers, citizens of England, associated as principals in the business of insurance under and by authority of the government of the United Kingdom of Great Britain and Ireland, and carrying on the business in England on the Lloyds' plan, by which each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. The London Lloyds had not complied with any of the requirements imposed by the laws of Massachusetts upon foreign insurance companies, and had not been admitted to do insurance business in the commonwealth, according to law.

[555] The defendant requested the court to instruct the jury that so much of the Massachusetts statute as purported to make illegal such acts as were done by the defendant was contrary to the 14th Amendment of the Constitution of the United States, and as such was unconstitutional and void. The request was refused; and the court instructed the jury that upon the facts above stated they would be warranted in finding the defendant guilty. To all of this the defendant duly excepted, and being found guilty, his exceptions were overruled by the supreme judicial court of Massachusetts. 175 Mass. 154, 55 N. E. 895. He *was thereupon [556] sentenced in the superior court, and sued out this writ of error.

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Mr. J. Hubley Ashton argued the cause and filed a brief for plaintiff in error:

It is the absolute constitutional right of a citizen or resident of a state to enter into contracts made outside of the state with foreign underwriters not admitted to do business in the state, for the insurance of his property in the territory of the state, and to effectuate such contracts by acts done within the limits of the state, any prohibition of a state statute to the contrary notwithstanding.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The contract which is the basis of this

criminal prosecution was an English, and not a Massachusetts, contract, and the whole business of insurance involved was transacted by the British underwriters within British jurisdiction, and not within the state of Massachusetts.

Milliken v. Pratt, 125 Mass. 374; *Commonwealth Mut. F. Ins. Co. v. William Knabe & Co. Mfg. Co.* 171 Mass. 265, 50 N. E. 516; *Western Massachusetts Mut. F. Ins. Co. v. Girard Point Storage Co.* 6 Pa. Super. Ct. 288.

The object of the 14th Amendment of the Constitution of the United States is to protect the citizens of the United States and the people of the states against all such arbitrary state legislation, under the guise of the police power, as that enforced against the plaintiff in error in this case.

Wharton, American Law, §§ 365, 594, 595.

The statute, as construed and applied in this case, is a plain violation of the principle of right and justice embodied in the Amendment, that "the equal protection of the laws is a pledge of the protection of equal laws."

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Mr. McKie having the constitutional right to effect this insurance with the underwriters at Lloyd's, there can be no punishment inflicted by the state upon the plaintiff in error for doing what he did as the agent or servant of McKie in respect to the insurance.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

There can be no valid legislation by a state under its police power, or otherwise, which encroaches upon individual rights granted, secured, or protected by the Federal Constitution.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 654, 29 L. ed. 518, 6 Sup. Ct. Rep. 252; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.

Any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. It is not competent, therefore, to forbid any person or class of persons, whether citizens or aliens, to offer their services in lawful business, or to subject others to penalties for employing them.

Cooley, Const. Lim. p. 745; *Baker v. Portland*, 5 Sawy. 566, Fed. Cas. No. 777.

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty

of the courts to so adjudge, and thereby give effect to the Constitution.

Mugler v. Kansas, 123 U. S. 625, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

It cannot be otherwise than unlawful for the legislature to use any means whatever to accomplish an unlawful purpose.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Ward v. Maryland*, 12 Wall. 431, 20 L. ed. 453; *Woodruff v. Parham*, 8 Wall. 130, 19 L. ed. 384; *Hinson v. Lott*, 8 Wall. 152, 19 L. ed. 388; *Welton v. Missouri*, 91 U. S. 279, 23 L. ed. 349; *Cook v. Pennsylvania*, 97 U. S. 573, 24 L. ed. 1017.

Every constitutional right of liberty and property should be liberally construed and enforced.

Bronson v. Kinzie, 1 How. 318, 11 L. ed. 145; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557.

Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect to.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

And such a right or privilege is abridged whenever the state law interferes with any legitimate operation of the Federal authority which concerns his interest, whether it be an authority actively exerted, or resung only in the express or implied command or assurance of the Federal Constitution or laws.

Cooley, Const. Law, 246; Cooley, Const. Lim. 6th ed. p. 489.

The power of Congress to regulate international and interstate commerce embraces within its control all the instrumentalities by which that commerce may be carried on.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Cooley, Const. Lim. 732.

The contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction of the United States.

De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776; *New England Mut. Marine Ins. Co. v. Dunham*, 11 Wall. 1, 20 L. ed. 90.

Mr. Hosea M. Knowlton argued the cause and, with Mr. Arthur W. De Goosh, filed a brief for defendant in error:

The form of the indictment, and the sufficiency of the evidence to support the material allegations of it, have been determined by the state court, and are not Federal questions.

Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193.

There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and un-

less the conditions are complied with the prohibition may be absolute.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. See also, to the same effect, *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

The state of Massachusetts has the right to prohibit foreign companies from doing business in this state without a license. As a means of giving effect to such prohibition, it must have the right to prevent those who are not licensed to act as insurance brokers from soliciting such business; otherwise the law would be of no value, and the state would be powerless to prevent the very thing it has the right to prohibit.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

[556] *Mr. Justice Gray, after stating the case as above, delivered the opinion of the court:

A state has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the state may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse. The state, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties. *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The statute of Massachusetts of 1894, chap. 522, on which this indictment is founded, besides requiring foreign insurance companies, as conditions precedent to doing business in the state, to appoint agents within the state, and to deposit a certain sum in trust for their policy holders and creditors, provides in § 3 that "it shall be unlawful" "for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of" insurance on or concerning any property, interest, or lives in Massachusetts, except as authorized by the act; and in § 98 that any person "who shall act in any manner in the negotiation or transaction of unlawful insurance" (evidently intending insurance declared unlawful by § 3) "with a foreign insurance company not admitted to do business in this commonwealth" shall be punished by fine.

The acts of negotiation or transaction by the defendant in Massachusetts, admitted in [557] the facts agreed by the parties, are *that he solicited from McKie the business of procuring insurance upon his vessel in Boston, and, as agent of Johnson & Higgins of New 183 U. S.

York, having an office in Boston, secured the authority of McKie to the placing of a contract of insurance for a certain sum in pounds sterling upon the vessel, and transmitted an order for that insurance to Johnson & Higgins in New York; whereupon they, acting according to the usual course of business of the defendant, of themselves and of their agents in Liverpool, obtained from the London Lloyds, who had not been admitted to do business in Massachusetts, a policy of insurance for that amount on the vessel; and the defendant afterwards, in Massachusetts, received from Johnson & Higgins that policy, and sent it by mail to McKie, which tends to show that the policy obtained from the foreign insurance company was the insurance which he had originally solicited. These facts clearly convict the defendant of negotiating and transacting in Massachusetts unlawful insurance with a foreign insurance company, in violation of the statute, if that statute is constitutional.

In *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, Hooper, the agent in California of the same Johnson & Higgins of New York, obtained from them a policy of marine insurance of a Massachusetts insurance company on a vessel in California owned by a citizen of California, to whom he delivered the policy in California. It was held that a statute of California by which Hooper was guilty of procuring insurance for a resident of California from a foreign insurance company which had not given bond as required by the laws of California was constitutional.

In *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, the insurance was not obtained through an agent or broker, but by the assured himself; and the point decided was that a statute of a state punishing the owner of property for obtaining insurance thereon in another state was unconstitutional. In that case the decision in *Hooper's Case* was expressly recognized and distinguished; and Mr. Justice Peckham, speaking for the court, and repeating the words of Mr. Justice White in *Hooper's Case*, observed: "It is said that the right of a citizen to contract for insurance for himself is guaranteed by the 14th Amendment, and that therefore he cannot be deprived by the state of the capacity to so contract through an agent. The 14th Amendment, however, does not guarantee the citizen the right to make within his state, either directly or indirectly, a contract the making whereof is constitutionally forbidden by the state. The proposition that because a citizen might make such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction." 155 U. S. 658, 659, 39 L. ed. 302, 5 Inters. Com. Rep. 620, 621, 15 Sup. Ct. Rep. 211, 212; 16

S. 587, 588, 41 L. ed. 835, 17 Sup. Ct. Rep. 430, 431.

As was well said by the supreme judicial court of Massachusetts: "While the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit, not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons." 175 Mass. 156, 55 N. E. 895.

We are of opinion that the case at bar comes within *Hooper v. California*, and not within *Allgeyer v. Louisiana*; and that § 98 of the statute of Massachusetts under which the plaintiff in error has been convicted is not contrary to the Constitution of the United States.

The effect of the other provision of the Massachusetts statute declaring that "all contracts of insurance on property, lives, or interests in this Commonwealth shall be deemed to be made therein" need not be considered; because the defendant has been convicted, not of the making of the contract, but of negotiating and transacting that contract in Massachusetts.

Judgment affirmed.

Mr. Justice **Harlan**, dissenting:

In my opinion this case does not differ in principle from *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; and so thinking I cannot concur in the opinion and judgment in this case.

[559] *ISADORE MINDER, *Plff. in Err.*,
v.

STATE OF GEORGIA.

(See S. C. Reporter's ed. 559-562.)

Constitutional law—due process of law—equal protection of laws—refusal to continue criminal case for absence of non-resident witnesses.

The refusal of a state court to continue a criminal case on account of the absence of material witnesses residing in another state is not a denial of due process of law or the equal protection of the laws secured by U. S. Const. 14th Amend. because it is not within the power of the state courts to compel the attendance of witnesses beyond the limits of

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

328

the state, or because the taking or using of depositions of witnesses so situated in criminal cases on behalf of defendant is not provided for and may not be recognized in that state.

[No. 417.]

Argued December 3, 1901. Decided January 6, 1902.

IN ERROR to the Superior Court of Bibb County, State of Georgia, to review a conviction for murder affirmed by the Supreme Court. *Affirmed.*

See same case below, 113 Ga. 772, 39 S. E. 284.

The facts are stated in the opinion.

Mr. **John R. Cooper** argued the cause, and, with Messrs. *Herman Braseh* and *Marion W. Harris*, filed a brief for plaintiff in error:

No state in this Union shall deprive a citizen of his life, liberty, or property without due process of law, nor deny to any citizen the equal protection of the laws. Due process of law is process of law according to the law of the land.

French v. Barber Asphalt Paving Co. 181 U. S. 330, 45 L. ed. 884, 21 Sup. Ct. Rep. 625; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Yick Wo v. Hopkins*, 118 U. S. 369, 30 L. ed. 226, 9 Sup. Ct. Rep. 1064; *Davidson v. New Orleans*, 96 U. S. 102, 24 L. ed. 618; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Cooley, Const. Lim.* 351; *Mallett v. North Carolina*, 181 U. S. 599, 45 L. ed. 1020, 21 Sup. Ct. Rep. 730.

It is within the power of each state of this Union to try and punish her own citizens according to her laws, as long as the authority does not infringe upon the limited power of the Constitution of the United States.

Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148.

A person accused of crime has a right to process to compel the attendance of witnesses in his behalf.

Ex parte Marmaduke, 91 Mo. 228, 60 Am. Rep. 250, 4 S. W. 91.

The constitutional guaranty that persons accused of crime shall have compulsory process for obtaining witnesses in their favor includes, as an essential to the enjoyment of the right, reasonable time for making such process effectual; and a statute whose effect is to bring the defendant to trial before he has had a proper opportunity to obtain his witnesses is unconstitutional and void.

Graham v. State, 50 Ark. 161, 6 S. W. 721; *State v. Berkley*, 92 Mo. 41, 4 S. W. 24.

The right of an accused, under U. S. Const. 6th Amend., to have compulsory process for obtaining witnesses in his favor was by the 14th Amendment extended to every citizen of every state charged with a crime in the state courts.

Spies v. Illinois, 123 U. S. 131, *sub nom.* *Ex parte Spies*, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Downes v. Bidwell*, 182 U. S. 282, 45 L. ed. 1104, 21 Sup. Ct. Rep. 770.

183 U. S.

The record in this case does not show that Minder was present in court when the sentence of death was passed upon him; nor does it show that he was asked by the court if he had any reason to urge against the imposition by the court of the sentence of death. This is a failure of due process of law as guaranteed by the 14th Amendment.

Ball v. United States, 140 U. S. 119, 35 L. ed. 377, 11 Sup. Ct. Rep. 761; *Schwab v. Berggren*, 143 U. S. 442, 36 L. ed. 218, 12 Sup. Ct. Rep. 525; *French v. State*, 85 Wis. 400, 21 L. R. A. 402, 55 N. W. 566; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31; *Wilson v. State*, 87 Ga. 584, 13 S. E. 566; *Barton v. State*, 67 Ga. 653; *Nolan v. State*, 55 Ga. 521, 53 Ga. 138; *Wade v. State*, 12 Ga. 25; *Gilligan v. Com.* 3 Va. Sup. Ct. Rep. 77, 37 S. E. 962; *Smith v. State*, 60 Ga. 431; *Clark, Crim. Proc.* 423.

Mr. J. M. Terrell argued the cause and filed a brief for defendant in error:

"Due process of law" and "by the law of the land" are intended to convey the same meaning.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; *Re Lourie*, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489.

These requirements are met by any law which embraces all persons who are in, or who may come into, like situations and circumstances.

Vanzant v. Waddel, 2 Yerg. 270; *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430.

Or any general and public law which is equally binding upon every member of the community.

State use of Roane County v. Burnett, 6 Heisk. 186.

"By the law of the land" is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629.

The 14th Amendment did not create any new legal rights, but operated upon legal rights as it found them established, and declared that, such as they were in each state, they should be enjoyed by all persons alike.

Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405.

What is due process of law in a state is determined by the law of that state.

Walker v. Sauvinet, 92 U. S. 92, 23 L. ed. 679.

Even trial by a jury in a state court is not insured by the 14th Amendment.

Ibid.

The Federal government cannot, under U. S. Const. 14th Amend., interfere with the mode prescribed for the trial of state offenses.

2 Story, Const. 5th ed. p. 695; Brannon, 14th Amend. pp. 107, 417, 418.
183 U. S.

The 14th Amendment was not designed to interfere with the police power of states.

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Powell v. Pennsylvania*, 127 U. S. 683, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257.

It does not limit the power of the state in the prosecution of criminals.

Re McKee, 19 Utah, 241, 57 Pac. 23; *Re Maxwell*, 19 Utah, 502, 57 Pac. 412.

An ordinance making it unlawful to sell lottery tickets has been held to be a police regulation, and not repugnant to the constitutional requirement of due process of law, though it provides for arrest, summary punishment, and sentence without trial by jury.

State v. Dobard, 45 La. Ann. 1412, 14 So. 253.

The 14th Amendment does not give the right to indictment by a grand jury in felony cases.

Hurtado v. California, 110 U. S. 538, 28 L. ed. 239, 4 Sup. Ct. Rep. 111, 292.

It does not limit the state's power over crimes, except to guarantee equal justice.

Leeper v. Texas, 139 U. S. 467, 35 L. ed. 226, 11 Sup. Ct. Rep. 577.

The denial of compulsory process to enable a person charged with a crime to obtain witnesses at the trial in the court below does not invalidate the judgment.

Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780.

*Mr. Chief Justice **Fuller** delivered the[559] opinion of the court:

At the November term, 1900, of the superior court of Bibb county, Georgia, Isadore Minder was tried on an indictment for murder, convicted, and sentenced to death. A motion for new trial was made upon the ground, among other things, that the court erred in refusing to continue the case on account of the absence of material witnesses residing in Alabama, whose names were given. The defense was insanity, and the motion for continuance set forth that the witnesses would testify that the accused was insane; "that all the powers of the court have been exhausted to procure the attendance of said witnesses;" that they had refused to attend; and that the court had no authority under the Constitution and laws of the state of Georgia to procure their attendance or their testimony, and that their depositions would not be admissible in evidence if obtained. The motion further stated that if he were tried "without being *af-[560] forced process by which either to compel the attendance or to procure the depositions of said witnesses, that defendant, who is a citizen of the United States and a resident of Georgia, would be deprived of his life, liberty, and property without due process of law, and would be denied his right and privilege and immunities as a citizen of the United States in violation of the Constitution of the United States, and particularly the 1st paragraph of the 14th Amendment thereto; and in violation of said Amendment would be de-

nied the equal protection of the laws with American citizens of other states of this Union where the state and Federal process affords the defendant means to secure the depositions of nonresident witnesses in capital cases, and the state allows the introduction of such depositions in evidence in behalf of the defendant in such other states." It was further stated that "unless the state will consent to the introduction of depositions from said nonresident witnesses, and will afford him a reasonable opportunity to secure the same, petitioner will be denied the equal protection of the laws, and will be deprived of his life and liberty without due process of law." The motion for new trial was overruled by the superior court, and defendant sentenced, whereupon an appeal was taken to the supreme court which affirmed the judgment. 113 Ga. 772, 39 S. E. 284.

This writ of error was then sued out, and the errors assigned were, in substance, that the supreme court erred in not reversing the judgment of the court below for error in denying the motion for continuance, which denial it was contended was a denial of due process of law and the equal protection of the laws secured by the 14th Amendment. This point was made in the Supreme Court and the matter of the ruling on the motion to continue was disposed of thus:

"The application for a continuance was made upon the ground of the absence of certain witnesses whose testimony it is claimed was very material to the defense of insanity set up by the accused. It appeared that these witnesses resided in the state of Alabama, that the court had caused subpoenas to be issued directed to these witnesses, that they had been transmitted by mail to the witnesses, that the subpoenas had been received by *them, and that they had refused to attend court upon the advice of their counsel in Alabama that there was no law requiring them to leave their state to attend as witnesses a court of another state. It distinctly appeared that the witnesses had refused to attend, and there is nothing in the record to indicate that there were any reasonable grounds for hoping that they might be induced to attend at a subsequent term of the court if the case had been continued. Under such circumstances it does not seem to us that the court erred in refusing to postpone the case. In a case of this character, where the life of the accused is at stake, and the court has at its command no compulsory process which could be used to enforce the attendance of the witnesses from beyond its jurisdiction, a promise by the witnesses to attend at a subsequent term of the court might address itself very strongly to the discretion of the trial judge and authorize him to continue the case; but certainly there is no abuse of discretion when the witnesses are beyond the jurisdiction of the court and beyond the power of its process, and not only refuse to attend voluntarily, but give no in-

dication that they will at any time in the future be willing to attend upon the sessions of the court. It was argued here that the court should have sent an officer into the state of Alabama and served each of the witnesses personally with subpoenas. We do not think the court had any authority to do this, even if there were no impropriety in an officer of this state going into the state of Alabama and making personal service of a paper. The courts of this state are under no obligations to litigants to send their officers beyond the limits of the state to do acts which would be purely voluntary on the part of such officers; and certainly the court should not use one of its officers in this way when the sole purpose in so doing would be to produce a species of moral coercion upon a citizen of another state to come into this state, when he is not required by law to do so, and would have a right to ignore the command of the court thus transmitted to him. The point was made in the court below, and was argued here, that the failure of the law of this state to provide a method for compelling the attendance of witnesses from beyond the jurisdiction of the state, or for obtaining the depositions of *such witnesses[562] and allowing them to be introduced in evidence in behalf of a person charged with crime, was a denial to such person of the equal protection of the laws, and his conviction under such circumstances would be depriving him of life or liberty, as the case may be, without due process of law, in violation of the 14th Amendment to the Constitution of the United States. We do not see how a person on trial could be said to be denied the equal protection of the laws when he is tried under laws of procedure applicable to every person charged with crime. Nor can we see how a person is deprived of life or liberty without due process of law, on account of not having the benefit of the testimony of witnesses who are beyond the jurisdiction of the court, when the lawmaking power of the state is powerless to make any provision which would result in the compulsory attendance of the witnesses, and the use of depositions in such cases is directly contrary to the usages, customs, and principles of the common law."

The requirements of the 14th Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government. Because it is not within the power of the Georgia courts to compel the attendance of witnesses who are beyond the limits of the state, or because the taking or use of depositions of witnesses so situated in criminal cases on behalf of defendants is not provided for, and may not be recognized in Georgia, we cannot interfere with the administration of justice in that state on the ground of a violation of the 14th Amendment in these particulars.

Judgment affirmed.

[563] *McKINLEY CREEK MINING COMPANY
et al., Appts.,
v.

ALASKA UNITED MINING COMPANY
et al.

(See S. C. Reporter's ed. 563-572.)

*Appeal in equity—error in instructions—
finding of fact—notice of mining claim—
location by alien.*

1. Assignments of error based upon the refusal of instructions in a suit in equity in which the verdict is only advisory to the court cannot be entertained on appeal.
2. A finding by the court on a question of fact upon which the evidence is conflicting cannot be rejected on appeal.
3. A sufficient location of placer mining claims is made by notices upon a stump in a creek, of a claim running 1,500 feet along the creek bottom and extending 300 feet each way from the center of the creek, adding that it is an extension of another claim named, a certain distance from the first falls on said creek.
4. The location of a mining claim by an alien, and the rights following therefrom, are voidable, not void, and are free from attack by anyone except the government.

[No. 37.]

Argued April 15, 16, 1901. Decided January 6, 1902.

A PPEAL from the District Court of the United States for the District of Alaska to review a judgment entered on a verdict for the plaintiffs in an equity case to establish title to placer mining claims. *Affirmed.*

Statement by Mr. Justice **McKenna**:

This is a bill in equity brought by the appellee company, who was plaintiff below, to establish title to two placer mining claims, against a like claim of appellant company to the same ground.

The bill alleged that "Peter Hall, William A. Chisholm, James Hansen, John Dalton, and Dan. Sutherland, partners under the firm name and style of the Alaska United Mining Company, bring this their bill of complaint against C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Chas. P. Leitch, and C. P. Cahoon, partners under the firm name of the McKinley Creek Mining Company, and show to the court that the said parties, both plaintiffs and defendants, are citizens of the United States and residents of the district of Alaska."

The bill also alleged ownership of the claims by reason of location, exploration, and discovery of precious metals, and the compliance with the local rules and regulations of the mining district. Also possession of the claims and the erection of valuable

try upon that possession by defendants (appellants) with an attempt and avowed purpose to drive plaintiffs (appellees) therefrom, and unless restrained they would proceed to the execution of said threats. An injunction was prayed for.

The defendants admitted their citizenship, but denied the citizenship of plaintiffs on the ground that the defendants had not sufficient knowledge to form a belief thereto, and traversed in like manner or absolutely the other allegations of the bill, and alleged title by reason of prior discovery by members of the company. The answer also alleged prior possession by members of the company, from which they were dispossessed by the plaintiff, and claimed that as to the controversies thus arising "defendants are under the law and practice of this court entitled to a jury trial for the trial of the title to said claims and each of them, and to that end and purpose have commenced in this honorable court a suit in ejectment for the trial and determination of the title to said property in an action at law and according to the usage and practice of this court, and until the trial and determination of such trial at law by this honorable court the defendants are entitled to a restraining order against said plaintiff company and its individual members restraining them and each of them from the commission of the wrongful acts herein complained of."

A temporary injunction was prayed against plaintiffs (appellees).

There was a reply filed to the new matter of the answer and to the cross complaint.

A jury was impaneled to try the case on motion of plaintiffs, no objection being made by defendants, and, after hearing the evidence and receiving instructions from the court, the jury rendered a verdict for plaintiffs, as follows: "We, the jury in the above-entitled and numbered cause, find for the plaintiffs, Peter Hall, Wm. A. Chisholm, Dan. Sutherland, James Hansen, and John Dalton, partners under the firm name and style of the Alaska United Mining Company, the claims in controversy."

The defendants in due time moved for judgment notwithstanding the verdict, upon the ground that on the evidence the *defend- [565] ants were entitled "to a judgment in their favor for the possession of the mines and property in controversy." The motion was denied.

Subsequently defendants moved for a new trial (1) upon the testimony in the cause, the rulings therein and exceptions taken, and upon the pleadings and proceedings in cause No. 967; (2) the insufficiency of the evidence to justify the verdict; (3) error in refusing to give certain instructions requested by defendants (appellants).

The motion was denied, and the following judgment was entered:

"This cause came on to be heard at this term upon the bill, the answer and cross bill of defendants, and the replication thereto of plaintiffs, and the proofs in the case, and upon the request of defendants, duly made by their counsel, Messrs. Winn & Weldon,

NOTE.—On location of mining claims—see notes to Last Chance Min. Co. v. Tyler Min. Co. 39 L. ed. U. S. 859, and Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 42 L. ed. U. S. 96.

the issues arising upon said pleadings and proofs were submitted to a jury of good and lawful men, duly selected, impaneled, and sworn, to wit, J. Montgomery Davis and eleven others, who, having heard the said proofs adduced in the case, and having been instructed by the court as to the law, and having heard the argument of counsel, retired in charge of the bailiff to consider of their verdict, and after due deliberation had returned into open court the following verdict, to wit:

"We, the jury in the above-entitled and numbered cause, find for the plaintiffs, Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen, and John Dalton, partners under the firm name and style of the Alaska United Mining Company, the claims in controversy.

"(Signed) J. Montgomery Davis,
Foreman.

"Which said verdict was by the court received and ordered recorded, and the findings therein contained upon the issues in said cause were by the court approved and adopted.

"Now, therefore, upon consideration of the said bill, the answer thereto and the cross complaint of said defendants, the replication of plaintiffs, and the said proofs, and by reason of the verdict of the jury [566] thereon, approved and adopted by the court, it is, upon consideration thereof, ordered, adjudged, and decreed as follows, to wit:

"That the said defendants, C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch, and C. P. Cahoon, a mining copartnership under the name and style of the McKinley Creek Mining Company, have not, nor have any of them, any right, estate, title, or interest whatever in or to those two certain mining claims, lands, and premises described in the said bill of complaint and in the said answer and cross complaint of defendant and hereinafter more particularly described; that the title of the plaintiff, The Alaska United Mining Company, a corporation composed of Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen, and John Dalton, thereto, is good and valid, and that the said defendants and each of them be, and they and each of them are hereby, forever enjoined and restrained from asserting any claim whatsoever in or to said mining claims, lands, and premises adverse to said plaintiffs, and that the said plaintiffs be, and they are hereby, quieted in their possession, use, and enjoyment of the same."

A description of the claims followed.

Objection was made to the judgment, and the defendants claimed that the only judgment which could be entered was one "restraining the defendants from the acts complained of in the bill of complaint pending the trial of cause No. 967, *McKinley Creek Min. Co. v. Alaska United Min. Co.*, which is a suit in ejectment now pending in this

court and at issue, the record and files of which are hereby referred to and made a part of this objection."

From the judgment entered the case is here on appeal.

Mr. S. M. Stockslager argued the cause, and, with *Mr. George C. Heard*, filed a brief for appellants:

The locations are utterly invalid because the same are not "distinctly marked on the ground," or otherwise designated as required by law.

Lindley, Mines, § 371; *Gleeson v. Martin White Min. Co.* 13 Nev. 442; *Clarke, Mineral Law Digest*, p. 78; *Newbill v. Thurston*, 65 Cal. 419, 4 Pac. 409; *Pharis v. Muldoon*, 75 Cal. 284, 17 Pac. 70; *Neuebaumer v. Woodman*, 89 Cal. 310, 26 Pac. 900; *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906, 17 Colo. 243, 29 Pac. 173.

The reasons for the statute and for its strict construction are obvious.

Gonu v. Russell, 3 Mont. 358; Lindley, Mines, § 37; *Faxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702.

Notwithstanding the fact that where the lands are surveyed placer claims are required to be adjusted to the surveys, it is not sufficient marking in such a case to post the claim as of the particular subdivision of the survey.

Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419; *White v. Lee*, 78 Cal. 593, 21 Pac. 363.

The attempted marking on the ground was not a sufficient compliance with the law.

Holland v. Mount Auburn Gold Quartz Min. Co. 53 Cal. 149; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Cresus Min. Mill & Smelting Co. v. Colorado Land & Mineral Co.* 19 Fed. 78; *Book v. Justice Min. Co.* 58 Fed. 107; *Gelcich v. Moriarty*, 53 Cal. 217; *Newbill v. Thurston*, 65 Cal. 419, 4 Pac. 409. See also *Golden Fleecce Gold & Silver Min. Co. v. Cabel Consol. Gold & Silver Min. Co.* 12 Nev. 312; *Gleeson v. Martin White Min. Co.* 13 Nev. 442; *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455.

Aliens who seek to maintain, under Or. Code, § 500, an action against citizens who have connected themselves with the title of the government for the quieting of their title and the enjoining of the defendants from interfering with them, must show their right to the exclusive possession of the ground in dispute.

Tichenor v. Knapp, 6 Or. 205; *Murphy v. Sears*, 11 Or. 127, 4 Pac. 471; *San Francisco v. Ellis*, 54 Cal. 72; *Stark v. Starr*, 6 Wall. 410, 18 L. ed. 927; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129; *Smith v. Brannan*, 13 Cal. 107; *Louisville v. Gray*, 1 Litt. (Ky.) 147; *Bank of United States v. Schultz*, 2 Ohio, 495; *Norton v. Beaver*, 5 Ohio, 178.

A location by an alien is void, but may be validated by naturalization if done prior to the intervention of adverse rights.

Barringer & Adams, Mines & Mining, p. 202.

Citizenship is essential to the validity of a location, and must be affirmatively proved by one who alleges a location.

Ibid.; *Bohanon v. Howe*, 2 Idaho, 417, 17 Pac. 583.

A qualified locator may relocate a mining claim in the possession of an alien who has not declared his intention to become a citizen, if relocation be made without force or violence and prior to declaration of intention or conveyance to a citizen. As against an intruder, possession is prima facie evidence of right to possession; but as against one connecting himself with the government title, mere occupancy must yield to the higher right.

Wilson v. Triumph Consol. Min. Co. 19 Utah, 66, 56 Pac. 300. To the same effect is *Golden Fleece Gold & Silver Min. Co. v. Cabell Consol. Gold & Silver Min. Co.* 12 Nev. 312.

Messrs. S. M. Stockslager, George C. Heard, and John R. Winn also filed a supplemental brief for appellants.

Mr. L. T. Michener argued the cause, and, with *Messrs. W. W. Dudley, J. F. Malony, and J. H. Cobb*, filed a brief for appellees:

The location notices and the "markings on the ground" were sufficient.

Haws v. Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666.

A location made by an alien is voidable only.

Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651; *McEvoy v. Megginson*, 29 Land Dec. 164; *Cræcus Min. Mill & Smelting Co. v. Colorado Land & Mineral Co.* 19 Fed. 78; *Lone Jack Min. Co. v. Megginson*, 27 C. C. A. 63, 48 U. S. App. 452, 82 Fed. 89.

[566] *Mr. Justice McKenna delivered the opinion of the court:

The assignments of error present for review the rulings of the *court upon the admission of testimony, the correctness of the court's instructions to the jury, and the sufficiency of the evidence to justify the judgment.

We may dispose of the rulings on the admission of testimony summarily. They are not precisely indicated by counsel in their brief, and to review them with a detail of the evidence would unduly extend this opinion. It is enough to say that we have examined the evidence and considered the rulings, and do not discover any prejudicial error in the latter. Besides, it is questionable if such rulings are reviewable in an appellate court. *Wilson v. Riddle*, 123 U. S. 608, 31 L. ed. 280, 8 Sup. Ct. Rep. 255; *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341; *Peabody v. Kendall*, 145 Ill. 519, 32 N. E. 674.

For an understanding and consideration
183 U. S.

of the other contentions of appellants it is only necessary to indicate the propositions which the evidence of the parties tended to establish. On the part of the plaintiffs (appellees) the evidence tended to show that Dan. Sutherland, James Hanson, William Chisholm, and Jack Dalton, who compose the appellee company, and Peter Hall, and one Hawes, and C. P. Cahoon, were working at Pleasant camp in Alaska for William Chisholm on and prior to October, 1898. Prospecting on the river Porcupine was resolved on to be done by Hanson, Sutherland, and Cahoon, and the following power of attorney was given to Cahoon:

Know all men by these presents that Peter Hall, William Chisholm, William S. Hawes, of Pleasant camp, British Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, C. P. Cahoon, of Pleasant camp, British Columbia, our true and lawful attorney, for us and in our names, place, and stead, to locate a mining claim in the territory of Alaska.

In testimony whereof we have hereunto set our hands and seal this 4th day of Oct., A. D. 1898.

Peter Hall. [SEAL.]

Wm. A. Chisholm. [SEAL.]

Wm. S. Hawes. [SEAL.]

Signed, sealed, and delivered in the presence of—

Dan. Sutherland.
J. Hanson.

*Provisions were furnished the party, and [568] they started out on the 4th of October, 1898, and met on the creek (subsequently given the name of McKinley) certain members of the appellant company. Gold was discovered, and Cahoon wrote notices of location for Chisholm and Hall upon a snag or stump in the creek, making their claims contiguous, and afterward reported that he had done so, saying that he had staked Chisholm first and Hall next. Chisholm and Hall went to the claims about the 20th of October, and cut trails to them, and did other work upon them; and at that time copied the notices of location and had them recorded. The notices, with their indorsements, were introduced in evidence.

The testimony was given by several witnesses and in great detail, and it was opposed at about all points by testimony of several witnesses, including Cahoon; and as to who first discovered gold there was a decided conflict whether Sutherland did, who is one of the appellee company, or whether Hackley did, under a location by whom the appellant company claims. Also a conflict as to whether Hackley protested when Cahoon wrote the notices of location for Chisholm and Hall, and whether Cahoon promised to take them down and authorized Hackley to do so, and, upon his declining, authorized Lewis, one of the appellant company, to take them down and relocate Chisholm and Hall further up the creek, and whether Lewis did so.

1. It will be observed that the main controversy of fact between the parties was as to who made the first discovery of gold,—Hackley or Sutherland. On this testimony appellants have three contentions, to which, they claim, the instructions asked by them at the trial court were addressed:

(1) That the discovery of mineral is a precedent condition to the making of a valid location, and that Hackley was the first to discover gold.

(2) That the locations relied on by appellees were invalid because they were not “distinctly marked on the ground, or otherwise designated as required by law.”

(3) That the citizenship of Chisholm and Hall was put at issue by the pleadings, and no evidence was offered to establish it, [569] but, *on the contrary, the power of attorney under which Cahoon acted represents them to be citizens of British Columbia.

Without now questioning the soundness of either of these contentions, it is enough to say that the assignments of error based upon the refusal of instructions cannot be entertained. This is undoubtedly a suit in equity, and if it may be regarded as entertained under the general powers conferred by the act of May 17, 1884 (23 Stat. at L. 24, chap. 53), error cannot be predicated upon the giving or the refusing of instructions. The verdict was but advisory to the court, to be adopted or disregarded at the court's discretion. This we regarded as indisputable, but in order that counsel might be heard upon the effect of the Oregon Code, if regarded as applicable to Alaska, we requested briefs of counsel “as to what errors, in respect of giving or refusing instructions or other rulings on trial by a jury in a cause of this character, are open for consideration: on appeal from the district court of Alaska.”

In response to that request, counsel for appellant urge that by § 7 of the act of May 17, 1884, *supra*, the final judgments of a district court of Alaska are reviewable by this court “as in other cases,” and that the terms, “other cases,” “necessarily refer to the procedure for review provided by §§ 691 and 692, Revised Statutes, governing district and circuit courts having like jurisdiction.” But the procedure there prescribed is for the purpose of reviewing error; and error, as we have already said, cannot be based on instructions given or refused in an equity case. Nor is the rule different in the state of Oregon. *De Lashmatt v. Everson*, 7 Or. 212; *Swegle v. Wells*, 7 Or. 222.

2. There was no finding of facts by the court, and, assuming that we may look into the evidence, we find it conflicting as to who first discovered gold,—Hackley or Sutherland. The court below evidently determined that Sutherland did, and, having no test of the credibility of the witnesses, we cannot pronounce that determination unsound. Sutherland seems to have been acting with and co-operating with Cahoon. At any rate, Sutherland is not contesting the [570] locations made by Calhoon *for Chisholm and

Hall, but, on the contrary, asserts their validity and claims title under them. The locations, therefore, are valid so far as they depend upon the discovery of gold.

The second contention is that they are invalid because they were not “distinctly marked on the ground.” The appellants base this contention on Cahoon's testimony. His testimony is that he wrote the notices of locations upon a stump or snag in the creek, and they were as follows: “I, the undersigned, claim 1,500 feet running down this creek and 300 feet on each side.”

But the notices produced by other witnesses, and which were testified to be copies, as near as could be made out, of those on the stump, were respectively as follows:

Notice is hereby given that I, the undersigned, have, this 6th day of October, 1898, located a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley creek, in Porcupine mining district, running into Porcupine river. This claim is the east extension of W. A. Chisholm claim on about 1,800 feet from the first falls above the Porcupine river, in the district of Alaska.

Peter Hall, Locator.

Witnesses: J. Hanson.

D. Sutherland.

Notice is hereby given that I, the undersigned, have, this 6th day of Oct., 1898, located a placer mining claim 1,500 feet along creek bottom and 300 feet from center of creek each way on creek known as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim and about 300 feet above first falls on said creek, in the district of Alaska.

Wm. A. Chisholm, Locator.

Witnesses: D. Sutherland.

James Hanson.

These notices constituted a sufficient location; the creek was identified, and between it and the stump there was a definite relation which, combined with the measurements, enabled the boundaries of the claim to be readily traced. *Haus v. Victoria Copper Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282.

*3. Conceding, appellants say, a proper discovery and a proper description of the location, nevertheless, as the citizenship of the locators was put in issue, it was necessary to be proved to justify a judgment for the appellees, because, under § 2319, Rev. Stat., the public lands of the United States are only open to exploration, occupation, and purchase by citizens of the United States and those who have declared their intention to become such. [571]

In *Manuel v. Wulff*, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651, this court sustained the validity of a conveyance of a mining location to an alien, reversing a decision of the supreme court of Montana to the contrary. The decision was based upon the difference between a title by purchase and title by descent, and the doctrine expressed that an alien can take title by pur-

chase, and can only be divested of it by office found. The case of *Doe ex dem. Governor v. Robertson*, 11 Wheat. 332, 6 L. ed. 488, was cited and approved, and the remarks of Mr. Justice Johnson in that case become apposite:

"That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. Hence it is usually said that it has regard to the solemnity of the livery of seisin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which from its good sense and applicability to the nature of our government makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural-born subject that is resident in the Kingdom and that owes a local allegiance to the King, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold."

That grantees of the public land take by purchase this court, in *Manuel v. Wulff*, left no doubt. It was said that when a location *is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110; *Noyes v. Mantle*, 127 U. S. 348, 32 L. ed. 168, 8 Sup. Ct. Rep. 1132.

The appellants, however, deny the application of *Manuel v. Wulff*, and contend that this suit having been brought under § 500 of the Oregon Code, in order to maintain the suit, the appellees must show a right to the exclusive possession of the ground in dispute. This is in effect to say that, while the validity of the location may not be disputed by appellants, that the right to the possession, which is but an incident of the location, may be. We do not concur in this view. The meaning of *Manuel v. Wulff* is that the location by an alien and all of the rights following from such location are voidable, not void, and are free from attack by anyone except the government.

It is not necessary to notice other points made by appellants; and, discovering no error in the record, judgment is affirmed.

183 U. S.

PABLO MAESE, José L. Lopez, Dionicio Gonzalez, and Jesus Maria Tafoya, Appts.,

v.

BINGER HERMAN, Commissioner of the General Land Office of the United States, and Ethan Allen Hitchcock, Secretary of the Department of the Interior of the United States.

(See S. C. Reporter's ed. 572-582.)

Private and claims—equity—public lands.

A confirmation to a town of a claim reported by the surveyor general as a claim by the town under a Mexican grant cannot be contested by a bill in equity against the Land Department on the ground that the grant, properly interpreted, was to private persons instead of to the town, even if the so-called town has no legal or corporate existence, since the capacity of the town to take the patent is settled by the confirmation to it by Congress.

[No. 226.]

Argued November 6, 7, 1901. Decided January 6, 1902.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming a decision dismissing a bill in equity against the officers of the Land Department. *Affirmed.*

See same case below, 17 App. D. C. 52.

Statement by Mr. Justice McKenna:

*This is a bill in equity brought in the [573] supreme court of the District of Columbia, praying for an injunction against respondents from issuing a patent to the town of Las Vegas, New Mexico, of the lands in the Las Vegas private land grant, or, if a patent has issued, to declare it to be void, or, if a patent has not issued, to direct one to issue "to all of said lands, to the heirs, legal representatives, and assigns of the said Juan de Dios Maese, Manuel Duran, Miguel Arculeta, José Antonio Cassaos, and those who were associated with them as the original grantees and as representatives of said original grantees; and that their title in and to said lands may be quieted; and said plaintiffs pray for such other and further and general relief as they may show themselves entitled to under the law and the facts."

There was a demurrer to the bill, which was sustained, and the complainants declining to amend their bill, it was dismissed.

An appeal was taken to the court of appeals, and the action of the supreme court of the district was affirmed. 17 App. D. C. 52.

The suit was brought by the complainants as heirs of the original grantees, for themselves and others, who, it is alleged, are too numerous to be made parties. The de-

335

fendants are sued in their official character. The facts as they appear from the bill are that on the 20th of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Cassaos, for themselves and on behalf of twenty-five men, presented a petition to the corporation of El Bado, in the territory of New Mexico, Mexico, for the grant and possession of the tract of land "commonly known as Las Vegas, on the Galenas river, which was desired for the cultivation of moderate crops and for pasture and watering places." The land was under the jurisdiction of El Bado, and was bounded as follows: "On the north by the Sappello river, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel del Bado."

The tract contains 496,446.96 acres of land, and was afterwards surveyed in 1860, which survey was approved by the surveyor general of New Mexico.

[574] *The petition was presented to the territorial deputation, approved by that body on the 23d of March, 1835, and the grant made as asked for, with the provision "that persons who owned no land were to be allowed the same privilege of settling upon the grant as those who petitioned for it, and that 'the pasture and watering places are free to all.'"

On the 24th of March, 1835, the acting governor and political chief of the territory approved the action of the territorial deputation, and directed the constitutional justice of El Bado to place the parties in possession of the lands prayed for. This was done on the 6th of April, 1835.

The heirship or legal succession of the parties to the original grantees is alleged, and that the complainants "are now the true and real owners of undivided interests in said land, the separate interest therein of each being of the full value of not less than \$10,000." The total value of the land is \$2,000,000.

The treaty and protocol of Guadalupe Hidalgo are invoked, and it is alleged that the surveyor general of New Mexico, under the provisions of the act of Congress of July 22, 1854 (10 Stat. at L. 309, chap. 103), and acting under the instructions of the Secretary of the Interior and Commissioner of the General Land Office, gave notice to parties claiming grants from Mexico to present their claims, and thereupon Francisco Lopez, Henry Connelly, and Hilario Gonzalez, on behalf of themselves and a large number of citizens of the United States, residents of San Miguel county, presented their petition claiming the Las Vegas grant. The surveyor general investigated the claim, found, and reported its validity. His report was approved by Congress and the grant confirmed, "thereby confirming in and to the original grantees named and designated in said Las Vegas grant, their heirs and assigns, their absolute right and title to all of the lands embraced within the aforesaid boundaries and limits, free of all

right, title, claim, or control upon the part of the United States."

It is the duty of the Commissioner of the General Land Office to issue patents in "all such confirmed private land grants, to the grantees named in the original grant, their heirs or assigns, *and in the discharge and[575] performance of his duty therein he has no judicial or discretionary powers, but acts ministerially alone in the issuing of such patents."

It is further alleged in the bill that—

"December 17, 1898, upon a petition filed in the Interior Department of the United States, praying that a patent be ordered to be issued to the town of Las Vegas to all the land included in said Las Vegas grant, the Honorable Thomas Ryan, the then acting Secretary of the Interior Department, addressed a letter to the Commissioner of the General Land Office wherein and whereby the said Interior Department ordered and directed the honorable Commissioner of the General Land Office to issue a patent to said lands to the town of Las Vegas, which order of the Interior Department now remains and continues in full force and effect, not having been set aside, vacated, or omitted.

"Said plaintiffs are informed and believe, and upon their information and belief they charge the fact to be, that at the date of the making of said Las Vegas grant, as aforesaid, there was no place of collection of people having any legal existence under the laws, customs, or usages of the Republic of Mexico or the territory of New Mexico known or designated as the town of Las Vegas, nor was there any town by name of Las Vegas on said grant or elsewhere at that time which under the laws in force at that time in the territory of New Mexico had any legal or corporate existence, or which under or by virtue of any law, custom, or usage in force in New Mexico could take or acquire title to lands.

"And said plaintiffs allege and charge further that said land grant was not made to any town by name of Las Vegas or by any other name; that the town of Las Vegas nor any other town ever petitioned the surveyor general of New Mexico to investigate the nature, character, extent, or validity of said grant; and that the only petition ever preferred to any surveyor general for such an investigation touching said grant was preferred by individuals representing the original grantees Juan Dios Maese *et al.*, their heirs and assigns, the same hereinbefore referred to. They aver further that said surveyor general reported that said grant was made in due form to Juan Dios Maese and *his associates, and was to them[576] a valid grant, and plaintiffs aver that said grant was duly and legally confirmed by Congress to the original grantees, the said Juan Dios Maese and his associates, and that it was not confirmed to a town by the name of Las Vegas or to any other town. Said plaintiffs further show that they are informed and believe, and upon their information and belief they charge the fact to

be, that there was not on December 17, 1898, any town by name of Las Vegas anywhere in the United States, having any legal or corporate existence or any defined boundaries, or that could take or acquire title, either equitable or legal, to any lands whatsoever; and, further, that there was not at the time of the cession of the country included in the territory of New Mexico to the United States, by the Republic of Mexico, or at the time of the confirmation by Congress of the United States of said Las Vegas grant, any such town having any legal or corporate existence or having any defined boundaries, or any place by that name capable in the law of acquiring, having, or holding title, either legal or equitable, to the lands included within the Las Vegas grant or any other real estate."

It is further alleged that such patent, if issued, will be a cloud upon the title of plaintiffs, and that they have presented their claim to said grant, and have requested a patent to be issued to the heirs and assigns of the original grantees, and that their request has been ignored, "and said Commissioner of the General Land Office is now about to issue the patent to said grant to a nonentity called the town of Las Vegas, in violation of law and in violation of the rights of plaintiffs and to their great and irreparable injury, and will do so unless restrained from so doing by this court."

The demurrer to the bill was general, charging want of equity, no jurisdiction of the court over the subject-matter, and a defect of parties.

The other facts stated in the opinion are taken from H. Ex. Doc. 14, 30th Cong., p. 36, quoted in the brief of counsel for appellants.

Messrs. Fred Beall and H. C. Burnett argued the cause and filed a brief for appellants.

Assistant Attorney General Van Devanter argued the cause and filed a brief for appellees.

[577] *Mr. Justice **McKenna** delivered the opinion of the court:

The first and second grounds of demurrer are substantially the same, or depend upon the same arguments. Of the second ground the courts below took different views, the supreme court holding that the town of Las Vegas was not, and the court of appeals holding that the town was, a necessary party.

As stated in the bill, the act of July 22, 1854, in execution of the treaty of Guadalupe Hidalgo, required the surveyor general of New Mexico, under the instruction of the Secretary of the Interior, to investigate and report upon the validity of grants of land from the Mexican government. On September 11, 1855, a petition was presented to the surveyor general for the examination of the grant of Juan de Dios Maese *et al.*, which stated that it was presented by "Francisco Lopez and Henry Connolly and Hilario Gonzales, on behalf of them-

selves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, territory of New Mexico, represent to your honor that they and the citizens they represent are the claimants and legal owners of a certain tract of land lying and being situate in the county of San Miguel, in the territory of New Mexico."

It also stated the fact of a grant, the boundaries of the grant, and concluded as follows:

"The said claimants cannot show the quantity of land embraced in said grant, except as the same are set forth in the boundaries of said grant; nor can they furnish a plat of survey of said grant, as no survey of said land has ever been executed.

"Your petitioners, the claimants, are also informed and believe that Thomas Cabeza de Baca, for himself and others, are claimants also for the lands embraced in said grant and now claimed by your petitioners. Your petitioners pray that their claim and title to said lands be examined as required by law, *and that said grant be confirmed to [578] them; and, as in duty bound will ever pray," etc.

The surveyor general made report of the claim, stating—

"The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but, as far as the documentary evidence shows, is made in strict conformity with the laws and usages of the country at the time.

"Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant, and that they went upon the land knowing the existence of a prior grant; but as these matters are not deemed to be pertinent to the case so far as this office is concerned, it is not necessary to comment upon them.

"It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain, and entirely beyond the disposal of the general government, and that, in the absence of the one, the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises."

The claims and thirty-two others which the surveyor general had investigated were submitted to Congress, with his report thereon. The claims were designated by numerals from one to thirty-eight, number twenty being the "town of Las Vegas and Thomas Baca *et al.*" H. Ex. Doc. 14, pp. 42, 45.

The claims were confirmed by the act of June 21, 1860. 12 Stat. at L. 71, 72, chap. 167. Section 6 of the act is as follows:

"And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as

is claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so [579] selected by said heirs of *Baca when thereunto required by them: Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer. Approved June 21, 1860." 12 Stat. at L. 71, 72, chap. 167.

Notice of the confirmation was sent by the Land Office to the surveyor general of New Mexico, and his attention was particularly directed to the 6th section of the act of Congress as follows:

"In this connection I have to draw your special attention to the 6th section of said act of June 21, 1860. . . . This law gives the land to the Vegas town claim, and allows the Baca heirs to take an equal quantity of vacant land, not mineral, in New Mexico, to be located by them in square bodies, not exceeding five in number. To give this law timely effect you will give priority, in surveying private land claims, to this claim, particularly as it is in the vicinity,—about 4 miles from the outside of the public surveys. You will proceed to have the exteriors of the Las Vegas town claim properly run and connected with the line of the public surveys. The exact area of the Las Vegas town tract having been thus ascertained; the right will accrue to the Baca claimant to locate a quantity equal to the area of the town tract elsewhere in New Mexico, as vacant land, not mineral, in square bodies, not exceeding five in number."

The grant was surveyed, and a plat was made showing its area to be 496,446.96 acres. A certificate was issued to the Baca heirs for a like quantity of land, which entitled them to locate, and they did afterwards locate that quantity, and the location was sustained by this court. *Shaw v. Kellogg*, 170 U. S. 317, 42 L. ed. 1052, 18 Sup. Ct. Rep. 632.

On May 4, 1861, the surveyor general reported his action to the General Land Office, and transmitted the survey, field notes, and plat. The papers were received and filed in the Land Office, and the grant was treated as confirmed for 496,446.96 acres. In the reports of the General Land Office, subsequently made, the tract was named "town of Las Vegas," and the claimants the "inhabitants of the town."

On March 3, 1869, Congress passed an act which provided for the issue of patents for [580] private land claims in New Mexico *which had theretofore been confirmed by Congress. Section 2 of the act is as follows:

"And be it further enacted, That the Commissioner of the General Land Office shall, without unreasonable delay, cause the lands embraced in said several claims to be surveyed and platted, at the proper expense

of the claimants thereof, and upon the filing of said surveys and plats in his office he shall issue patents for said lands in said territory which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid, but for which no patents have heretofore been issued." 15 Stat. at L. 342, chap. 152.

It is stated by counsel for appellants that, prior to the act of March 3, 1869, the General Land Office was without authority to issue a patent for the lands in controversy. See also *Shaw v. Kellogg*, 170 U. S. 342, 42 L. ed. 1061, 18 Sup. Ct. Rep. 632. That act, therefore, is the sole authority to the General Land Office to issue the patent, and it would seem not to admit of controversy that the patent must issue to the confirmer of Congress. We think that the town of Las Vegas was that confirmer, and this conclusion relieves us from considering some of the interesting questions discussed by counsel.

The grant originally was as much to a community as to individuals, and a town was contemplated. The decree of the governor directed the selection of "a site for a town to be built by the inhabitants," and the constitutional justice, in executing the decree, informed those to whom he made "the distribution" of the land "that the water and pasture were free to all, and that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all, which being done, that they notify the justice, in order that he may mark out to each one equally the portion he is entitled to." A town was started, and grew and had attained substantial proportions at the time the confirmatory act was passed.

The petition of the surveyor general of New Mexico describes the petitioners as "residents of the town of Las Vegas and its vicinity;" and he manifestly regarded it a claim on behalf of the town, stated it from that standpoint, and reported it to Congress *as a claim by the town of Las Vegas. The [581] claim was confirmed by reference to the report, and the town was especially designated the claimant in § 6 of the confirmatory act. That it received confirmation at all may be because it was a claim by a town. Its legality might have been questioned. The claimants in their petition stated that their claim was disputed by Thomas Cabeza de Baca, and reporting on that dispute the surveyor general said that testimony was introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the grant to Juan de Dios Maese, and that the claimants "went upon the land, knowing the existence of a prior grant,"—the Baca grant. The surveyor general, however, did not assume to decide the dispute between the parties, but referred it to "the proper tribunals of the country" and to Congress. Congress accommodated the dispute by a magnificent donation of lands to the heirs of Baca, and

confirmed the original land to the town; and we can easily see that Congress might have exercised its bounty to adjust a controversy to which a town was a party, when, if the contestants were individuals, they would have been remitted to the courts to litigate their rights and priorities. But however this may be, we cannot assume that Congress approved the report of the surveyor general unadvisedly, used the name of the town unadvisedly, or intended primarily some other confirmee.

This interpretation of the act of Congress cannot be changed even if Las Vegas had or has "no legal or corporate existence." If the designated confirmee cannot take, another cannot be substituted in its stead. Nor do we think the capacity of the town to take a patent is open to dispute in the Land Office. Of that capacity Congress was satisfied, and it is not for the Land Department to conceive and urge doubts about it raised upon disputable legal propositions. The town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States. It is the duty of the Land Office to issue that patent, to give the town and its inhabitants the benefit of that authentication, and to remit all controversies about it to other tribunals and proceedings. It will be observed from this view that the question in the case is narrower than appellants conceive it. It is not what rights they had before confirmation of the grant, nor what rights they may assert under or against the patent, but what Congress has done, and what it has directed the Land Department to do. It is strictly this and nothing more, and on this only we express an opinion.

Decree affirmed.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, *Plff. in Err.*,
v.

BERTHA ZERNECKE, Administratrix of
the Estate of Ernest H. Zerneck, De-
ceased.

(See S. C. Reporter's ed. 582-588.)

*Corporations—acceptance of condition in
act of incorporation—due process of law.*

A corporation incorporated under the Nebraska railroad incorporation act of 1867 accepts as a part and condition of its charter the rule of liability for injuries to passengers expressed in § 3 of that act as absolute, unless the injury was one caused by the passenger's

own criminal negligence or by his violation of some rule of the railroad company brought to his actual notice, and such company cannot complain that by such section it is deprived of its property without due process of law.

[No. 58.]

Argued October 25, 1901. Decided January 6, 1902.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Lancaster County entered upon a verdict for plaintiff in an action to recover damages from a railroad company for the death of a passenger. *Affirmed.*

See same case below, 59 Neb. 689, 82 N. W. 26.

The facts are stated in the opinion.

Mr. W. F. Evans argued the cause, and, with Mr. M. A. Low, filed a brief for plaintiff in error.

Mr. Thomas C. Munger argued the cause, and, with Messrs. John M. Stewart and A. E. Harvey, filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This action was brought in the district court of Lancaster county, Nebraska, by the defendant in error as the administratrix of the estate of Ernest H. Zerneck, deceased, against the plaintiff in error, for damages, under a statute of the state, for the death of Zerneck, caused by the derailment of the train of plaintiff in error upon which Zerneck was a passenger.

The plaintiff alleged negligence in the railroad company and its servants. The answer of the company denied negligence, and alleged that the derailment was caused by some person or persons unknown to the company and not in its employment or under its control, who wilfully, maliciously, and feloniously removed and displaced from the track certain spikes, nuts, angle-bars, fishplates, bolts, and rails, and otherwise tore up and destroyed the track. The company also alleged care in the maintenance of its track and the management of its train.

The petition alleged that the plaintiff in error "was a corporation, duly incorporated under the laws of the state of Nebraska," and the admission of the answer was that plaintiff in error, "at all times mentioned in said petition, was a corporation organized and existing under and by virtue of the laws of the states of Illinois and Iowa, and a domestic corporation of the state of Nebraska."

The case was tried before a jury. The evidence of defendant in error (petitioner) was that at the time Zerneck was killed he was being transported as a passenger over the railway of plaintiff in error, and that the train upon which he was riding was thrown from the track, resulting in his death and the death of ten other persons. The plaintiff in error then offered witnesses and depositions to sustain the allegations of its

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

answer. The testimony, upon the objection of defendant in error, was rejected, and at the close of the evidence, on motion of defendant in error, the court instructed the jury as follows:

"1. The jury are instructed that if you find from the evidence that Ernest H. Zernecke was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is his administratrix, and she and her children had a pecuniary interest in his life and suffered loss by his death, then you should find for the plaintiff."

[584] "The jury returned a verdict for defendant in error for \$4,500, upon which judgment was entered. The judgment was affirmed by the supreme court of the state (59 Neb. 689, 82 N. W. 26), and the case was then brought here.

The assignments of error are based upon the contention that the action of the district court and the decision of the supreme court in affirming the judgment of the district court were based upon § 3 of the act providing for the incorporation of railroad companies, and it is contended that the section contravenes the 14th Amendment to the Constitution of the United States, in that said section deprives plaintiff in error of its property without due process of law. The section is as follows:

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Neb. Comp. Laws, 838.

The court, interpreting the statute, said: "It gives or creates a right of action in favor of the injured passenger, and when it is established that a person is injured while a passenger of the railroad company a conclusive presumption of negligence arises in every case, except where it is disclosed that the injury was one caused by his own criminal negligence or by his violation of some rule of the company brought to his actual notice. . . . In other words, a conclusive presumption of negligence arises where the case does not fall within the exceptions of the law and he has his right of action. . . . Now it is indisputable that if Zernecke had been injured merely, and not killed, he could have recovered against the railway company under said § 3, article 1, of chapter 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect, or default of the said railway company in failing to carry such passenger safely. Hence this

[585] case falls within the scope of said *chapter 21, and the fact of negligence, or the defendant's wrongful acts or default, is established when the evidence discloses the facts specified in said § 3 of chapter 72."

In other cases the supreme court has passed upon the statute, the titles of which cases are inserted in the margin.†

In *McClary v. Sioux City & P. R. Co.* (1873) 3 Neb. 44, 19 Am. Rep. 631, railroad companies were held not to be insurers of their passengers. In that case the injury was caused by the upsetting of the train by a gust of wind. The negligence of the company consisted in being behind time. If the train had been on time it would have escaped the tempest. The negligence, it was decided, was too remote as a cause, and the company was held not liable.

Subsequently (39 Neb. 803, 58 N. W. 434) railroad companies were held to be insurers of their passengers. The company escaped liability, however, by reason of the gross negligence of the person injured.

In *Omaha & R. Valley R. Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114, the words of the statute exempting railroad companies from liability, "where the injury done arose from the criminal negligence of the persons injured," were defined to mean "gross negligence," "such negligence as would amount to a flagrant and reckless disregard" by the passenger of his own safety, and "amount to a wilful indifference to the injury liable to follow." This definition was approved in subsequent cases. It was also approved in the case at bar, and the plaintiff in error, it was in effect declared, was precluded from any defense but that of *negligence as[586] defined, or that the injury resulted from the violation of some rule of the company by the passenger brought to his actual notice, and the company, as we have said, was not permitted to introduce evidence that the derailment of its train was caused by the felonious act of a third person. The statute, thus interpreted and enforced, it is asserted, impairs the constitutional rights of plaintiff in error. The specific contention is that the company is deprived of its defense, and not only declared guilty of negligence and wrongdoing without a hearing, but adjudged to suffer without wrongdoing, indeed even for the crimes of others, which the company could not have foreseen or have prevented.

Thus described, the statute seems objectionable. Regarded as extending the rule of liability for injury to persons which the common law makes for the loss of or injury to things, the statute seems defensible. And it was upon this ground that the supreme

†*Chollette v. Omaha & R. Valley R. Co.* 26 Neb. 159, 4 L. R. A. 135, 41 N. W. 1106, 33 Neb. 143, 49 N. W. 1114; *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Union P. R. Co. v. Porter*, 38 Neb. 226, 56 N. W. 808; *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 97, 66 N. W. 1000; *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434; *Omaha & R. Valley R. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887; *Fremont, E. & M. Valley R. Co. v. French*, 48 Neb. 638, 67 N. W. 472; *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556; *Chicago, B. & Q. R. Co. v. Wolfe* (Neb.) 86 N. W. 441, decided March 20, 1901.

court of the state defended and vindicated the statute. The court said:

"The legislation is justifiable under the police power of the state, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers, as they were of baggage and freight; and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight."

Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of a master for the acts of his servants.

In *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, a statute of Kansas abrogating the common-law rule exempting a master from liability to a servant for the negligence of a fellow servant, was sustained against the contention that such statute violated the [587] 14th Amendment of the Constitution *of the United States. And in *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176, a statute of Iowa which extended liability for the "wilful wrongs, whether of commission or omission," of the "agents, engineers or other employees" of railroad companies, was vindicated against the double attack of being an unjust discrimination against railroad corporations and the deprivation of property without due process of law. See also *Tullis v. Lake Eric & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

It seemed to the able judges who decided *Coggs v. Bernard* [2 Ld. Raym. 909], that on account of the conditions which then surrounded common carriers public policy required responsibility on their part for all injuries to and losses of goods intrusted to them, except such injuries and losses which occurred from the acts of God or public enemies, and many years afterwards Chancellor Kent praised the decision of cases which declined to relax the rule to excuse carriers for losses by fire. That rule was not and has not been extended by the courts to passengers, and Chief Justice Marshall, in speaking for this court in *Boyce v. Anderson*, 2 Pet. 150, 7 L. ed. 379, refused to apply the rule to slaves, saying: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried farther, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them."

But because courts have not extended the doctrine to carriers of passengers, it does not follow that a state legislature is pre-
183 U. S.

cluded from doing so. The common-law doctrine was declared by Chief Justice Holt in *Coggs v. Bernard* to be "a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.

*That reason may not apply to passengers. [588] but other reasons do, which arise from the conditions which exist in and surround modern railroad transportation, and which may be considered as strongly justifying a rule of responsibility for injury to passengers which makes sure, as the common-law rule does, that responsibility be not avoided by excuses which do not exist, or the disproof of which might be impossible.

We might extend the discussion and illustrate it by other cases, but, however interesting such discussion might be, we do not think it is necessarily demanded by this record. We think plaintiff in error is precluded from objecting to the rule of liability expressed in § 3. That rule of liability was accepted by plaintiff in error as a part and as a condition of its charter. "It was incorporated under the laws of the state of Nebraska," is the allegation of the petitioner. "It is . . . a domestic corporation of the state of Nebraska," is the allegation of the answer. It was incorporated, therefore, under the railroad incorporation act of 1867, and the liability which has been enforced upon it by the decision of the supreme court of the state is the liability declared by § 3 of that act. That liability, we repeat, plaintiff in error accepted with its incorporation, and cannot now complain of it. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518. We need not repeat the reasoning of *Waters-Pierce Oil Co. v. Texas*. The case followed and applied the doctrine of many prior cases. Judgment affirmed.

Mr. Justice Gray did not hear the argument, and took no part in the decision.

*CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased.

(See S. C. Reporter's ed. 589, 590.)

Corporations—acceptance of condition in act of incorporation—due process of law.

This case is governed by the decision in the case of *Chicago, R. I. & P. R. Co. v. Zernecke*, ante, 339.

Argued October 25, 1901. Decided January 6, 1902.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Thayer County entered upon a verdict for plaintiff in an action to recover damages from a railroad company for the death of a passenger. *Affirmed.*

See same case below, 59 Neb. 698, 82 N. W. 1119.

The facts are stated in the opinion.

Mr. W. F. Evans argued the cause, and, with Mr. M. A. Low, filed a brief for plaintiff in error.

Mr. Thomas C. Munger argued the cause, and, with Messrs. John M. Stewart and A. E. Harvey, filed a brief for defendant in error.

[589] *Mr. Justice McKenna delivered the opinion of the court:

This action was brought in the district court of Thayer county, Nebraska, by the defendant in error as the administrator of the estate of John R. Mathews, deceased, against the plaintiff in error, for damages, under a statute of the state, for the death of Mathews, caused by the derailment of the train of plaintiff in error upon which Mathews was a passenger.

The record presents the same questions which were presented and passed on in the case of the plaintiff in error herein against Zerneck, administratrix, No. 58 of this term, just decided. 183 U. S. 582, ante, 339, 22 Sup. Ct. Rep. 229. As in the latter case the ground of action in the case at bar was negligence in the railroad company and its servants. The answer of the company denied negligence, and alleged that the derailment was caused by some person or persons unknown to the company, and not in its employment or under its control, who wilfully, maliciously, and feloniously removed and displaced from the track certain spikes, nuts, angle-bars, fishplates, bolts, and rails, and otherwise tore up and destroyed the

[590] track. *The company also alleged care in the maintenance of its track and the management of its train.

The petition alleged that the plaintiff in error "was a corporation, duly incorporated under the laws of the state of Nebraska," and the admission of the answer was that plaintiff in error, "at all times mentioned in said petition, was a corporation organized and existing under and by virtue of the laws of the states of Illinois and Iowa, and a domestic corporation of the state of Nebraska."

The case was tried before a jury. The evidence of defendant in error (petitioner) was that at the time Mathews was killed he was being transported as a passenger over the railway of plaintiff in error, and that the train upon which he was riding was thrown from the track, resulting in his death and the death of ten other persons. The plaintiff in error then offered witnesses and depositions to sustain the al-

legations of its answer. The testimony, upon the objection of defendant in error, was rejected, and at the close of the evidence, on motion of defendant in error, the court instructed the jury as follows:

"The jury is instructed that if you find from the evidence that John R. Mathews was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Mathews, and that plaintiff is the administrator of the estate of said Mathews, then you should find for the plaintiff if you find a pecuniary loss from such death has resulted to the next of kin, in this case the father."

The jury returned a verdict for defendant in error for \$1,500, upon which judgment was entered. The judgment was affirmed by the supreme court of the state, upon the decision in *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb. 689, 82 N. W. 26, and this writ of error was then allowed.

The facts, contentions, and questions being the same as those presented in the *Zerneck Case*, 59 Neb. 689, 82 N. W. 26, for the reasons stated in the opinion in that case the judgment is affirmed.

*UNITED STATES REPAIR & GUARAN- [591]
TY COMPANY, *Petitioner*,
v.

ASSYRIAN ASPHALT COMPANY.

(See S. C. Reporter's ed. 591-601.)

*Patent—*for method of repairing asphalt pavement—lack of novelty.

The Perkins patent, 501,537, for a method of repairing asphalt pavements, consisting of so heating the spot to be repaired and the adjacent surface that the asphalt is reduced to the soft, pliable state in which it was originally laid, then mixing in enough new material to fill up the spot to be repaired, and then subjecting it to the usual finishing operations, is void for lack of novelty by reason of the prior French patent to Crochet, the process in which differed chiefly in the fact that the old asphalt was removed from the spot to be repaired, while this was not done by the Perkins method.

[No. 61.]

Argued October 28, 29, 1901. Decided January 6, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree affirming

NOTE—On patentability of invention—see notes to *Thompson v. Boisselier*, 29 L. ed. U. S. 76; *Corning v. Burden*, 14 L. ed. U. S. 683; *Grant v. Walter*, 37 L. ed. U. S. 553; *Wollensak v. Sargent*, 38 L. ed. U. S. 138; *Market Street Cable R. Co. v. Rowley*, 39 L. ed. U. S. 285, and *Dashiel v. Grosvenor*, 40 L. ed. U. S. 1025.

a decision of the Circuit Court adjudging a patent invalid. *Affirmed.*

See next case below, 41 C. C. A. 123, 100 Fed. 965.

The facts are stated in the opinion.

Mr. Lysander Hill argued the cause, and, with *Messrs. Raymond & Barnett*, filed a brief for petitioner:

The Perkins process belongs to the group of process inventions, the characteristic of which is the "subjection of a specific object to a specific application of specific forces, producing in the object a certain specific result."

1 Robinson, Patents, pp. 142, 144, 150, 249, 366, 398; *National Filtering Oil Co. v. Arctic Oil Co.* 8 Blatchf. 416, Fed. Cas. No. 10,042.

The essential thing necessary to constitute a patentable process is that it shall "involve chemical or other similar elemental action, though mechanism may be necessary in the application or carrying out of such process.

Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745.

If any material difference of result is produced a difference of action among the elements is inferred, and if the difference of result is new and useful, the person who first caused its production is a discoverer, and his patent is valid.

United Nickel Co. v. Harris, 15 Blatchf. 319, Fed. Cas. No. 14,407; *United Nickel Co. v. Manhattan Brass Co.* 16 Blatchf. 68, Fed. Cas. No. 14,410; *United States Nickel Co. v. Anthes, Holmes*, 155, Fed. Cas. No. 14,406; *United Nickel Co. v. Keith, Holmes*, 328, Fed. Cas. No. 14,408; *Lawther v. Hamilton*, 124 U. S. 1, 31 L. ed. 325, 8 Sup. Ct. Rep. 342; *National Filtering Oil Co. v. Arctic Oil Co.* 8 Blatchf. 416, Fed. Cas. No. 10,042; *Neilson v. Harford*, Webster Patent Cases, 295; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. ed. 279.

A process is a mode of treatment of certain materials to produce a given result. It is an act or series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing.

Cochrane v. Deener, 94 U. S. 788, 24 L. ed. 141.

Messrs. Ernest Wilkinson, Lysander Hill, and William R. Omohundro filed a brief in support of petition for certiorari.

No counsel for respondent.

[591] **Mr. Justice McKenna* delivered the opinion of the court:

This suit was originally brought for the infringements of three letters patent issued to the petitioner as assignee of Amos Perkins. The patents were respectively numbered 501,537, 542,349, and 560,599, and were dated respectively 18th July, 1893, 9th July, 1895, and the 19th of May, 1896. The first, 501,537, was for an improved "method of repairing asphalt pavements;" the other numbers were for "improvement in apparatus for repairing asphalt pavements."

183 U. S.

The bill contained the usual allegations of invention and infringement, and prayed an injunction.

The answer admitted the issue of the patents, but denied that Perkins was the original and first inventor of the subject-matter, or that the improvements therein disclosed constituted new and useful inventions within the meaning of the patent laws, or that said improvements were not known or used in this country, or had not been patented or described in any printed publication in this or in foreign countries before the alleged invention thereof by Perkins.

*The petitioner dismissed the bill as to patent number 542,349. Upon the hearing the circuit court sustained the apparatus patent number 560,599, finding that the Assyrian Asphalt Company had infringed upon that apparatus, and ordered an injunction and a reference for an accounting. The method patent, number 501,537, was adjudged invalid, and the court said:

"From the evidence in this suit regarding the prior state of the art, and the argument before me, I find that the term 'asphalt' is not limited in its meaning to the Trinidad deposit, or to so-called 'American mixture,' but includes as well the bituminous paving material used in France and elsewhere, comprising natural rock asphalt and compositions of bitumen and lime or sand particles; and that the claims of the Perkins method patent are so broad with reference to the application of heat to the repair of asphalt pavements that they are anticipated by the Crochet patent, and are invalid." [96 Fed. 236.]

The petitioner took an appeal to the court of appeals, and that court affirmed the judgment of the circuit court. 41 C. C. A. 123, 100 Fed. 965. The case was then brought here by a certiorari.

The proceedings here are only concerned with the method patent, number 501,537. The letters patent describe the invention as follows:

"My invention is designed to produce a method whereby the repairing of asphalt pavements may be quickly and cheaply accomplished, and a neater appearing pavement be obtained after repairing than has heretofore been the case.

"Heretofore in the repairing it has been customary to dig out with a pick or other instrument the surface material around the spot to be repaired, sometimes applying heat to the spot to soften the material so that it may be more easily removed. When the material has been removed the depression thus made is thoroughly cleaned and given a coat or dressing of tar. New material in a heated state has then been placed in the depression, and been ironed down and smoothed off in the usual manner of finishing, the tar acting as a solder to hold the new material in place. When completed, however, the line or joint between the old hardened material and the new material has been plainly discernible, and more often there has been more or less of *a ridge. [593

Again, this new block of material, by reason

of frost or from other causes, is frequently torn loose from its soldered connection with the old material, thus necessitating new repairs. In practising my invention, however, I subject the spot to be repaired and the surrounding edges to such a degree of heat that the surface asphalt—not only the exact spot to be repaired, but the surrounding portion, to a greater or less degree—is reduced to the soft pliable state in which it is originally laid. With a rake or other suitable instrument it is then agitated and mixed with enough new material to fill up the spot to be repaired. It is then subjected to the usual finishing operation of ironing and burnishing. The heating of the surface may be accomplished in various ways and by means of various forms of apparatus, and while I have herein shown but one form for accomplishing the result, yet I would have it understood that I do not limit myself to any particular form of apparatus for carrying out my invention.”

The apparatus described consists of a suitable tank mounted on a wheel for carrying gasoline. The tank is connected with a series of horizontal pipes which carry a series of burners, and “project a flame downward against the pavement.”

“In carrying out the invention A represents a suitable tank for carrying gasoline mounted on the wheeled frame B and connected by the pipe C with a series of horizontal pipes, D. These pipes D carry a series of burners, E, which pass through a hood or shield, F, and project a flame downward against the pavement. Pressure is then obtained upon the gasoline to force it to the burners and to produce a blast by means of an air pump, G, mounted upon the tank.”

The letters patent further say:

“The apparatus is also provided with a handle, H, whereby the operator may readily move it to the desired spot. Now, as would be seen by turning on as many of the burners as are desired, a strong blast of heat is projected against the surface of the asphalt, and readily melts it. As explained above, when it is desired to repair a spot, the apparatus is moved adjacent thereto with the burners directly above the spot. These soon reduce the surface asphalt, both at the spot and at the surround-

[594]ing *edges, to a pliable state, the strong blast causing not only the immediate surface, but the particles deep down, to be melted and yet not burned. With a rake or other suitable instrument the operator then agitates or stirs up the softened material, and, by adding new material of substantially the same degree of softness, the spot or depression to be repaired is filled up and subjected to the usual smoothing and finishing operation as in the case of a new pavement. This, as will be seen, is done without the use of the tar for the purpose of uniting the parts or sections of material, and is done without any distinct dividing line between the old and new material. In fact, there is no dividing line, because the new material has been mixed with and becomes a part of

344

the old material. As stated above, while heating the spot to be repaired, the surrounding edges or portions must be heated to a greater or less degree, and the new material is worked into these edges, as well as in the spot to be repaired, so that when hardened it is practically impossible to tell where the pavement has been repaired.

“What I claim is—

“1. The method of repairing asphalt pavements, which consists in subjecting the spot to be repaired to heat, adding new material, and smoothing and burnishing it, substantially as described.

“2. The method of repairing asphalt pavements, which consists in subjecting the spot to be repaired to heat until the material is softened, agitating it, and mixing with it new material, and finally smoothing and burnishing it, substantially as described.”

Infringement is only asserted of the first claim, and, considering the language of the claim and of the specifications, it seems impossible to escape the conclusion that the invention claimed is for the application of heat to the spot to be repaired. And the patentee did not confine himself to the particular apparatus he described. That, he said, was “one form of accomplishing the result.” He would have it understood, he said, that he did not confine himself “to any particular form of apparatus for carrying out” his invention; and the independence of his method from any form of apparatus is brought out by *contrast of what had been [595] done and what he proposed to do as an improvement. What had been done was to take out with a pick or other instrument the surface material around the spot to be repaired, sometimes applying heat to the spot to soften the material, so that it might more easily be removed. And the new method he proposed was to subject the spot to be repaired and surrounding edges to such a degree of heat that the surface asphalt—not only the exact spot to be repaired, but the surrounding material, to a greater or less degree—will be reduced to the soft, pliable state in which it was originally laid. Here we have the comparison of the two methods. The old was to take out the surface material around the spot to be repaired, sometimes applying heat to soften such material. The new method was to apply heat, not only to the exact spot to be repaired, but the surrounding edges. What, then, was the advantage of the new method? The patent tells us. In the old method the depression made by the removal of material was “thoroughly cleaned and given a coat or dressing of tar.” The tar acted as a solder, but the joint between the old and the new material was discernible, and often a ridge was formed, and the adhesion of the materials yielded to frost and other causes. The new method dispenses with the tar and its consequences. It substituted the melting of the surrounding edges, producing a union and coalescing of the old and new material, making a better appearing and more lasting repair. If the method and effect of the patent be different from this.

183 U. S.

we are unable to discern it from the patent or from the testimony. Indeed, there is no other difference established by the testimony. One of the expert witnesses of the petitioner testified as follows:

[596] "It is further evident that in such use of defendants' device and in the repair of pavements in part by the use of said device by defendants, the use of tar or any other cement or 'solder' is obviated; that the union between the patch of new material and the old pavement is direct, immediate, and complete, without the intervention of an interposed body of tar or like material; and that the joint need, therefore, present none of the disadvantages, objections, or defects, in respect either of appearance *or of effectiveness, which distinguished the old tar joint and which are obviated by the method here in controversy.

"There are three steps or process elements enumerated in this claim, to wit: First, 'subjecting the spot to be repaired to heat;' second, 'adding new material;' and third, 'smoothing and burnishing.' These are all performed in the same order by the defendants. The separate steps are, moreover, essentially the same in kind in defendants' practice, as set forth in the patent. The heat is applied to the spot to be repaired with a flame blast. The new material added is the same in condition and character; it is not tar or any part tar, but is solely the asphalt composition like that of the old pavement, and in the soft condition and heated state in which said composition is and was originally applied. The smoothing and burnishing is the same step in both cases, being the old and familiar operation performed by means of heated metal tamping and smoothing irons long before used in leveling and smoothing original asphalt pavement surfaces."

And he further testified:

"It appears to me to be a feature of the patented method, or a characteristic of the steps of applying the new material, that the new material is placed into direct contact with the old, as if the claim read 'adding new material in direct contact with the old material, and smoothing and burnishing it.'"

In other words, the mixing of the old and new material around the edges of the excavation, and "adding of new material in direct contact with the old material, smoothing and burnishing it," is the essence of the invention; and so unqualifiedly is this true that a witness of petitioner testified that if the heat which was applied not only melted, but burned, the immediate surface and as well "the particles deep down," and the material thus burned raked away clean before new material was applied, the method of the patent would be followed.

As thus described, was there anything in the art which preceded the Perkins method and took from it the claim of originality and invention? The circuit court and the circuit court of appeals found that a patent issued to Paul Crochet *June 11, 1880, in
[597] 183 U. S.

France, had that effect; and we concur in the finding. The process described in the Crochet patent is for the "preparation and recharging of compressed asphalt roadways." The following is the specification of the patent:

"When it was designed to repair or recharge a roadway in asphalt with the means which are now at command, the operator generally delimits with a pick the part which is to be replaced, and takes therefrom the asphalt; but it is rare that this operation has not for consequence the starting of the adjacent portions which are sound, swelling them up in such wise that at the end of a little while it is necessary to repair them in their turn.

"To avoid this I have designed a process for repairing and recharging asphalt roads which suppresses such inconveniences. It consists in reheating the part to be mended by means of a movable furnace which the operator shifts about at the surface of the roadway, until such portion deerepitates and becomes friable. The upper part of the layer of asphalt and that which has been damaged are taken off by means of an iron scraper armed with small teeth which perform the office of a rake; said scraper in raising the material forms at the same time upon the part remaining numerous striae which render the surface wrinkled, and augment the adherence of the additional overthickness which constitutes the recharge.

"The repeated passage of the movable furnace thereon has equally for its effect to vaporize the water and the humidity which are found in the asphalt pavement at the portion to be repaired or recharged.

"After this preparatory operation the workman spreads a convenient depth of asphalt in powder-like state and stamps it by the ordinary means; because of the softening of the subjacent layer, said layer solders itself perfectly to the new coat, and forms with it a thickness without break in continuity. Such repair and such recharging do not at all impair the neighboring portions.

"It is clearly evident, besides, that the same work of recharging can be done over the whole surface of a street, instead of being done in spots, and that it is independent of the depth of the asphalt layer.

*"The heating apparatus which I have arranged for thus effecting the softening the surface of the asphalt roadways is represented on the drawing annexed, in longitudinal and transverse sections, Figs. 1 and 2. It is composed of a box body, the sides A, A, B, B, of which are perforated throughout, and the bottom C, whereof is formed a grating, below which there is a metal plate D, to radiate the heat over the surface of the asphalt. Said plate D is movable to allow for the withdrawal of cinders. The box is mounted upon the wheels E, the axes of which are adjustable upon supports a, the elevation of which in guides b can be varied to augment or diminish the distance of the box to the roadway. A handle, F, serves to maneuver the car over the pavement. This

system, especially applicable for streets of compressed asphalt, can be equally employed to repair and recharge streets of bitumen.

"Résumé:

"I claim as my invention my system for reparation and recharge of asphalt roadways, presenting as distinctive characteristics the points following:

"1st. The softening of the upper surface of the asphalt layer at the part to be repaired, and the removal of such upper surface by means of a toothed scraper which striates the part remaining.

"2d. Recharging, by the addition upon the surface thus softened, of an asphalt layer of convenient thickness, which is stamped by the usual means.

"3d. The movable furnace which I have combined to such end, according to the conditions described and represented."

The similarity, if not identity, of the patents, is manifest, and it would seem unnecessary to enlarge upon their resemblance. They are both methods of repairing asphalt roadways; they both apply heat to the spot to be repaired; the old material is removed in the Crochet patent; in the Perkins patent it is reduced to the state in which it was originally laid, then agitated and mixed with new material. But this agitation and mixing of old and new material is not necessary to the method. It may be advisable to do or not to do, a witness testified. But

[599] further, the Perkins patent calls for a heating of the surrounding *edges of the spot to be repaired, to make continuity between the spot repaired and the surrounding pavement. The Crochet patent has not this detail in words, but it is clearly implied. Describing the prior art, the Crochet patent says: ". . . the operator generally delimits with a pick the part which is to be replaced, and takes therefrom the asphalt; but it is rare that this operation has not for consequence the starting of the adjacent portions which are sound, swelling them up in such wise that at the end of a little while it is necessary to repair them in their turn." His method, he says, "suppresses such inconveniences," and the repeated passing of the heating apparatus over the pavement has the effect that the new coat forms with the old "a thickness without break in continuity, and it does not at all impair the neighboring portions." Surely, considering the method of this patent alone, it did not require the exercise of invention to pass to or conceive the Perkins method. Besides, that conception had the aid of other publications. In some of them the application of heat is mentioned as necessary in the original construction of asphalt pavements, and also in their repair. In a work entitled "Asphalt, its Origin, its Preparation, and its Application," by Leon Malo, published in Paris in 1888, the repair of pavements after excavations and deteriorations was described. In making excavations two precautions were recommended, and the second consisted, the author said—

"In heating the edge rims of the asphalted bed which limit (*i. e.*, define) the

whole trench, before pouring in the hot powder destined to repair the part lacking."

And again, 'as to deteriorations:

"The wheels of vehicles encounter the disintegrated parts, digging there a hole which—if it be not promptly repaired—finishes by deepening itself as far as the beton. The sole remedy for this evil is to remove all the bad part and replace it by new asphalt, taking care therein to heat the edges of the sound portion so as to obtain a perfect soldering, as we have explained a little further back."

The counsel claim, however, that the Perkins "method is characterized by a new and useful way of applying heat to the *pave-[600]ment, to wit, by sending a flame blast into direct contact with the pavement surface," and that the Crochet patent had no suggestion of that; and, besides, the Crochet process applied to *compressed asphalt roadways*, which was a different asphalt roadway than that to which the Perkins method was intended to apply. And upon the difference in the asphalt counsel has dwelt long and interestingly, but the argument finally comes to a dependence upon the fact that the compressed asphalt of the Crochet patent disintegrates and crumbles, and if overheated becomes as inert as sand; whereas the asphalt of the Perkins patent melts under the action of heat and has "a peculiar property or 'susceptibility;' namely, that when its surface is subjected constantly to a lively heat, the exposed material automatically covers itself with a thin, protecting shield, and merely melts and softens beneath that shield." The answer to the contentions is that given by the circuit court of appeals; the patent does not support them. Before the time of either patent the world knew that heat disintegrated some things and melted others, and we cannot concede invention to the thought that that might be true of different kinds of asphalt. Indeed, even in the face of the grave testimony contained in this record given by unquestionably expert men, we find it also difficult to concede that it was an exertion of invention to apply heat to the edges of an excavation to make a bond between the old and the new material. To devise an instrument to do that well and quickly might be invention, and that Perkins achieved by his apparatus patent. To allow him more under the facts of this record would be to give him a monopoly of the machine and of that which the machine can do. And this is an answer to the contention based upon the peculiar property of American asphalt to interpose a shield against a blasting heat to protect itself from destruction,—a virtue in American asphalt, no doubt. If it is a virtue resulting from a peculiar application of heat, there is nothing in the record to show that Perkins was aware of it. He certainly did not reveal it in the specifications of his patent nor describe it as part of his method. His apparatus, it is true, is provided with burners by which blasts of heat may be projected against the pavement. But his method is independent

[601]*of his apparatus. He says in his patent: "The heating of the surface may be accomplished in various ways and by means of various forms of apparatus, and while I have herein shown but one form for accomplishing the result, yet I would have it understood that I do not limit myself to any particular form of apparatus for carrying out my invention."

And what is claimed is, as we have seen, "the subjecting the spot to be repaired to heat."

In further answer to the contention we may quote the circuit court of appeals as follows:

"Another objection to the proposed limitation of the claim by making it read 'a blast of heat,' or 'a strong blast of heat,' in lieu of the unqualified word 'heat,' is in the fact that the third claim, which contained the additional words, was withdrawn by the patentee upon a ruling or declaration of the Patent Office that the first and third claims were the same in substance and could not both be permitted to remain in the case. That was not merely a casual expression of opinion by an examiner, but was in effect a requirement that one or the other of the claims be withdrawn, and no reason is perceived for not applying the ordinary rule. Having voluntarily abandoned the claim for a method limited to the use of 'a blast of heat,' the patentee or his assignee may not now insist that a broad claim, containing no suggestion of such intention, shall nevertheless be subjected by construction to the same restriction. This point, in view of the reservation already considered, is unimportant, and might be passed, but it is to be observed that if the third claim was withdrawn by mistake, a correction should have been sought in the Patent Office, either by a surrender and re-issue, or possibly by a new application. It is not within the rightful power of the courts to enlarge or restrict the scope of patents which by mistake were issued in terms too narrow or too broad to cover the invention, however manifest the fact and extent of the mistake may be shown to have been."

Decree affirmed.

[602] *MIDWAY COMPANY, *Plff. in Err.*,
v.

FRANK W. EATON, Leonidas Merritt,
Merrill M. Clark, Richard H. Fagan, and
Margaretha Lonstorf.

(See S. C. Reporter's ed. 602-619.)

Public lands—Sioux half-breed scrip—validity of power of attorney to locate and sell—improvements—direct connection of half-breed with land.

1. Powers of attorney to locate Sioux half-breed scrip, and to sell the lands located therewith, do not amount to an assignment of such scrip, in violation of the provisions of act of July 17, 1854, in pursuance of which

183 U. S.

such scrip was issued, that "no transfer or conveyance of any of said certificates or scrip issued shall be valid."

2. The erection of a house 14 by 16 feet in size, upon unsurveyed lands, is a sufficient improvement to satisfy the provision of act of July 17, 1854, for the location of Sioux half-breed scrip issued under that act, upon any "unsurveyed lands . . . upon which they (the half-breeds) have respectively made improvements."
3. Improvements caused to be erected upon unsurveyed land by an attorney in fact of a Sioux half-breed to locate scrip issued under act of July 17, 1854, are made by the half-breed, within the meaning of the provision of that act that such scrip may be located upon any "unsurveyed lands . . . upon which they (the half-breeds) have respectively made improvements."
4. No direct connection with the land or claim for personal use by one to whom Sioux half-breed scrip has been issued under the act of July 17, 1854, is essential to the validity of a location of such scrip under the provisions of the act authorizing such location upon "any unsurveyed land . . . upon which they (the half-breeds) have respectively made improvements."

[No. 80.]

Argued December 4, 5, 1901. Decided January 13, 1902.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment affirming a judgment of the District Court for the County of St. Louis, which adjudged the validity of locations of Sioux half-breed scrip. *Affirmed.*

See same case below, 79 Minn. 442, 82 N. W. 861.

Statement by Mr. Justice **McKenna**:

This is an action to quiet title, and was brought in the district court in the eleventh judicial district, county of St. Louis, state of Minnesota.

The plaintiff in error claims title under a United States patent issued to its grantor, one Frank Hicks, upon a homestead settlement. The defendants in error claim under locations of what is commonly known as "Sioux half-breed scrip," issued under *the[603] act of July 17, 1854. 10 Stat. at L. 304, chap. 83. These locations, it is alleged, were prior in time and right to the claim of Hicks, and therefore the patent was illegally issued to Hicks. It was prayed that the title represented by the patent be adjudged to be held in trust for the defendants in error, and that the plaintiff in error be required to convey such title to them in proportion to their interests set forth in their cross bill.

The controversy turns upon the validity of the scrip locations. Their validity was adjudged by the district court, and by the supreme court of the state. 79 Minn. 442, 82 N. W. 861. This writ of error was then sued out.

The facts as found by the court are: That under the act of July 17, 1854, and in pursuance of said act, there were issued to Orillie Moreau certificates commonly known

as Sioux half-breed scrip numbered 19E and 19D, which entitled her to select and take 160 acres of the public lands of the United States of the classes mentioned in said act; "that thereafter, and on the 16th day of June, A. D. 1883, the said Orillie Moreau, then Orillie Stram, never having theretofore made use of the said certificates of scrip, and the same never having been in any manner extinguished or satisfied, through the defendant Frank W. Eaton, who had theretofore been by her duly empowered as her attorney in fact for that purpose, presented said scrip at the local land office in Duluth, Minnesota, and then and there made application to locate the same on certain then unsurveyed lands of the United States in said district in which said land office was located, and did then and there enter and file upon by virtue of said scrip the lands for which said application was made as aforesaid, and filed therewith a diagram or plat of said land embracing a sufficient description thereof to properly designate the same, which lands were in said application described by metes and bounds;" and that the same were "lands not reserved by the government of the United States for any purpose whatsoever;" and also that "prior to the location of said scrip upon said land as above found improvements had been made thereon, consisting of a house 14 by 16 feet, by and under the authority of the said Frank W. Eaton."

[604] On the 20th of July, 1885, the lands having been duly surveyed, *a plat and survey of the township in which the lands were situated were "duly filed in the local land office at the city of Duluth, Minnesota, and thereupon, and on the 21st day of July, 1885, upon application of the said Orillie Stram, acting by and through her said attorney in fact, said certificate of Sioux half-breed scrip number 19D was adjusted to and upon the lands in controversy" (they were specifically described), and the scrip was then and there duly located upon said lands as surveyed lands, and the locations were allowed by the officers of the local land office at Duluth, there not being at that time, nor at the time the scrip was located upon the lands when unsurveyed, nor at any other time, any valid adverse claim to said lands; and on the 21st of July, 1885, receiver's final receipts and certificates of entry were duly and regularly issued to said Orillie Stram, and duly and regularly, recorded in the counties of Lake and St. Louis, Minnesota, within a few days thereafter.

The "rights and interests" of Orillie Stram, by sundry mesne conveyances, were conveyed to the defendants in the proportions respectively as follows: "Frank W. Eaton, the undivided 13-36, Merrill M. Clark, the undivided 9-36, Margaretha Lonsdorf, the undivided 8-36, and Richard H. Fagan, the undivided 6-36; and the said defendants are still the owners of the said lands in said proportions."

That on the 20th of July, 1885, one Thomas Hyde and one Angus McDonald respectively made application to make pre-

emption filings on portions of the lands in controversy, which applications were denied both on the ground of the prior locations of the scrip and that the applications were not made in good faith, but in fraud, and in violation of the pre-emption laws. And it was determined by the local land office and sustained by the Commissioner of the General Land Office, and by the Secretary of the Interior, that neither Hyde nor McDonald ever had or obtained any rights whatsoever by reason of their application or any subsequent proceedings, but, notwithstanding, said Hyde and said McDonald "made an attack upon the said decisions of the Land Department some time in November, 1885, and upon the location of the said certificates *of scrip and the entry of [605] lands thereunder." A hearing was had on the 6th of April, 1886, and the local land officers sustained the scrip locations. An appeal was taken to the Commissioner of the General Land Office, and he held "adversely to the scrip locations." An appeal was then taken to the Secretary of the Interior. A hearing was had before the Secretary February 18, 1889, and he held and determined that neither Hyde nor McDonald had any interest or valid claim to the lands, but, notwithstanding, also held that the scrip locations were illegal and invalid, and that neither Orillie Stram nor those claiming under her were entitled to the lands for the following reasons: (1) that the improvements made upon the land when it was unsurveyed were not made under the personal supervision of Orillie Stram, and that she had not had personal contact with the land; (2) that the power of attorney to Eaton to locate the scrip, and the power of attorney executed at the same time to Leonidas Merritt to sell the lands which should be located, operated as an assignment of the scrip, and were in violation of the act of July 17, 1854, and the entry of the lands therefore was not for the benefit of said Orillie Stram; (3) that the subsequent location and adjustment of the scrip to the lands after the latter were surveyed were ineffectual in view of the previous attempt to locate the scrip, and in view of his (the Secretary's) decision relative to the question of improvements; (4) that Orillie Stram had no power to alienate the lands before location of the scrip, or to contract for the sale of them, or to grant a power of attorney to sell the same for her after they should be located, but held that she had the right to sell immediately after location of the scrip. As a deduction from these conclusions, the Secretary held that the lands were still public lands, and open to entry. The decision of the Secretary was attached to the findings as an exhibit.

That on the 31st day of March, 1886, and prior to the hearing had before the local land office at Duluth, the said Orillie Stram and her husband Roman Stram made and executed a deed for seven ninths of the land in controversy to Frank W. Eaton, with warranty of title. The deed was subsequently recorded in St. Louis and Lake counties.

[606] *The deed recited the location of the scrip in the land office at Duluth, June 16, 1883, by Eaton, as the constituted and appointed attorney in fact of the Strams, and that the title thereby vested in Orillie Stram. It also recited the survey of the lands and the adjustment of the scrip and entry to such lands, and "thereby the aforesaid scrip and entry were adjusted July 21, A. D. 1885, thereby specifically and perfectly describing the land filed upon for me, the said Orillie Stram, by the said Frank W. Eaton, and intended to be entered on June 15, A. D. 1883, in the name of the said Orillie Stram, by our attorney in fact, the said Frank W. Eaton." It also recited the power of attorney given to Leonidas Merritt, acknowledged it, and ratified and confirmed the conveyance by him to Eaton.

It was further found that in pursuance of the decision of the Secretary of the Interior the lands were attempted to be thrown open to public entry, and a patent was subsequently issued to Frank Hicks, and that Frank Hicks and his wife conveyed the same to the Midway Company, the plaintiff in error, "who now holds whatever title thereto inured to the said Frank Hicks." That neither Orillie Stram nor her husband, nor any of the defendants, "were in any manner parties to the proceedings to the decision of the Secretary of the Interior rendered on the 18th of February, 1889, and that said Hicks had at all times full knowledge of all rights and claims of the defendants." That the findings of fact of the Secretary of the Interior were fully sustained by the evidence in the cause presented to him, "except that it is found as a fact by this court that the improvements caused to be erected by Frank W. Eaton upon the said premises consisted of a house about 14 by 16 feet in size; and it is further found as a fact that from the evidence before the Secretary of the Interior in said cause presented to him by the record upon said appeal, it did not appear that the scrip referred to in the decision of said Secretary had passed through many hands or through any hands before coming into the hands of the said Frank W. Eaton; nor did it appear that the powers of attorney to locate said scrip and to convey the land located therewith had been executed by the said Orillie Stram years before the location thereof by the said Frank W. Eaton, but that, *on the contrary, it appeared from the evidence before the Secretary that said powers of attorney were executed by the said Orillie Stram about one week before the location of the said scrip by the said Frank W. Eaton, and that the said powers did not contain the names of the grantees. It is further found as a fact that it did not appear from the evidence before the said Secretary that the said Orillie Stram never saw the said lands; it did not appear from the evidence before the said Secretary that she had sold the said scrip long prior to the location thereof; it did not appear from the evidence before the said Secretary that for a long time she directly and positively repudiated Eaton and

[607] 183 U. S.

Merritt as her attorneys in fact, denying that they acted for her in any capacity whatsoever."

Mr. Walter Ayers argued the cause, and, with Mr. P. H. Seymour, filed a brief for plaintiff in error:

The right to acquire public lands by means of Sioux half-breed scrip is a purely personal right in the one to whom the scrip issues.

Felix v. Carroll, Land Dec. March 27, 1863, and *Murphy v. Jones*, Land Dec. June 29, 1876, unpublished; *Allen v. Merrill*, 8 Land Dec. 207, 12 Land Dec. 138; *Hyde v. Eaton*, 12 Land Dec. 157; *McGregor v. Quinn*, 18 Land Dec. 368; *Strong v. Pettijohn*, 21 Land Dec. 111; *Morgan v. Missoula Electric Light Co.* 21 Land Dec. 306; *Re Poe*, 29 Land Dec. 309; *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414; *Thompson v. Myrick*, 20 Minn. 205, Gil. 184; *Coursolle v. Weyerhaeuser*, 69 Minn. 328, 72 N. W. 697; *Dole v. Wilson*, 20 Minn. 356, Gil. 308; *United States v. Chapman*, 5 Sawy. 528, Fed. Cas. No. 14,785; *Rose v. Nevada & G. Valley Wood & Lumber Co.* 73 Cal. 385, 15 Pac. 19; *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; *Fee v. Brown*, 162 U. S. 602, 40 L. ed. 1086, 16 Sup. Ct. Rep. 875.

The object of the clause against the assignability of the scrip and requiring improvements by the half-breed as a condition precedent to its location upon unsurveyed lands was to guard the half-breeds from being imposed upon in the disposition of their land.

See House Report No. 138, 33d Cong. 1st Sess. Congressional Globe 1854, pt. 2, p. 1114.

A transaction whereby a person attempts to acquire, by means of blank powers of attorney, scrip issued under the act of July 17, 1854, is a fraud upon the Indian, is against the letter and policy of the law, and is a palpable device to evade the provisions of the law against the assignment of the scrip.

Felix v. Patrick, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; *Carter v. Ruddy*, 166 U. S. 493, 41 L. ed. 1090, 17 Sup. Ct. Rep. 640.

The Land Department has jurisdiction to cancel locations of Sioux half-breed scrip.

Monette v. Cratt, 7 Minn. 234, Gil. 176; *Allen v. Merrill*, 8 Land Dec. 207, 12 Land Dec. 138; *Hyde v. Eaton*, 12 Land Dec. 157; *Re Bourke*, 12 Land Dec. 105; *Cyr v. Fogarty*, 13 Land Dec. 673; *McGregor v. Quinn*, 18 Land Dec. 368; *Strong v. Pettijohn*, 21 Land Dec. 111; *Morgan v. Missoula Electric Light Co.* 21 Land Dec. 306; *Re Poe*, 29 Land Dec. 309; *Murphy v. Jones*, June 29, 1876; *Eaton v. Hyde*, February 18, 1889; *McGee v. Ortle*, 14 Land Dec. 523; *Coursolle v. Weyerhaeuser*, 69 Minn. 328, 72 N. W. 697; *United States v. Chapman*, 5 Sawy. 528, Fed. Cas. No. 14,785; *Chapman v. Polack*, 70 Cal. 487, 11 Pac. 767.

The department has authority at any time before a patent is issued to inquire whether

the original entry was in conformity with the act of Congress.

Hawley v. Diller, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986; *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208; *Knight v. United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

A certificate of location of Sioux half-breed scrip conveys at best an equitable title. A patent is necessary to convey the legal title.

Carter v. Ruddy, 166 U. S. 493, 41 L. ed. 1090, 17 Sup. Ct. Rep. 640.

Unless it is clear that the interpretation or construction given to the act by the officers of the Land Department for so long a period is erroneous it cannot be overturned.

United States v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; *United States v. Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; *Hahn v. United States*, 107 U. S. 406, 27 L. ed. 528, 2 Sup. Ct. Rep. 494; *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

If the act was ambiguous the settled construction given to it from the time of its passage to the present date is conclusive.

Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603; *Brown v. United States*, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *United States v. Burlington & M. River R. Co.* 98 U. S. 341, 25 L. ed. 198; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *United States v. Moore*, 95 U. S. 763, 24 L. ed. 589; *United States v. Alabama G. S. R. Co.* 142 U. S. 621, 35 L. ed. 1136, 12 Sup. Ct. Rep. 306; *McPherson v. Blacker*, 146 U. S. 27, 36 L. ed. 874, 13 Sup. Ct. Rep. 3.

The court erred in not holding that the findings of fact of the Secretary of the Interior, set forth and embodied in his decision of February 18, 1889, were final and conclusive.

United States v. Quiney, 6 Pet. 446, 8 L. ed. 459; *Catholic Bishop v. Gibbon*, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779.

The words employed in the act, both as to the clause against the assignment of the scrip, and as to the location of the scrip upon any other "unsurveyed lands . . . upon which they have respectively made improvements," are so clear that there is no necessity for construction, the aid of which is invoked only when ambiguity appears.

Lake County v. Rollins, 130 U. S. 670, 32 L. ed. 1063, 9 Sup. Ct. Rep. 651.

If the act needs interpretation that interpretation will be from the words used and the subject-matter to which it relates, in order to discover the reason, as well as the meaning, of particular provisions.

McKee v. United States, 164 U. S. 293, 41 L. ed. 39, 17 Sup. Ct. Rep. 92; 23 Am. & Eng. Enc. Law, p. 322.

If the act is ambiguous and needs the aid of construction there is not the slightest difficulty in ascertaining the policy which Congress intended to embody in the act by

reference to the report accompanying the bill and the explanation offered of its purposes by the chairman of the committee who presented the bill to the House sitting as a committee of the whole.

Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Elk v. Wilkins*, 112 U. S. 118, 28 L. ed. 651, 5 Sup. Ct. Rep. 47; *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155.

The Sioux half-breeds occupied the Lake Pepin reserve, holding the same as other Indian titles were held, that is to say, in common, the right being one of occupancy merely, which could be conveyed by the Indians to no one but the United States, and which might be disposed of by the United States even without their consent.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *United States v. Four Bottles Sour-Mash Whisky*, 90 Fed. 720; *Johnson v. M'Intosh*, 8 Wheat. 543, 5 L. ed. 681; *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210; *Spaulding v. Chandler*, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360; *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496.

The relation which the Indians occupied to the government of the United States resembles that of guardian and ward. They are in a state of pupillage.

Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

The general policy of the government with reference to the Indians, whether of full or mixed blood, has been from the first to render the Indian self-supporting, to induce him to take land in severalty and to cultivate that land; to make improvements thereon and to protect him in those improvements; to educate him in the arts of civilization, and to make at least a herdsman or agriculturist of him as the first step in the civilizing process rendered inevitable by the pressure of the white population upon what was formerly wholly Indian territory; and upon the success or failure of this policy depends the preservation or extinction of the Indian race.

Treaties with Red Lake and Pembina Bands of Chippewa Indians, 13 Stat. at L. 667-691, arts. 5, 8; with Pillager Chippewas, February, 1855, 10 Stat. at L. 1165; with Winnebagoes, February 27, 1855, 10 Stat. at L. 1172, art. 4; with Ottos and Missourias, March 15, 1854, 10 Stat. at L. 1038; with Omahas, March 16, 1854, 10 Stat. at L. 1043; with Shawnees, May 10, 1854, 10 Stat. at L. 1053; with Dwámish Indians, January 22, 1855, 12 Stat. at L. 927; with Makahs, 12 Stat. at L. 939; with Walla Wallas, June 9, 1855, 12 Stat. at L. 945; with Yakamas, 12 Stat. at L. 951; with the Sacs and Foxes, May 18, 1854, 10 Stat. at L. 1075; with Kaskaskias, May 30, 1854, 10 Stat. at L. 1083; with Wyandotts, January 31, 1855, 10 Stat. at L. 1159; with Poncas, March 12, 1858, 12 Stat. at L. 997, art. 3.

At the time of the passage of the act of Congress in 1854 there was no right whatever to settle upon unsurveyed lands by either pre-emptor or homesteader in Minnesota, nor anywhere except in California; and even there the act allowing settlement upon such lands was temporary and expressly limited in duration for a short period of one or two years.

Buxton v. Traver, 130 U. S. 232, 32 L. ed. 920, 9 Sup. Ct. Rep. 509; *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Webster v. Luther*, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963.

One of the first matters in the mind of Congress, and one which was being continually called to its attention, was the known improvidence of the Indian, and especially with reference to scrip or land warrants, of which when issued the Indian was always defrauded.

Messages and Documents, 1853-4, pt. 1, p. 61; Messages and Documents, 1856-7, pt. 1, p. 828.

There is no right apart from the scrip which can be the subject of transfer.

Crews v. Burcham, 1 Black, 352, 17 L. ed. 91; *Doe ex dem. Mann v. Wilson*, 23 How. 457, 16 L. ed. 584; *Jones v. Mechan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

The rule that restrictions upon alienation are strictly construed has no application in this case, for this rule is merely one of construction, the object of which is to ascertain the legislative intent.

To entitle Eaton and his associates to relief against the patent of the government they must show a better right to the land than the patentee,—such as in law should have been respected by the officers of the Land Department, and, being respected, would have given them the patent. It must affirmatively appear that they were entitled to it, and that, in consequence of the erroneous ruling of those officers on the facts existing, it was denied to them.

Sparks v. Pierce, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Bohall v. Dilla*, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; *Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

The officers of the Land Department upon the affirmative showing made by Eaton's own case as disclosed by the evidence upon which he claims that the officers of the Land Department erroneously ruled, and upon which he claims that it was the duty of the Land Department to have issued the patent of the government to him, should have canceled Eaton's location in the absence of a contest.

Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *Knight v. United States Land Assn.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

A court upon such a showing will deny the defendants any equitable relief.

Beck v. Flournoy Live-Stock & Real Estate Co. 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30.

Mr. Jed L. Washburn argued the cause, **183 U. S.**

and, with *Mr. William D. Bailey*, filed a brief for defendants in error Clark, Fagan, and Merritt:

The main object of the act of July 17, 1854, appears to have been to get rid of the Indian or half-breed title to the reservation on the west side of Lake Pepin, and to bring the same into market.

Monette v. Cratt, 7 Minn. 234, Gil. 184.

It was not the purpose of Congress to impress the provisions of the act of July 17, 1854, with the requirements of the homestead or pre-emption laws, or that the application and construction of such statute should be governed by the controlling principles of these laws.

Hope v. Stone, 10 Minn. 141, Gil. 114; *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414.

This court, in the exercise of its judicial power, will determine, without being hampered by any new construction by the Secretary of the Interior, whether the statute bears any such interpretation.

Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963.

If the legislature has expressed its intention in the law itself with certainty, it is not admissible to depart from that intention on any extraneous consideration of the theory of construction.

Sutherland, Stat. Constr. § 236; *Denn v. Reid*, 10 Pet. 524, 9 L. ed. 519; *McCluskey v. Cromwell*, 11 N. Y. 601; *People ex rel. Boekes v. Wemple*, 115 N. Y. 308, 22 N. E. 272; *Sturges v. Crowninshield*, 4 Wheat. 202, 4 L. ed. 550; *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830; *Importers' & T. Bank v. Colgate*, 120 N. Y. 381, 8 L. R. A. 712, 24 N. E. 799.

It is admitted, even by the department, that the half-breeds could convey the land as soon as the scrip was located, without waiting for a patent to issue.

Allen v. Merrill, 8 Land Dec. 217.

Restrictions upon alienation are not favored by the law, and are not implied. It requires a clear provision restraining or prohibiting alienation of the land in order to give such an effect to the law.

Camp v. Smith, 2 Minn. 155, Gil. 142; *Dole v. Wilson*, 20 Minn. 356, Gil. 308; *Townsend v. Fenton*, 30 Minn. 530, 16 N. W. 421; *Myers v. Croft*, 13 Wall. 291, 20 L. ed. 562; *Maxwell v. Moore*, 22 How. 185, 16 L. ed. 251; *Thredgill v. Pintard*, 12 How. 25, 13 L. ed. 877; *Doe ex dem. Mann v. Wilson*, 23 How. 458, 16 L. ed. 584; *Lamb v. Davenport*, 18 Wall. 307, 21 L. ed. 759; *Webster v. Luther*, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963.

The fact that the government saw fit to make the scrip, as such, nonassignable, does not operate to prevent the beneficiary before location from making an agreement or giving power to convey the land when the scrip shall have been located and the land entered.

Gilbert v. Thompson, 14 Minn. 544, Gil. 414; *Knight v. Leary*, 54 Wis. 459, 11 N. W. 600.

No different rule of construction should

be adopted because the beneficiaries are half-breeds.

Felix v. Patrick, 36 Fed. 457.

The fact that the name of the donee was not filled in in the power of attorney until it was delivered was of no consequence, if such was the fact.

McDonald v. Hartman, 19 Land Dec. 563; *Hartman v. Warren*, 19 Land Dec. 65; *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90, 3 Sup. Ct. Rep. 517.

Any attempt to transfer the scrip would involve no moral turpitude, nor a breach of any legal duty, as in case of the transfer of a pre-emptive right; but it simply could not be done, and would be ineffectual.

Gilbert v. Thompson, 14 Minn. 544, Gil. 414; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697; *Midway Co. v. Eaton*, 79 Minn. 450, 82 N. W. 1118.

The improvements may be made by an agent.

Allen v. Merrill, 8 Land Dec. 217.

Neither an attempted assignment of the scrip, nor any transaction, or attempted transaction, relating to a sale of the land, can have any effect upon otherwise valid acts in effecting a location.

Felix v. Carroll, Land Dec. 1862, 1863, unpublished.

The method adopted in the location of this scrip has had judicial recognition.

Marks v. Dickson, 20 How. 501, 15 L. ed. 1002; *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414; *Hope v. Stone*, 10 Minn. 141, Gil. 114; *Fackler v. Ford*, 24 How. 323, 16 L. ed. 690.

If the method pursued by Mr. Eaton was in accordance with the then and hitherto existing practice, no departure from that practice thereafter should deprive defendants of their rights.

United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; *Re Masterson*, 7 Land Dec. 577; *Germania Iron Co. v. James*, 32 C. C. A. 348, 61 U. S. App. 1, 10, 89 Fed. 818, 46 C. C. A. 476, 107 Fed. 602.

Mr. **Luther C. Harris** argued the cause, and, with Mr. C. A. Towne, filed a brief for defendants in error Eaton and Lonstorf:

The purpose of the act must be ascertained from the language of the act itself, and not from some committeeman's opinion.

United States v. Wong Kim Ark, 169 U. S. 699, 42 L. ed. 908, 18 Sup. Ct. Rep. 456; *Aldridge v. Williams*, 3 How. 24, 11 L. ed. 475.

The right to determine what are, and what are not, legitimate objects and purposes of legislation, belongs exclusively to the legislature, and the courts cannot, under the guise of interpretation, declare that the object of a statute should be one thing, when the language, according to the ordinary meaning of the words, shows that its purpose is something else.

Black, Interpretation of Laws, p. 35; Sutherland, Stat. Const. § 234; *Alexander v. Worthington*, 5 Md. 485; *Cone v. Nimocks*, 78 Minn. 249, 80 N. W. 1056.

There is a plain and well-recognized distinction between a prohibition against the

assignment of a right to land, and a prohibition against the transfer of the land itself.

Camp v. Smith, 2 Minn. 155, Gil. 131; *Myers v. Croft*, 13 Wall. 291, 20 L. ed. 562; *Dole v. Wilson*, 20 Minn. 356, Gil. 308.

As a rule of construction the courts will never assume that the legislature has intended to prohibit the alienation of land, unless the prohibition runs directly against the land itself, or unless the language used would not bear any other interpretation.

Ibid.

Wherever grants have been made to Indians they have been held by the courts to be free from restrictions, unless the intent to restrict is clearly expressed.

Hartman v. Warren, 19 Land Dec. 65, 22 C. C. A. 30, 40 U. S. App. 245, 76 Fed. 157; *Dole v. Wilson*, 20 Minn. 356, Gil. 308; *Doe ex dem. Mann v. Wilson*, 23 How. 457, 16 L. ed. 584; *Crews v. Burcham*, 1 Black, 352, 17 L. ed. 91; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

If the purpose of the law was to prevent conveyances of the land, then for a period of thirty-five years from the passage of the act in 1854 to the rendering of Secretary Vilas's decision in 1889 it utterly failed to accomplish this purpose, for during this entire period this scrip was used in identically the same manner as it was in the case of Eaton and Stram.

Gilbert v. Thompson, 14 Minn. 544, Gil. 414; *Thompson v. Myrick*, 20 Minn. 205, Gil. 184; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697; *Allen v. Merrill*, 8 Land Dec. 207; *Re Bourke*, 12 Land Dec. 106; *Felix v. Patrick*, 36 Fed. 460.

It is not in violation of the law for a scribee and a third person to enter into an agreement whereby the third person is to make use of the scrip to obtain the title to land for his own use, and in which land the scribee is to have no interest whatever.

Thompson v. Myrick, 20 Minn. 205, Gil. 184, Affirmed 99 U. S. 291, 25 L. ed. 324; *Hope v. Stone*, 10 Minn. 141, Gil. 114.

Where the officers of the executive branch of the government have, in the performance of their duties, construed a law, and such construction has been acted upon for a considerable length of time, the courts will not overturn it, even though in the opinion of the court the construction is wrong.

Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648.

Where rights have grown up under a long-continued and generally adopted practice those rights should not be overturned by a stringent application of the rules of law.

Black, Interpretation of Laws, p. 216.

*Mr. Justice **McKenna** delivered the [607] opinion of the court:

The decision of the controversies in this case depends upon the validity or invalidity of the scrip locations, either originally when the land was unsurveyed, or subsequently when the location was adjusted to the land as surveyed.

The act of Congress of July 17, 1854 (10 Stat. at L. 304, chap. 83), authorized the

issue of scrip to the half-breeds of the Sioux Nation of Indians in exchange for certain lands, which scrip might be located (1) upon any land within the Sioux half-breed reservation; or (2) "upon any other unoccupied lands subject to pre-emption or private sale;" or (3) "upon any other unsurveyed lands not reserved by government, upon which they [the half-breeds] have respectively made improvements. It is provided in said act "that no transfer or conveyance of any said certificates or scrip shall be valid."

[608] *On the latter provision of the act the plaintiff in error bases the contention that the scrip is not assignable, and that the power of location is strictly personal to the Indian, and must be made whether on surveyed or unsurveyed land either by him, or for his benefit, and that the improvements on unsurveyed land must be made under his personal supervision and direction; that he must come in personal contact with the land. And it is hence asserted that the powers of attorney given to Eaton and Merritt were virtual assignments of the scrip, and frauds upon the act of Congress; that the improvements were made, not by Orillie Stram, the half-breed, or for her benefit, but by Eaton, and for his benefit; and that the subsequent adjustment of the locations of the land after its survey was made for him, not for her; for his benefit, not for hers. On the other hand, the defendants in error contend that the prohibition against the assignment of the scrip is strictly of the scrip as such, not of the rights or powers conferred by it. That the provision of the statute is not a prohibition upon the alienation of the land, but is intended to protect the government against controversies about the transfer of the scrip, and to require and secure all of the steps and proceedings to be in the name of the Indian, and the title to be issued in his name. It is claimed, therefore, that the requirements of the statute have been observed; that the locations were made in the name of the Indian, and for her benefit. And it is also claimed that if there was any defect in the location upon the land when unsurveyed, by reason of the insufficiency of the improvements or by whom erected, that defect was supplied by the location of the scrip after the land was surveyed, and the acceptance of the location of the scrip by the local land office, there being then no adverse rights to the land. And further that the power of Eaton to make the location for the Indian was ratified by her (if it needed ratification), and all rights which inured to her were conveyed by her warranty deed to Eaton.

These contentions exhibit the controversy between the parties, and present the only questions upon which we think it is necessary to pass, and the questions are certainly close ones. The Interior Department has [609] not always given the same answer to *them, and the latest decision of that Department is opposed in the case at bar by the courts of Minnesota.

It is natural to respect the rulings of the
183 U. S. U. S., Book 46.

Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning. One of the reasons is that the officers of the Land Department may have recommended the statute—indeed, may have written its words or, at any rate, were familiar with the circumstances which induced the legislation. We have not, however, in the case at bar, an exactly contemporaneous construction of the act of 1854 by the Land Department. The first circular of instructions was not issued until March 21, 1857. It is, however, not without value, and it tends to the support of the contentions of the defendants in error. The circular stated that the scrip "must be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian." And further: "You will observe that this scrip is *not assignable*, transfers of the same being held void; consequently, each certificate, as hereinbefore stated, can only be located in the name of the half-breed; and such certificate or scrip are not to be treated as money, but located acre for acre."

In the circular issued February 22, 1864, those instructions were repeated, and the following added: "When not located by the reservee in proper person, the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee." Prior to the issuance of the circular of February 22, 1864, to wit, in 1863, a contest came on appeal to the Land Department, between a location made by Sioux scrip which was issued to one Sophia Felix, and a claim under a pre-emption settlement. The Commissioner of the Land Department decided against the scrip location on two grounds, one of which was: "That 'the location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent, for her use and benefit, but by *an unauthorized person, [610] and for the use and benefit of a person having no legal interest therein.'"

The decision was reversed by the Secretary of the Interior, who stated, through Otto, Assistant Secretary:

"As to your second objection, I remark that this kind of scrip is by the law declared to be not assignable. In this case Sophia Felix has signed the application to locate her own scrip. The signature must be treated by us as genuine, when there is no proof to the contrary; and when she has made no complaint against this use of her scrip. The fact that the scrip was carried to the land office and the business transacted by another person, does not affect the validity of her entry of the land.

"As the certificate of location issued in her name, and the patent will issue to her, neither the register's report nor the affidavits of third parties can be admitted to es-
23

tablish the interest of any other person in the location.

"We could not recognize such interest if an assignment in writing was produced and duly proven to have been executed by the half-breed—whether she could sell or did sell the land after the location of her scrip we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrament of the courts of law. The location is valid on its face, and the owner of the scrip, so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto."

In 1872 a special circular was issued (1 C. L. L. 723) which contained the following direction:

"That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made by or under the personal supervision or direction of said Indian, giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application.

[611] "In 1878 a new circular was issued which repeated the provisions *of the circulars of 1864 and 1872, above quoted. 2 C. L. L. 1355; 5 C. L. O. 126."

Then came the decision of the Secretary of the Interior, Vilas, in *Allen v. Merrill*, 8 Land Dec. 207, and in *Hyde v. Eaton* [12 Land Dec. 157]. They were affirmed on review by Secretary Noble. Those cases laid down the propositions upon which plaintiff in error relies in the case at bar. Between the decision in those cases and that in the *Felix Case* there was an interval of thirty years, and pending that interval there were decisions of the courts which took the same view as Secretary Otto expressed in the *Felix Case*.

In *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414, a conflict of titles was presented based upon deeds from one Amelia Monette, a Sioux half-breed. The action was ejectment, and the deed which plaintiff relied on was executed by Amelia in person May 29, 1867; the deed upon which defendant depended was executed by her attorney in fact, Benjamin Lawrence, July 18, 1857, under a power of attorney dated May 27, 1857. The power of attorney authorized Lawrence to act for Amelia as follows:

"For me and in my name to enter into and take possession of all the real estate belonging to me, or of which I may hereafter become seised, situated in the county of Wabasha, in the territory of Minnesota; and for me to lease, bargain, sell, grant, and confirm the whole or any part thereof; . . . and for me and in my name to make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof good and sufficient conveyances."

Affirming the judgment which passed for

defendant, the supreme court of the state said by Chief Justice Gilfillan:

"The act of Congress of 1854, under which Sioux half-breed scrip was issued, provides 'that no transfer or conveyance of any of said certificates or scrip shall be valid.'

"It was the intention of Congress that the right to acquire public lands by means of this scrip should be a personal right in the one to whom the scrip issued, and not property, in the sense of being assignable; but no restraint is imposed upon the right of property in the land after it is acquired by location of the scrip. In the scrip itself the half-breed had nothing which *he [612] could transfer to another; but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him, and the title to the land acquired by it would vest in him, just as though no such attempt had been made. Such attempt to transfer would not involve any moral turpitude nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual, because the scrip is not transferable.

"A power of attorney, so far as it intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and land would remain the same; it could not be made irrevocable, nor create any interest in the attorney. Should the attorney sell under it, he would be accountable to his principal precisely as in the case of any power to sell; but a simple power to sell, executed by a half-breed, is good till revoked, and would extend to lands subsequently acquired by means of scrip, if such lands came within its terms. We think such a power could not be varied by parol proof that the parties had an intention not expressed in it, even to defeat the power, except on the same grounds as would admit such proof in other cases. The intent to transfer the scrip not being illegal, but only ineffectual, could not affect the power where not expressed in the same instrument, or in one equal in degree, as evidence. Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide."

Gilbert v. Thompson was affirmed and applied in *Thompson v. Myrick*, 20 Minn. 205, Gil. 184. The latter case came to this court (99 U. S. 291, 25 L. ed. 324), and its doctrine was approved. The suit was for specific performance. Thompson, who was plaintiff in the court below, was in occupation of the land to which he was desirous of obtaining title. Myrick was "attorney in fact (duly constituted) of Francis Longie and Joseph Longie, his son, then a minor under the age of fourteen years, and of Francis Roi and Henry Roi, his son, then a minor under the age of fourteen *years, and was [613] duly authorized to locate certain half-breed scrip issued to said Joseph and Henry in

accordance with the provisions of the act of Congress approved July 17, 1854."

With a view to the location of the scrip for the benefit of the beneficiaries, Myrick placed the same with powers of attorney in the hands of Thompson, and at the same time entered into a written agreement with Thompson, in which he agreed that upon the location of the scrip he would secure the title to the land located to be lawfully vested in Thompson. The consideration was \$2,800, evidenced by a note payable in one year from its date, and to be secured upon the land as soon as Thompson should acquire title. Thompson located the scrip and demanded a conveyance of the title. Myrick refused, and conveyed the land to his wife, who was also a defendant in the suit. Specific performance was decreed by the trial court, and the decree was affirmed by the supreme court of the state. Among other defenses it was urged that the agreement between Myrick and Thompson was void as contravening the act of Congress of July 17, 1854. To the contention the supreme court of the state replied: "As to the point that the real object of the contract was to accomplish a transfer of the scrip, we see nothing to distinguish this case in any important respect from *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414."

And further, in answer to the contention that the agreement was void on common-law grounds, by reason of the relations of Myrick to the grantees of the scrip, the court said: "As the scrip was made nonassignable by the act of Congress (10 Stat. at L. 304, chap. 83), and therefore no valid transfer or conveyance of the same could be made, Myrick's relation to the scrippees was that of an attorney in fact, duly authorized to locate the scrip for them. . . . As this relation was to end upon such location, we can conceive of no reason why Myrick was not at liberty, either before or after the location was made, to enter into an agreement to secure the title (inuring from the location) to the plaintiff upon payment of an agreed consideration. Such an agreement did not, so far as this case shows, tend to produce a conflict between Myrick's private interest and his duty to *locate* the scrip to the best advantage of his principals."

[614] *These defenses were reviewed by this court, and, commenting on them, it was said by Mr. Justice Clifford:

"Attempt, it seems, was made in the argument of the case in the supreme court of the state, to show that the terms of the agreement were in conflict with the provisions of the act of Congress; but the answer which that court made to the proposition, though brief, is satisfactory and decisive."

And further:

"Holders of such certificates or scrip were forbidden to transfer the same, and the defendants contended that the real object of the agreement was to effect a transfer of the same; but the state supreme court overruled the defense, and referred to one of

their former decisions, assigning the reasons for their conclusion that the defense was not well founded. *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414.

"Since the case was submitted, the opinion of the court in that case has been carefully examined, and the court here concurs with the state court that the case is applicable to the present case, and that the reasons given for the conclusion are satisfactory and conclusive. For these reasons the court is of the opinion that the Federal questions involved in the record, as set forth in the assignment of errors, were decided correctly by the state supreme court."

Secretary Vilas, in passing on the validity of the location in the present litigation, in effect disagreed with the decision in *Gilbert v. Thompson*, and expressed the view that "all the documents, *besides* any parol additions [the italics are ours], are to be taken together to ascertain what in effect the agreement was, and it will be judged according to its nature as so ascertained;" and applying this rule, he considered that the transaction between Stram and Eaton was tantamount to a direct sale and transfer of the scrip, accompanied by the declaration that "to circumvent the statutory prohibition" two letters of attorney have been executed in blank, the one to locate the scrip, and the other to convey the land when the scrip shall be located, and an agreement that by whomsoever the letters of attorney may be executed no claim will be made by the Indian to the scrip or land. And he concluded that if letters of attorney *accom- [615] panying such a document would be invalid, the powers of attorney to Eaton and Merrill constituted "a part of a transaction which cannot be supported in law." Secretary Noble considered the case more at length [12 Land Dec. 152], and said: "The controlling points in the case, as decided by the court, plainly were (1) that a simple power to sell, executed by a half-breed, such as the one there considered, would extend to lands subsequently acquired by means of scrip, if within its terms; and (2) that parol proof of an intent coincident with the creation of the power to transfer the scrip could not be received to defeat the power."

The first point was not controverted, and of the second it was said that, as a rule of evidence, it might properly be enforced in controversies between individual claimants, but that it did not apply "against the government, whose interest it is, before it parts with its title, to see that the law has been faithfully complied with."

The learned Secretary regarded *Gilbert v. Thompson* as turning upon a rule of evidence, and that the court did not pass upon the question which he was considering; and this, he said, was "clearly shown by their statement that 'we do not decide' whether a power to sell contained in an instrument, on its face a transfer, the power being merely incidental to the transfer, would be upheld. That is the question here—the only difference being the manner of its presentation. It properly arises here on the record;

in *Gilbert v. Thompson* it did not, the evidence of the transfer being excluded on technical grounds, and therefore was not decided." And he observed that *Thompson v. Myrick* went no farther, and was "in fact ruled on *Gilbert v. Thompson* by the state court, and that rule was affirmed by the supreme court [this court] on appeal."

We did not think those cases were as confined as represented. It is very evident that the courts did not think that "parol additions" could unite and make single the documents, or, when thus united, they constituted a violation of the statute. And it is a deduction from the opinions that it was not the manner of proof, but the substance of what was proved or to be proved, that was passed upon. If evidence was excluded in *Gilbert v. Thompson*, it was admitted and [616] considered in *Thompson v. Myrick*; and in both cases the delivery of scrip and its location under letters of attorney were decided to be valid, forming in one case a good title, and in the other constituting a ground for a compulsory conveyance from the half-breed. The moral and legal effect of the transfer of scrip was declared by the court in *Gilbert v. Thompson*. The first involved, the court said, no "turpitude nor the breach of any legal duty, as in the case of an attempt to transfer a pre-emption right; of the second, it was said, it would be of no effect as a transfer; that "the title to the scrip would remain in him (the half-breed), and the title to the land covered by it would vest in him (the half-breed) just as though no such attempt had been made." The power of attorney, however, was given full legal effect as authority to sell the land located. It is true the court excluded parol evidence of an intention to transfer the scrip. But why? Manifestly because the transactions did not constitute a transfer of the scrip as such, and their legal character could not be destroyed by parol proof that they were intended to be something else. In other words, the court decided that the transactions were intended as a conveyance of the land, and represented that intention, and could not be shown to be a transfer of the scrip. And in *Thompson v. Myrick* the court observed: "We can conceive of no reason why Myrick was not at liberty, either before or after location was made, to enter into an agreement to secure the title (inuring from the location) to the plaintiff upon the payment of an agreed consideration." The reasoning and the conclusions of the supreme court of Minnesota were approved by this court, as we have seen.

The consideration of the location of scrip under the act of 1854 came before this court again in *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862. It is a good complement to the other cases. It recognized, as they did, the difference between the transfer of the scrip itself and its location by or in the name of the half-breed, as a means of conveying the land located upon. There are expressions in the opinion that seem to go further, but they must be considered in reference to the facts. It

was said: "The device of a blank power of attorney and quitclaim deed was doubtless resorted to for the purpose of evading the provision *of the act of Congress that no[617] transfer or conveyance of the scrip issued under such act should be valid. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued, but from the moment the scrip was located and the title in the land vested in Sophia Felix, it became subject to her disposition precisely as any other land would be. In order, therefore, for the purchaser of this scrip from Sophia Felix to make the same available, it became necessary to secure a power of attorney or a deed of the land, and as the scrip had not then been located, and the person who should locate it was unknown, the name of the grantee and the description of the land must necessarily be left blank."

And again: "As the bill alleges that Patrick obtained possession of these instruments while still in blank, he is clearly chargeable with notice that they were intended as a device to evade the law against the assignment of scrip."

Felix was a half-breed to whom scrip had been regularly issued. It was obtained from her by some person unknown, "by wicked devices and fraudulent means;" the power of attorney omitted the name of the attorney, the number of the scrip, and the description of the land. The quitclaim deed also omitted the name of the grantee and the description of the land; otherwise the instruments were in legal form. The transaction was held to be a fraud upon Felix, and Patrick was adjudged to hold the title he obtained by the location of her scrip and the deed to him, as trustee for her. The court made no question of the validity of the location. Indeed it was necessarily assumed, and the half-breed given the benefit of it. It may be said that neither of the litigants was concerned to dispute the location, or to assert the provision of the act of Congress prohibiting the transfer of the scrip. If so, that provision, from the point of view of the case at bar, was not in judgment, and the expression in regard to it must therefore be strictly confined to the facts and the issue which was presented.

This brings us to the consideration of the amount and kind of improvements required by the act of 1854 to be erected upon *un-[618] surveyed land. The act is not explicit. It does not define the extent or kind of improvements. It permits a location to be made upon "unoccupied land . . . upon which they (half-breeds) have respectively made improvements." Residence is not required, either initial or subsequent, temporary or continuous. The purpose of the provision of the statute would seem, therefore, necessarily to be identification, notice of appropriation, and the kind and extent of improvements only to be necessary for that. But we may concede, as held by Secretary Noble, "that the requirement of improvements must have some substantial significance," and "it is not satisfied by doing

something which is a betterment of the land but of too slight a character to mark anything more than a pretext of compliance." The improvements erected on the land in controversy satisfied the rule whether they were as it is claimed Secretary Vilas found, or were as the trial court found in the present case.

It is further urged that the improvements were not erected for the benefit of the Indian, nor did she have "a direct connection with the land;" and that those requirements are made conditions precedent to a valid location by the circulars of the land office issued in 1872 and subsequently.

1. It was decided in *Thompson v. Myrick*, 20 Minn. 205, Gil. 184, that a valid location could be made by an attorney in fact of the Indian, and that he could, "either before or after the location was made," enter into an agreement to secure or convey the title. That case was affirmed by this court, and the facts of the case at bar bring it within the ruling.

2. To consider the act of 1854 as requiring its beneficiaries to have "a direct connection with the land and claim the same for his personal use" would lead to great embarrassment, if not to discrimination, between the beneficiaries. The effect of that construction was expressed by the supreme court of the state as follows:

"Under this law the President was authorized to do what was actually done,—issue to each person entitled several pieces of scrip of different sizes or acreage. Was it expected that each of these persons should [619] be personally connected with these several* and separate improvements required to be made if all of the pieces were located on unsurveyed lands, and would have to claim the same for personal use? Surely not. This law contemplated, and there were actually issued, several pieces of scrip to each of a large number of minors. Babies in arms were held to be entitled, and to them scrip was issued, and in many cases located before the minors reached majority, as might reasonably be expected. With these facts before us, can it be urged that Congress thought or intended that these minors would be required by a construction of the law personally to supervise the selection of from three to five tracts of land on which to locate their pieces of scrip, or that they would have to be directly connected with each of these locations, or in case unsurveyed lands were desired they would have to claim the necessary improvements as their own?"

It is impossible to escape the force of these observations and to accept a construction of the statute which has the consequences expressed. Upon the other points discussed by counsel we do not consider it necessary to pass.

Judgment affirmed.

183 U. S.

MIDWAY COMPANY, *Plff. in Err.*,
v.

FRANK W. EATON, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf.

(See S. C. Reporter's ed. 619, 620.)

Public lands—Sioux half-breed scrip—validity of power of attorney to locate and sell—improvements—direct connection of half-breed with land.

This case is governed by the decision in *Midway Co. v. Eaton*, ante, 347.

[No. 81.]

Argued December 4, 5, 1901. Decided January 13, 1902.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District court of St. Louis County in favor of defendants in an action to determine adverse claims to real property. *Affirmed.*

See same case below, 79 Minn. 442, 82 N. W. 1118.

The facts are stated in the opinion.

Mr. Walter Ayers argued the cause, and, with *Mr. P. H. Seymour*, filed a brief for plaintiff in error.

Mr. Jed L. Washburn argued the cause, and, with *Mr. W. D. Bailey*, filed a brief for defendants in error Clark, Fagan, and Merritt.

Mr. Luther C. Harris argued the cause, and, with *Mr. C. A. Towne*, filed a brief for defendants in error Eaton and Lonstorf.

For contentions of counsel, see their briefs as reported in *Midway Co. v. Eaton*, ante, 347.

**Mr. Justice McKenna* delivered the [620] opinion of the court:

This action was brought by the Germania Iron Company against the defendants in error in the district court of St. Louis county, state of Minnesota, to determine adverse claims to the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 30, T. 63 N., of range 11 W., of the fourth principal meridian, according to the government survey in said St. Louis county.

Pending the action the land was conveyed to the Midway Company, and the latter company was substituted as plaintiff for the Germania Company.

Plaintiff in error claims title under a patent issued by the United States to Emil Hartman, dated October 21, 1895, by whom the land was conveyed to the Germania Company, and by the latter to the plaintiff in error.

The defendants claim title under a certain location of Sioux half-breed scrip issued under the act of July 17, 1854 (10 Stat. at L. 304, chap. 83).

The trial court rendered judgment for defendants, which was affirmed by the supreme court of the state, and this writ of error was

then allowed by the Chief Justice of that court.

The facts of this case are the same, and are presented upon exactly the same record, the same assignments of error and contentions as in *Midway Co. v. Eaton*, No. 80, just decided, 183 U. S. 602, *ante*, 347, 22 Sup. Ct. Rep. 261. On the authority of that case *the judgment of the Supreme Court is affirmed.*

[621]*TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*,
v.
EMIL REISS *et al.*

(See S. C. Reporter's ed. 621-631.)

Liability of connecting carrier — goods awaiting further conveyance—construction of bill of lading.

1. Cotton unloaded by a connecting carrier at its pier without giving any notice of its arrival to the succeeding carrier does not await further conveyance, within the meaning of a clause in the bill of lading relieving the carrier from liability other than as a warehouseman "while the said property awaits further conveyance."
2. A hidden or obscure meaning will not be sought for a particular clause of a bill of lading because its obvious meaning provides for contingencies which are also provided for by other clauses of the same bill.

[No. 77.]

Argued November 27, December 2, 3, 1901.
Decided January 13, 1902.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York entered upon a directed verdict for plaintiffs in an action to recover the value of cotton destroyed by fire. *Affirmed.*

See same case below, 39 C. C. A. 149, 680, 98 Fed. 533, 99 Fed. 1006.

Statement by Mr. Justice **Peckham**:

This action was brought in the circuit court of the United States for the southern district of New York by the plaintiffs, who are defendants in error here, and are residents of Liverpool, England, to recover the value of some 200 bales of cotton destroyed by fire at Westwego, Louisiana, opposite the

city of New Orleans, November 12, 1894, at a pier on the west bank of the Mississippi river, owned by the plaintiff in error. This is the same fire which is mentioned in *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. ed. 725, 19 Sup. Ct. Rep. 421. Upon the first trial the court directed a verdict in favor of the defendant, but the judgment entered thereon was reversed by the circuit court of appeals (39 C. C. A. 149, 98 Fed. 533), and a new trial *granted. Upon [622] the second trial the court, following the opinion of the circuit court of appeals, directed a verdict for the plaintiffs for the value of the cotton, and the judgment entered upon that verdict having been affirmed by the circuit court of appeals on the authority of its former opinion (39 C. C. A. 680, 99 Fed. 1006), the railway company brings the case here by writ of error. The defense of the company is based upon a clause in the bill of lading which will be set out hereafter.

The cotton had been shipped at Temple, in the state of Texas, on the Missouri, Kansas, & Texas Railway, to be carried over its road and the defendant's road to New Orleans, and from that port to Bremen. It arrived at New Orleans at the pier of the railway company November 6, 1894. One hundred and sixty bales were unloaded on November 7, and the balance soon thereafter, but on what day is not certain. One hundred and twenty bales were unloaded and placed at one point, and two different lots of forty bales each were deposited at other points, thus leaving the cotton at three different points on the pier of the railway company. At this time the pier was quite full, there being over 20,000 bales deposited upon it and some 8,000 bales in cars waiting to be unloaded. The pier was built, owned, and in the exclusive possession of the railway company. The bill of lading which was issued at Temple, in the state of Texas, by the Missouri, Kansas, & Texas Railway, expressed on its face to be on behalf of that company, and also the defendant company and the steamship company. It was an elaborate document, and purported to be "an export bill of lading approved by the permanent committee on uniform bill of lading." It acknowledged the receipt of the cotton consigned as marked, and to be carried to the port of New Orleans, Louisiana, and thence by the Elder, Dempster, & Company's steamship line to the port of Bremen, Germany. It had conditions which are stated to be:

NOTE.—On the liability of a common carrier for goods to be transported beyond the termination of his line—see notes to *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 21 L. ed. U. S. 297, and *Constable v. National SS. Co.* 38 L. ed. U. S. 904.

On the liability of a carrier of freight for loss of goods—see notes to *Richmond & D. R. Co. v. Payne* (Va.) 6 L. R. A. 849, and *Browning, K. & Co. v. Goodrich Transp. Co.* (Wis.) 10 L. R. A. 415.

As to rights and liabilities of connecting carriers—see *Fox v. Boston & M. R. Co.* (Mass.) 1 L. R. A. 703, and note; *Crossan v. New York*

& N. E. R. Co. (Mass.) 3 L. R. A. 766, and note; *Hill v. Denver & R. G. R. Co.* (Colo.) 4 L. R. A. 376, and note; *Browning, K. & Co. v. Goodrich Transp. Co.* (Wis.) 10 L. R. A. 415, and note. And see notes to *Richmond & D. R. Co. v. Payne* (Va.) 6 L. R. A. 849; *Adams Exp. Co. v. Harris* (Ind.) 7 L. R. A. 214, and *Miller v. South Carolina R. Co.* (S. C.) 9 L. R. A. 833.

On the question when the liability of a railway carrier of goods ceases to be that of a carrier—see *East Tennessee, V. & G. R. Co. v. Kelly* (Tenn.) 17 L. R. A. 691, and note.

"(1) With respect to the service until delivery at the port of New Orleans, Louisiana."

"(2) With respect to the service after delivery at the port of New Orleans, Louisiana."

[623] There are 12 clauses relating to the service until delivery *and 15 clauses relating specifically to the service after delivery at the port of New Orleans. Those clauses which are specifically referred to in this case are numbered 3, 11, and 12 in the bill of lading. They read as follows:

"3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . ."

"11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance; and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"12. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port; and the inland freight charges shall be a first lien due and payable by the steamship company."

The usual method of handling cotton upon its arrival at the pier of the company at Westwego, Louisiana, is stated, as both counsel in this case agree, with substantial accuracy in *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 352, 43 L. ed. 725, 727, 19 Sup. Ct. Rep. 421, 423, as follows:

"The mode in which the railway company and the steamship company transacted business was as follows: Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company, and a waybill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular waybill, the marks of the cotton, the weight, rate, freights, amount prepaid,

[624] etc., would be given to *the conductor of the train bringing the car to Westwego. Upon the receipt of the waybill and car at Westwego, a 'skeleton' would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the waybill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear

of the wharf, it would be taken by a clerk known as a 'check clerk,' and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened; and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items on the skeleton, and the same were then checked. The cotton thus taken from the car was deposited at a place on the wharf designated by the check clerk, and it would remain there until the steamship company came and took it away. After the checking of the cotton in this way to ascertain that the amounts, marks, and general information of the waybill were correct, the skeleton would be transmitted to the general office of the Texas & Pacific Railway Company in New Orleans, which thereupon would make out what was designated as a 'transfer sheet' that contained substantially the information contained in the waybill, and which being at once transmitted to the steamship company or its agents was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and, by the aid of the transfers returned from the steamship agents, point out to the master or mate of the vessel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton and *put it on board the [625] ship. In connection with the loading upon the vessel, or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take cotton from the wharf was entirely in the control of the steamship company. They sent for it as soon as they were ready."

At the time of the fire it is conceded that no transfer or skeleton sheets had been sent to the steamship company, or notice given it of the arrival of this cotton at the pier of the railway company.

Messrs. Rush Taggart and Arthur H. Masten argued the cause and filed a brief for plaintiff in error.

Mr. George Richards argued the cause, and, with **Messrs. Frederic E. Mygatt and Treadwell Cleveland**, filed a brief for defendants in error.

Contentions of counsel sufficiently appear in the opinion.

[625] *Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court:

In this case there had been no delivery of the cotton by the railway company prior to its destruction by fire. The cotton had arrived at the pier of the railway company, but no notification of its arrival had been given to the steamship company, nor was it in fact in the possession of, nor had it been delivered to, the latter company. It was still under the absolute control and in the possession of the railway company, and nothing had been done to terminate its common-law liability at the time the fire occurred.

In *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425, Mr. Justice Field, delivering the opinion of the court, and speaking of the duty of a connecting carrier, at page 106, L. ed. p. 326, Sup. Ct. Rep. p. 429, said:

[626] "If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to *deliver safely the goods to such line,—the next carrier on the route beyond."

As between intermediate carriers, the duty of the one in possession at the end of his route is to deliver the goods to the succeeding carrier or notify him of their arrival, and the former is not relieved of responsibility by unloading the goods at the end of his route, and storing them in his warehouse, without delivery or notice to or any attempt to deliver to his successor. *McDonald v. Western R. Corp.* 34 N. Y. 497; *Congdon v. Marquette, H. & O. R. Co.* 55 Mich. 218, 21 N. W. 321. In the latter case it is held that the duty of the connecting carrier is not discharged until it has been imposed upon the succeeding carrier; and this is not done until there is delivery of the goods, or at least until there is such a notification to the succeeding carrier as according to the course of business is equivalent to a tender of delivery.

Within these cases it cannot be claimed that this defendant had either actually or constructively delivered the cotton to the steamship company at the time of the fire. The defendant is compelled, therefore, to have recourse to the clauses in the bill of lading in its attempt to rid itself of liability consequent upon the destruction of the cotton by a fire while at its pier and in its possession. The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common-law liabilities; and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument,

and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 679, 24 L. ed. 563, 565, "both reasonable and just that its own words should be construed most strongly against itself." To the same effect is *London Assurance Co. v. Companhia de Moagens do Barreiro*, 167 U. S. 149, 159, 42 L. ed. 113, 120, 17 Sup. Ct. Rep. 785, and *The Queen of the Pacific*, 180 U. S. 49, 52, 45 L. ed. 419, 420, 21 Sup. Ct. Rep. 278.

*We come then to an examination of the [627] bill of lading for the purpose of determining whether the railway company has been exempted from liability by any of its provisions.

We do not understand it is contended that either clause 3 or 12 applies, because, as is conceded, there was never any notification given the steamship company of the arrival of this cotton. Without that notification counsel does not contend that either of those clauses applies. The argument at the bar was devoted to maintaining the proposition that the railway company was exempted under clause 11, and the other clauses in the bill of lading were referred to for the purpose of giving point to that contention. It was urged at the bar that under the 11th clause the question of notification was immaterial, because, although a notification had not been given, yet the cotton, upon its arrival at the pier and after it had been unloaded from the cars, "awaited further conveyance," within the meaning of the 11th clause, and while awaiting further conveyance the carrier was by the express terms of that clause relieved from liability otherwise than as warehouseman. In other words, that the carrier upon the arrival of the cotton and unloading it at the pier, and without giving any notification of its arrival, ceased to be a carrier, and became liable only for negligence which might cause the loss of the property, and there being no negligence proved in this case, the carrier was not liable.

It was argued that clauses 3 and 12 were intended to cover such a case as would have existed in the one now before us had notice been given to the steamship company of the arrival of the cotton at Westwego, such notice being understood by the steamship company as a request to come and take away the cotton; and in holding, as the court below did, that notification was necessary before the 11th clause could apply, that clause was thereby deprived of any separate effect, because after notification the 3d or the 12th clause would exempt the carrier, and therefore some further or other meaning must be given the 11th clause, so that it may operate in a case where no other clause would be available.

Upon this subject Circuit Judge Shipman, in the court below, said:

*"It is not claimed that the facts bring [628] the carrier's liability within clause 3 of the bill of lading, which says that the liability shall end after the property 'is ready for de-

livery' to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier. *McKinney v. Jewett*, 90 N. Y. 267. It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at Westwego has been accomplished, and it has been stacked on the wharf, and 'is awaiting further action in the way of notification and advice to the succeeding carrier,' it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of a warehouseman for the liability imposed by the common law; and doubtless they were at liberty to make a contract of limitation which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract. The clause 'no carrier shall be liable for delay,' when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and, while the term 'awaiting further conveyance' literally means 'awaiting the time when the next carrier shall take the property in hand,' it seems improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the ac-

[629]tion of the first *carrier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given."

We agree with the views of the court below, as expressed by Judge Shipman. We do not think that the property can be said to await further conveyance the moment it is dragged upon the pier of the railway company and unloaded from its cars, and before any notification is given to the steamship company that the cotton has arrived and awaits transportation by ship. In one sense it might be said that property awaited further conveyance if anywhere along the line of the railway company an engine of the train should break down, and the train be brought to a standstill for several hours,

183 U. S.

awaiting a new engine. In such case the cotton would not have arrived at the termination of the road of the railway company, and in one sense it would certainly be awaiting further conveyance, because it had not arrived at the end of the route; but no one would suppose for a moment that during the time that the train was thus at a standstill the 11th clause of the bill of lading would be applicable. No court would give such a construction to the clause as would exempt the company under the circumstances stated.

We are then to look for some fair and reasonable meaning to be given to the term, and we think that the court below has given such meaning to it. It cannot reasonably be said that within the meaning of that clause the property awaits further conveyance the moment it has been unloaded from the cars onto the pier of the defendant. As is stated by the circuit court, at that time the property awaits the further action of the defendant, and does not await further conveyance until it has become the duty of the succeeding carrier to take it further, after notification that it has arrived and awaits delivery to it. After that time it may be said to await further conveyance, but up to that time it awaits the further action of the railway company.

This meaning of the clause is not altered even if the language used in other clauses might also grant exemption upon the same facts. *We are not for that reason bound to [630] find some other and different meaning for the 11th clause than such as we think is obvious and plain upon its face. The various propositions mentioned in these different clauses and the many contingencies provided for therein under which the company might claim exemption render it not surprising that the same ground of exemption should possibly be covered by more than one provision in the bill, or that, in other words, the defendant should upon the same facts be exempt under more than one of its various and perhaps somewhat indefinite clauses. No rule of construction binds us to find some hidden or obscure meaning for a particular clause, because the simple and plain one which is seen upon its face provides for contingencies which may be also provided for in another clause of the same bill.

Reference was made in the opinion of the court below, and also upon the argument in this court, to the case of *McKinney v. Jewett*, 90 N. Y. 267, in relation to a delivery of goods at the termination of the carriage, where the meaning of the phrase "awaiting delivery" was under consideration, the court holding that the phrase implied not only the arrival of the goods, but the completion of whatever on the part of the carrier is necessary to be done to leave the risk of further delay upon the consignee; that the goods were "awaiting delivery" only after the duty of the common carrier is done, and he

is entitled to remain passive awaiting the action of the consignee.

[631]

It was objected on the argument at the bar that the case was not in point because of the distinction between awaiting delivery and awaiting carriage, and it is urged that this difference is substantial; that conveyance and delivery are different acts and relate to different parts of the service; that there could be no delivery to the consignee under the New York case until there had been notice in some form to the consignee, while the element of notice had no connection with the act of conveyance of the cotton, which might be entirely complete regardless of notice. The two cases differ in that the New York case, as counsel says, relates to a delivery at the end of the route, and the case at bar relates to goods awaiting conveyance by a connecting carrier; but in both the question arises as to the meaning of the term "await," and the New York case holds that goods do not await delivery within the meaning of that term as used in the bill of lading, until notice of their arrival has been given the consignee; and it seems to us that the same reasoning holds here, and that goods are not awaiting further conveyance by a connecting carrier until the preceding carrier has given him notice of their existence at the place where further conveyance is to be continued. We do not dispute that there is a distinction between the position of goods awaiting delivery and those awaiting further conveyance; and the fact of such distinction is recognized in *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 327, 21 L. ed. 297, 302, and it is therein stated that there is a clear distinction between property in a state to be delivered free to the consignee on demand and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it might be said to be awaiting delivery; in the latter to be awaiting transportation. But the analogy between goods awaiting delivery at the end of the route and goods awaiting further conveyance by a connecting carrier, so far as the requisite of notice in each case is concerned, we think exists, and should be recognized.

There having been in this case no notification to the steamship company, without which clauses 3 and 12 do not apply, and we being of the opinion that clause 11 has also no application without notification to the steamship company, it follows that the exemption claimed under the bill of lading is not sustained; that the defendant at the time of the fire was under obligation as a common carrier, and liable for the destruction of the cotton, and that the judgment in favor of the plaintiff below was right, and must be affirmed

362

*TEXAS & PACIFIC RAILWAY COM-[632]
PANY, *Plff. in Err.*,
v.

JOHN R. CALLENDER *et al.*

(See S. C. Reporter's ed. 632-642.)

Carriers—liability for loss of cotton by fire—construction of bill of lading—delivery to succeeding carrier.

1. A carrier remains liable as at common law for a loss of cotton by fire while in its possession, although it was "ready for delivery" to the next carrier, or was awaiting further conveyance within the meaning of clauses in the bill of lading modifying its common-law liability for the loss of goods under such circumstances, where such bill of lading also declares that "cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire," since this specific clause takes effect to the exclusion of general clauses containing matters of general exemption.
2. A railroad company does not, by unloading cotton on a pier under its sole and absolute control and possession and notifying a steamship company, the succeeding carrier, of its arrival, deliver the cotton "to the steamship company or on the steamship pier," within the meaning of a clause in the bill of lading providing that its liability shall terminate on such delivery, even assuming that such pier was the place agreed upon between the railroad and steamship companies to make delivery of cotton to be thereafter carried by the steamship company, where the railroad company still continues to retain full control of the cotton, and could, under certain contingencies, and at any time before delivery to the steamship, send the cotton by another steamer, and by agreement between the parties the steamship company was not to take the property until it sent a steamer to the pier for that purpose.

[No. 78.]

Argued December 3, 1901. Decided January 13, 1902.

IN ERROR to the Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York entered upon a directed verdict

NOTE.—As to rights and liabilities of connecting carriers—see *Fox v. Boston & M. R. Co.* (Mass.) 1 L. R. A. 703, and note; *Crossan v. New York & N. E. R. Co.* (Mass.) 3 L. R. A. 766, and note; *Hill v. Denver & R. G. R. Co.* (Colo.) 4 L. R. A. 376, and note; *Browning, K. & Co. v. Goodrich Transp. Co.* (Wis.) 10 L. R. A. 415, and note. And see notes to *Richmond & D. R. Co. v. Payne* (Va.) 6 L. R. A. 849; *Adams Exp. Co. v. Harris* (Ind.) 7 L. R. A. 214; *Miller v. South Carolina R. Co.* (S. C.) 9 L. R. A. 833.

On the liability of a carrier of freight for loss of goods—see notes to *Richmond & D. R. Co. v. Payne* (Va.) 6 L. R. A. 849, and *Browning, K. & Co. v. Goodrich Transp. Co.* (Wis.) 10 L. R. A. 415.

183 U. S.

in favor of plaintiff in an action to recover the value of cotton destroyed by fire. *Affirmed*.

See same case below, 39 C. C. A. 154, 98 Fed. 538.

The facts are stated in the opinion.

Mr. **Arthur H. Masten** argued the cause, and, with Mr. *Rush Taggart*, filed a brief for plaintiff in error.

Mr. **Treadwell Cleveland** argued the cause, and, with Messrs. *George Richards* and *Frederic E. Mygatt*, filed a brief for defendants in error.

Contentions of counsel sufficiently appear in the opinion.

[633] *Mr. Justice **Peckham** delivered the opinion of the court:

This action was brought by the defendants in error, who are aliens, in the circuit court of the United States for the southern district of New York, to recover the value of 187 bales of cotton destroyed in the same fire at Westwego, Louisiana, November 12, 1894, mentioned in the immediately preceding case. As in that case, the defense here is based upon certain clauses of the bill of lading providing exemption from common-law liability in the contingencies mentioned. There was a verdict for the plaintiffs by the direction of the court, and the judgment entered thereon having been affirmed in the circuit court of appeals (39 C. C. A. 154, 98 Fed. 538), the railway company has brought the case here by writ of error.

[634] The facts as to the manner of doing business at Westwego are the same as those stated in the foregoing case, and also in the *Clayton Case*, 173 U. S. 348, 43 L. ed. 725, 19 Sup. Ct. Rep. 421. The cotton arrived at Westwego between October 17 and 29, and had been so placed on the pier that it was only necessary for the steamship company to send a ship there and take the cotton when pointed out to its master or other officer. In this case there had been sent a notification to the steamship company, by means of the "transfer sheets" mentioned in the statement of facts in the other case of the arrival of the cotton as early as November 2, for most of it, and for a few bales as late as November 10. After the evidence was in, the defendant requested to go to the jury upon the question whether the cotton was awaiting further conveyance at the time of its destruction, and also upon the question of whether the cotton had been delivered to the steamship company, and also upon the whole case. The request was refused. The clauses of the bill of lading to which reference is made are the following:

"1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; . . . or for loss or damage to property of any kind at any place occurring by fire, or from any cause except the negligence of the carrier."

"3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said
183 U. S.

property is ready for delivery to the next carrier or to consignee. . . ."

"4. . . . Cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire. . . ."

"11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"12. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company."

*The claim of the railway company is that, [635] the language of the 4th clause in the bill of lading, which excepts cotton from any clause therein on the subject of fire, and which renders the carrier liable as at common law for loss or damage by fire, is limited in its application to those clauses in the bill of lading which speak of fire, and that the common-law liability of the company existing under the 4th clause is subject to the provisions of the other clauses mentioned in the bill, which provide for exemption or reduction of liability under the facts stated in them. In other words, that if the company might otherwise be liable for the loss of cotton by fire by reason of the 4th clause, yet, if at the time of the loss the property was ready for delivery, although not delivered, to the next carrier, as provided for in clause 3, or if it awaited further conveyance, though not actually delivered to the connecting carrier, as stated in clause 11, that then it would be exempted under the 3d or its liability reduced under the 11th clause of the bill of lading, and the plaintiff could not therefore recover, on the proof in this case. Of course if under the 12th clause the property had actually been delivered to the succeeding carrier, its destruction by fire thereafter would not render the preceding carrier liable for that loss.

The measure of the common-law liability between connecting carriers is stated in the opinion in the preceding case and the cases therein referred to, and need not be here repeated.

Now what is the true construction of the 4th clause? In relation to that it was stated by Judge Shipman, in delivering the opinion of the circuit court of appeals here, as follows:

"The principal question in the case is up-
363

on the proper construction of the sentence in clause 4 in relation to the liability of the defendant for loss of cotton by fire. The bill of lading was prepared for a contract in regard to property of any kind, and in clause 1 the carrier was exempted from liability from loss by fire except through his negligence. The part of the sentence in clause 4, 'Cotton is excepted from any clause herein on the subject of fire,' probably refers only to clauses wherein fire is mentioned; but the concluding part of the sentence, 'and the carrier shall be liable as at

[636] common law for loss or damage *of cotton by fire,' has a wider sweep, and means that the carrier, notwithstanding limitations of its common-law liability which are provided in the bill of lading, retains such liability in regard to damage to cotton by fire. The clause as a whole intended to leave and did leave unaltered the implied liability of the carrier for loss to cotton by fire. The limitations which the parties did permit were contained in clauses 3 and 11, which said that the carrier should not be liable for damage after a readiness to deliver, or otherwise than as a warehouseman after the property waited further conveyance. Whatever may be the extent of these limitations, they were to a certain degree modifications of the common-law liability of the first carrier, but its liability at common law for loss to cotton by fire remained intact. The request of the defendant to go to the jury upon the question of delivery of the cotton was properly refused. There was no evidence of a delivery. The cotton was never in the actual or constructive possession of either of the steamship companies, and neither was ready to take it from the defendant's possession; and therefore clause 12 has no bearing upon the question of the defendant's liability."

We think this view of the circuit court of appeals is the correct one, and that under the wording of the 4th clause in the bill of lading the defendant was properly held liable. The first part of that clause in terms takes cotton out of any clause on the subject of fire, and as if such language might possibly render it doubtful as to what the status of cotton would be by merely excepting it from any clause on the subject of fire contained in the bill of lading, it is further provided that "the carrier shall be liable as at common law for loss or damage of cotton by fire." The whole is a special and specific provision which applies to cotton alone and to the loss of cotton by fire. The other provisions apply generally to all property, whatever its character and wherever taken. In other words, these other clauses are of a general nature, while the 4th clause refers to cotton alone, and to the specific cause of the loss, *viz.*, by fire. We are of opinion that the specific clause takes effect to the exclusion of the general clauses containing matters of general exemption, and that therefore the carrier remains liable as at

[637] common *law for a loss of cotton by fire while in the possession of the carrier, although it was ready for delivery to the next

carrier within the meaning of the 3d clause, or was awaiting further conveyance within the meaning of the 11th clause; but that if it had been actually delivered before the loss, the railway company would not have been responsible therefor. The defendant's claim, if allowed, would leave the shipper without recourse for loss by fire after the notification had been given to the steamship company and before the delivery of the cotton had been made to it, because the railway company would be under no liability for the loss of the cotton by fire, excepting by reason of its own negligence, and the insurance of the cotton, while in the possession of the steamship company, would not attach, and so the shipper would be without any adequate protection during that time. True, he might obtain special insurance during this intermediate period, but it would add to the expense of the transit which under the terms of the bill he would naturally not feel called upon to make, and it would be inconvenient and troublesome to do it, and the court ought not to unduly limit the plain language of the clause for the purpose of thereby enabling the company to escape a liability cast upon it by the common law, and which it voluntarily assumed.

As cotton was the subject of the special provision, its language should be given full sway, and should not be curtailed by other provisions in other clauses of a general nature referring to all kinds of property.

We are also of opinion that there was nothing to go to the jury upon the question of a delivery of this cotton to the steamship company under the 12th clause of the bill of lading. It may be assumed that the pier of the railway company was the place understood and agreed upon between that company and the steamship company to make delivery, when it was made, of the cotton to be thereafter carried by the steamship company; but upon the uncontradicted evidence in this case we are of opinion that the simple arrival of the cotton at the pier, and notice thereof given to the steamship company by means of the "transfer sheets" spoken of in the other case, did not in and of *itself amount to a delivery of the cotton [638] to the steamship company, constructive or otherwise. Nor was it a delivery on the steamship's pier, as between the shipper and the railway company, within the language of clause 12, and for the reasons herein stated the notice to the steamship company did not relieve the railway carrier from liability.

The uncontradicted evidence shows that the cotton came to the railway pier under these circumstances: The pier was built by the railway company, and was in its sole and absolute control and possession. Not a bale of cotton could be taken from it without the action of that company; its own watchmen were in charge of the pier at all times, and when a steamship came to the pier it was only under a permit or an order from an officer of the railway company that the cotton was taken. It was pointed out by the servants of the railway company,

and, within the custom of the port of New Orleans, it had to be brought within the reach of the ship's tackle before the ship was called upon to take it. The expression "ship's tackle" means "where the ship's ropes can get onto it so that the ship's winches can pull the cotton in." The custom was that after a steamship company returned the transfer sheets which had been sent it by the railway company, an order was made out by the railway officials on the Westwego office of the defendant to deliver to the steamship company's agents such cotton as was ordered. It does not appear that any such order was given. Prior to the time of the arrival of the vessel which was to take the cotton and the arrival of the stevedores, the steamship company had no charge of any of the cotton on the pier. There was no particular spot on the pier at which, if cotton were there deposited, it was understood between defendant and the steamship companies to have been deposited in the care, control, or possession of any of such companies; but, on the contrary, the whole pier was covered by cotton destined indiscriminately for transportation to different European ports by different lines of steamers, not one of which could take a bale of cotton away without the order of the railway company.

[639] Before the ship took the cotton it gave a mate's receipt for it, although sometimes the receipt would not come as soon as *that, and the cotton would be delivered before the receipt was given. The cotton which came in on the cars of the defendant was placed all along the pier, and that which was destined for any particular company had to be pointed out and selected from a large mass of cotton on the pier. The railway company had contracts with various steamship companies,—with the West India & Pacific, the French line, the lines for which Miller & Company were agents, the Hamburg-American line, and some others,—and the cotton for all these various lines was unloaded upon this pier of the railway company, and was distributed all over the wharf, so that when a steamship came to the dock upon which the cotton was, that which was intended for the particular steamship then at the pier would be brought out to it or within reach of its tackle by the railway employees, depending upon where the cotton was, and how far away from the ship; and it was understood between the steamship and railway companies that the railway company would get out the cotton when necessary to do it, and by getting out the cotton was meant dragging it from where it was stored on the wharf out in front or near enough in front to enable the steamship people to get it without having to go around through the bales of cotton.

The connection of the steamship companies with the transportation of the cotton was the subject of special contracts between those companies and the railway company. The initiation would be an agreement between a steamship company and the railway company for a certain charge for freight

across the ocean for a stated amount of cotton from New Orleans to Liverpool or Bremen, or whatever other foreign port it might be, and no particular cotton was specified. Having obtained this agreement as to price and number of bales, the railway company would then agree with the shipper in Texas for a through rate from the point in Texas at which the cotton was to be taken to the port abroad, and it would then give a bill of lading such as was given in evidence in this case, providing for the through rate and the liabilities of the various carriers by rail and by sea; but it was only after an arrangement had been made and a contract entered into between the railway and a *steamship company that the lat-[640] ter company would send a steamer to the Westwego pier. The evidence is uncontradicted in regard to what the steamship lines had to do under the agreements they had with the defendant; in some cases they were not under any obligation to come to the pier unless the defendant had at least 1,500 or 2,000 bales of cotton ready for them, while in another case the steamship company which had a contract to take 20,000 bales of cotton from the railway company was not to be called on to go to the wharf unless there were at least 500 bales ready to deliver to it, and by the bill of lading the railway company might, under certain contingencies, if it deemed necessary, forward the cotton by some steamer of another line than that mentioned in the bill. The steamship companies took their own time in coming to the Westwego pier for the cotton. If they had no special contract with the railway company, they did not come at all. It was not the case of a regular delivery by the railway company to a connecting carrier at the pier of the latter.

Now upon these facts we regard it as entirely clear that at the time this cotton was lost there had been no delivery, actual or constructive, to the steamship company, so as to divest the defendant of its common-law liability for the loss of this cotton.

Within clause 12 of this bill of lading there was no delivery of the property by the defendant, either to the steamship, her master, agents, or servants, or to the steamship company, or on the steamship company's pier at the port of New Orleans, even upon the assumption that the pier at Westwego was the point agreed upon between the railway and the steamship companies, where the delivery of the cotton was to be made when it was delivered. How can it be said that there was a delivery to this steamship company upon the facts above detailed when, by agreement between the parties, the company was not to take the property until it sent a steamship to the pier for that purpose? Until it was delivered to it at the steamer's side the steamer had neither possession nor control over it. By the bill of lading the defendant could in certain contingencies, and at any time before delivery to the ship, send the cotton by another *steamer. Until the ship

did come to the pier, there can be no question of actual delivery in this case.

Nor does the notification to the steamship company that there was cotton at the pier awaiting or ready for delivery to it make such notification a constructive delivery of the cotton, and terminate the liability of the railway company. Here was a pier containing thousands of bales of cotton, destined to various European ports, and by various lines of steamers, with a special right to the railway company, mentioned in clause 11, to send the cotton mentioned in any particular bill of lading by a steamer of a line other than the one mentioned in the bill, and no obligation of the steamship company to send for the cotton until there was a quantity of 500 bales in some cases, and in others until there were from 1,500 to 2,000 bales ready for the particular steamer. A notification to a steamship company by means of a "transfer sheet," which was taken to be a notice that there was cotton at the pier ready for delivery to a steamer when it came, did not necessarily take away the right of the railway company to send that cotton by another steamer, and the company which was notified and sent a steamer would have no ground of complaint if, upon the arrival of the steamer at the pier, other cotton consigned to the same port were given it to the same amount. There being only this conditional obligation to send for cotton on the part of the steamship company, and none upon the part of the defendant to at all events deliver the specified cotton to the former, and the steamship company not having sent a ship to the pier, there was no limitation of the defendant's liability wrought by the notification.

Whatever may generally be the effect of a notice to a connecting carrier, upon the question of terminating or altering the liability of a preceding carrier for the goods, it is quite clear that it has no effect in diminishing the liability until actual delivery in a case where the preceding carrier still continues to have full control over the goods and has a choice as between connecting carriers, and may, notwithstanding such general notice, deliver the goods under certain [642] circumstances to another carrier for further transportation. Until actual delivery in such case, the preceding carrier is not divested of his liability.

The case of *Pratt v. Grand Trunk R. Co.* 95 U. S. 43, 24 L. ed. 336, and the other cases referred to by counsel in his argument at the bar, have no application in the view we take of the facts. The *Pratt Case* was fully commented upon in *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. ed. 725, 19 Sup. Ct. Rep. 421, in the course of the opinion of the court and it seems to be too clear for argument that the case does not justify an inference that the facts which we have just detailed in regard to this cotton constitute a delivery, either constructive or actual, to the steamship company, or to the pier of that company.

We are therefore of opinion that the court

below did not err in directing a verdict for the plaintiffs for the value of the cotton, and the judgment in their favor is affirmed.

SUN PRINTING & PUBLISHING ASSOCIATION, Petitioner,

v.

WILLIAM L. MOORE.

(See S. C. Reporter's ed. 642-674.)

Principal and agent—contracts in name of agent—authority of managing editor to charter yacht for collecting news—corporations—powers of general officers—acts ultra vires—shipping—construction of charter party—liability of charterer for loss of vessel—liquidated damages.

1. A charter party which the managing editor of the Sun newspaper, named therein as the hirer, signed "for the Sun Printing & Publishing Association," binds the latter, if such editor had the authority to make such a contract for his paper.
2. The trustees of a newspaper corporation, in whom is lodged the power to manage its affairs, are charged with the knowledge of the extent of the power usually exercised by the managing editor in the collection of news, and must be held to have acquiesced in the possession by him of such authority, even though they had not expressly delegated it to him.
3. The managing editor of a newspaper, charged with the full control of the business of collecting news, and impliedly vested with power to enter into contracts in respect thereto, is, in effect, a general officer of the newspaper corporation as to such matters, and as such has power prima facie to do any act which the directors or trustees of the corporation can authorize or ratify.
4. The chartering of a yacht by a newspaper corporation for the purpose of collecting news concerning events connected with hostilities between the United States and Spain, by a charter party embodying an absolute obligation to return the yacht at the expiration of the term of hiring, and a stipulation as to value in the event of nonreturn, is not *ultra vires* of the corporation as beyond the means incidental to the exercise of the power to charter.
5. The managing editor of a newspaper must

NOTE.—As to what corporate acts are *ultra vires*—see notes to *Scranton Electric Light & Heat Co.'s Appeal* (Pa.) 1 L. R. A. 285; *Rockhold v. Canton Masonic Mut. Benev. Asso.* (Ill.) 2 L. R. A. 420; *Portland Lumbering & Mfg. Co. v. East Portland* (Or.) 6 L. R. A. 290, and *Central Transp. Co. v. Pullman's Palace Car Co.* 35 L. ed. U. S. 55.

On the authority of agents generally—see notes to *Wheeler v. McGuire* (Ala.) 2 L. R. A. 808, and *Parsons v. Armor*, 7 L. ed. U. S. 725.

On the authority of an agent of a corporation—see note to *Sparks v. Despatch Transfer Co.* (Mo.) 12 L. R. A. 714.

As to when damages are liquidated—see notes to *Hathaway v. Lynn* (Wis.) 6 L. R. A. 551; *King Iron Bridge & Mfg. Co. v. St. Louis* (C. C. E. D. Mo.) 10 L. R. A. 826; *Condon v. Kemper* (Kan.) 13 L. R. A. 671, and *Taylor v. Sandiford*, 5 L. ed. U. S. 384.

be deemed to have had authority to charter a yacht for the purpose of gathering news concerning events connected with hostilities between the United States and Spain, by a charter party embodying an absolute obligation to return the yacht at the expiration of the term of hiring and a stipulation as to value in the event of nonreturn, where payments for the hire of the boat, the expenses of its management, and premiums for insurance were entered on the corporate books, and the corporation received money from other newspapers for accommodations furnished to their reporters on board the yacht, all of which matters must be presumed to have been brought to the notice of the board of trustees charged with the management of the corporate concerns, who must have known that the editor had hired the yacht, that its possession was pursuant to a contract, and that some obligation had been entered into for its return.

6. An absolute obligation to return a yacht at the expiration of the term of hiring is imposed upon the charterer, failure to comply with which is not excused because the vessel is lost without fault on his part, by a charter party which, after providing for the surrender of the vessel at the expiration of the term "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted," and requiring the hirer to make all repairs and to assume liability for all loss and damages, fixes in express terms the value of the vessel, and makes provision for security to protect against any loss or damage sustained by a failure of the hirer to fulfil any of the obligations which the contract imposes.
7. The obligation imposed upon a newspaper corporation by a charter party executed for it by its managing editor, of paying \$75,000, the agreed value of the vessel, in the event of her nonreturn, is not so modified as to require a deduction of the hire paid from such agreed sum, due as a consequence of a default in the return of the vessel, by a stipulation in an agreement executed by such editor for the corporation, in compliance with the requirement of the charter party, that the charterer should give security in that sum for the performance of the contract, that the liability thereunder should in no case exceed the sum of \$75,000, which stipulation followed the provisions that the corporation bound itself that the hirer would perform the obligations expressed in the charter party, and that the intention of the parties was to hold the corporation primarily liable for such obligations.
8. Whether a particular stipulation to pay a sum of money is to be treated as a penalty or as an agreed ascertainment of damages is to be determined by the contract, fairly construed, and it is the duty of the court, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract.
9. Parties to a charter party may stipulate the agreed value of the vessel as liquidated damages to be paid in the event of a failure to return the vessel, and such stipulation is conclusive upon them, in the absence of fraud or mistake.

[No. 49.]

Argued October 24, 25, 1901. Decided January 13, 1902.

183 U. S.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of a District Court in favor of plaintiff in an action to recover damages for the breach of a covenant in a charter party, and remanded the cause with instructions to enter a decree for a larger sum. *Affirmed.*

See same case below, 41 C. C. A. 506, 101 Fed. 591.

Statement by Mr. Justice White:

*The yacht Kanapaha, the property of the [643] respondent Moore, was let on April 1, 1898, for the term of two months, by a charter party, in which Chester S. Lord was recited to be the hirer, but which was signed by him as follows: "Chester S. Lord, for The Sun Printing & Publishing Association." At the time Mr. Lord was, and for many years prior thereto had been, the managing editor of the Sun newspaper, and had special charge of the collection of news for the Sun Printing & Publishing Association, the publisher of the newspaper aforesaid. We shall hereafter speak of this corporation as the Sun Association, and of the newspaper as the Sun.

In the body of the charter party the hirer agreed to furnish security, and contemporaneously with the execution of the contract a paper was signed, which is described in the body thereof as the "understanding or agreement of suretyship" required by the charter party. This paper recited on its face that it was made by "the Sun Printing & Publishing Association," and it also was signed by Lord exactly as he had signed the charter party. Before the time fixed in the charter party had expired, that is to say, about the middle of May, 1898, a second charter party and a second agreement of suretyship were executed. *These agree- [644] ments were substantially identical with the previous ones, except they provided for a new term to begin at the expiration of the previous one and to continue for four months thereafter, that is, up to October 1, 1898.

On the execution of the first papers the yacht was delivered to the Sun Association, was by it immediately manned, equipped, and provisioned, and one or more of its reporters were placed on board with authority to direct the movements of the vessel, and she was sent to Cuban waters, to be used as a despatch boat for the purpose of gathering news concerning the events connected with the hostilities between the United States and Spain.

Early in September, 1898, the yacht was wrecked, and became a total loss. For a breach of an alleged covenant to return the vessel, asserted to be contained in the charter party, this libel *in personam* was filed against the Sun Association, and the damages were averred to be the value of the vessel, which it was alleged was fixed by the charter party at the sum of \$75,000. The district court held that the writings were contracts of the Sun Association through Lord, its authorized agent, and were virtu-

ally one agreement; that by them that corporation was responsible for the nonreturn of the ship, whether or not the vessel had been lost by the fault of its agents or employees; and that there was a liability to pay the value of the vessel as fixed by the charter. Construing the two writings as a whole, this value, it was held, was subject to be diminished by the extent of the charter hire, paid when the charter party was executed. A judgment was entered for the sum of \$65,000, with interests and costs. 95 Fed. 485. On appeal the circuit court of appeals coincided with the district court except it disapproved the conclusion that the value of the vessel should be reduced by the sum of the charter hire. The decree of the district court was reversed, and the cause remanded with instructions to enter a decree for \$75,000, with interest and costs. 41 C. C. A. 506, 101 Fed. 591. The case was then brought here by certiorari.

Messrs. James Russell Soley and Franklin Bartlett argued the cause and filed a brief for petitioner:

In a contract involving a provision for the payment of damages in case of a breach the sum named therein, even though expressly stated to be liquidated damages, will be held to be a penalty if the sum stipulated is unreasonable, or unjust, or oppressive, or extravagant, or disproportionate to the actual damages.

Taylor v. Sandiford, 7 Wheat. 13, 5 L. ed. 384; *Spencer v. Tilden*, 5 Cowen, 151; *Noyes v. Phillips*, 60 N. Y. 411; *Gay Mfg. Co. v. Camp*, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 794, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 67; *Ward v. Hudson River Bldg. Co.* 125 N. Y. 230, 26 N. E. 256; 1 Sedgw. Damages, 8th ed. pp. 558, 583-586; *Colwell v. Lawrence*, 38 N. Y. 74; *Peekskill, S. C. & M. R. Co. v. Peekskill*, 21 App. Div. 94, 47 N. Y. Supp. 305; 1 Pom. Eq. Jur. 2d ed. § 440; *Davis v. United States*, 17 Ct. Cl. 201; *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91; Mayne, Damages, 5th ed. 1894, p. 148; *Charleston Fruit Co. v. Bond*, 26 Fed. 18.

If the intent is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty.

1 Pom. Eq. Jur. 2d ed. § 440; *Harris v. Miller*, 6 Sawy. 319, 11 Fed. 118; *Dimech v. Corlett*, 12 Moore, P. C. C. 199; *Jones v. Green*, 3 Younge & J. 304; *Green v. Price*, 13 Mees. & W. 701, 16 Mees. & W. 346; *Betts v. Burch*, 4 Hurlst. & N. 511; *Cushing v. Drew*, 97 Mass. 445; *Wallis v. Carpenter*, 13 Allen, 19; *Lynde v. Thompson*, 2 Allen, 456; *Streeper v. Williams*, 48 Pa. 450.

A charter party is an informal instrument, as often as otherwise, having inaccurate clauses, and on this account must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade.

Raymond v. Tyson, 17 How. 53, 15 L. ed. 47; *Abbott, Shipping*, Story's ed. 188; 3 Kent, Ch. 47; *Ruggles v. Bucknor*, 1 Paine,

358, Fed. Cas. No. 12,115; *The Volunteer*, 1 Sumn. 551, Fed. Cas. No. 16,991; *Disney v. Furness*, 79 Fed. 810.

Courts of admiralty act upon enlarged principles of equity, rather than upon the strict rules of common law.

O'Brien v. Miller, 168 U. S. 287, 42 L. ed. 469, 18 Sup. Ct. Rep. 140.

The principle that where damages cannot be fixed with reasonable exactness it is competent for the parties to agree upon a certain sum beforehand which shall be an approximation to the actual damages, by which they shall be bound, must be understood with the qualification, which is universal and absolute, that the amount so fixed shall be reasonable, and not out of proportion to the actual loss.

Ward v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256.

In a contract in which certain acts are to be done or omitted, and the contract is of such a nature that the actual damages are susceptible of computation in money, and the sum is named in the contract as a penalty or forfeiture for a violation, it is to be viewed as a penalty, and not as liquidated damages; and in such case the actual damages sustained will constitute the rule of recovery.

White v. Arleth, 1 Bond, 319, Fed. Cas. No. 17,536; *Taylor v. The Marcella*, 1 Woods, 302, Fed. Cas. No. 13,797.

There is no ground in the present case for considering the stipulated sum as liquidated damages on account of any supposed difficulty in determining actual damages.

East Moline Co. v. Weir Plow Co. 37 C. C. A. 62, 95 Fed. 250; *Trower v. Elder*, 77 Ill. 452; 1 Pom. Eq. Jur. 2d ed. § 440; *Spear v. Smith*, 1 Denio, 464; *Kemble v. Farren*, 6 Bing. 141.

Cases which hold that damages shall be considered as liquidated "where it is evident that they would be uncertain in their nature and impossible of ascertainment by a jury," or "speculative in character," or "not measurable by any exact pecuniary standard," apply to an entirely different state of facts from that presented here.

Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; *Dakin v. Williams*, 17 Wend. 447; *Knapp v. Maltby*, 13 Wend. 587; *Price v. Green*, 16 Mees. & W. 346; *Galsworthy v. Strutt*, 1 Exch. 659; *Ward v. Hudson River Bldg. Co.* 125 N. Y. 230, 26 N. E. 256.

The breach of the contract, alleged as the ground of recovery, being the failure to redeliver the vessel, the case falls within the principle that, where a contract has been made to deliver a specific thing, and the thing has in the meantime been destroyed, no obligation rests upon the contracting party to deliver it or answer in damages, unless the destruction was due to his negligence.

Young v. Leary, 135 N. Y. 569, 32 N. E. 607; *Taylor v. Caldwell*, 3 Best & S. 826, 32 L. J. Q. B. N. S. 164; *Appleby v. Myers*, L. R. 2 C. P. 651. See also *Benjamin, Sales*, 3d Am. ed. § 570; *Wells v. Culnan*, 107 Mass. 514, 9 Am. Rep. 65; *The Tornado*, 108 U. S. 349, 27 L. ed. 750, 2 Sup. Ct. Rep.

746; *Price v. Pepper*, 13 Bush, 42; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Thomas v. Knowles*, 128 Mass. 22; *Lovering v. Buck Mountain Coal Co.* 54 Pa. 291; *Walker v. Tucker*, 70 Ill. 527; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489; *Lindsey v. Gordon*, 13 Me. 60.

The qualifying words in our charter party, to "surrender the yacht in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted," release us from any obligation to restore the yacht which was destroyed by shipwreck.

Young v. Leary, 135 N. Y. 578, 32 N. E. 667; *McIntosh v. Lown*, 49 Barb. 550; *Ames v. Relden*, 17 Barb. 513.

The construction contended for by the libellant would make the contract unreasonable, and would place one of the parties at the mercy of the other, and the law does not favor such construction.

Gillet v. Bank of America, 160 N. Y. 557, 55 N. E. 292; *Russell v. Allerton*, 108 N. Y. 288, 15 N. E. 391; *Wright v. Reusens*, 133 N. Y. 298, 31 N. E. 215; *Buffalo & L. Land Co. v. Bellevue Land & Improv. Co.* 165 N. Y. 247, 51 L. R. A. 951, 59 N. E. 5.

Where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens.

Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779.

The circuit court of appeals erred in segregating certain provisions from the entire instrument or so-called charter party, and thus frustrating the consideration of the whole agreement.

O'Brien v. Miller, 168 U. S. 296, 42 L. ed. 472, 18 Sup. Ct. Rep. 140.

Where there is any uncertainty or ambiguity as to the meaning of an agreement it should be resolved in favor of the party who did not prepare the contract.

Gillet v. Bank of America, 160 N. Y. 555, 55 N. E. 292.

In every case where it has been held that the person exercising the power had general authority to do so, the power has been exercised by the president, the secretary, or the treasurer, or by some officer of the corporation, or by the board of directors, or by the cashier of a bank or the general manager of a business corporation, or by an authorized committee.

4 Thomp. Corp. § 4677.

A principal is bound only by the authorized acts of his agent.

Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 632; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 337, 5 L. ed. 103; *Alexander v. Cauldwell*, 83 N. Y. 480; *Bickford v. Menier*, 107 N. Y. 493, 14 N. E. 438; **183 U. S.** U. S., Book 46.

Edwards v. Dooley, 120 N. Y. 551, 24 N. E. 827.

An agent cannot create for himself an authority simply by asserting that he has it. 4 Thomp. Corp. § 4880.

The authority of Lord to execute these instruments cannot be inferred from the fact that on one or two previous occasions a vessel had been hired by him.

Id. § 4886.

Mr. George Zabriskie argued the cause, and, with *Mr. J. Archibald Murray*, filed a brief for respondent:

An instrument signed by an agent for his principal becomes the act and agreement of such principal if the agent had requisite authority thus to contract.

Prentice v. United States & C. A. SS. Co. 58 Fed. 702; *Alexander v. Sizer*, L. R. 4 Exch. 102; *Hill v. Miller*, 76 N. Y. 32; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 105.

If the agent had authority to bind the respondent by a charter party, he could make the contract in his own name for its benefit, and execute an instrument by which his principal made itself responsible for the performance of the terms of the charter.

Arnot v. Erie R. Co. 67 N. Y. 315; *Green Bay & M. R. Co. v. Union S. B. Co.* 107 U. S. 98, 27 L. ed. 413, 2 Sup. Ct. Rep. 221.

Where an agent's principal is known the presumption is that the agent contracted in his behalf; and if the principal claims that the other party dealt with the agent as principal, and not in his quality of agent, he assumes the burden of establishing this by clear proof.

Meeker v. Claghorn, 44 N. Y. 349; *Butler v. Evening Mail Asso.* 61 N. Y. 634.

As the whole management of the editorial department of the paper, which included the collection of news, was left by the company in Lord's charge; and as he had authority to make such arrangements as he thought fit, not only to obtain news in general, but also, in particular about the war in Cuba,—he had, as a necessary incident to this authority, the power to make contracts in furtherance of the purposes it was his duty to accomplish, and for which his authority existed; and any contracts so made by him are binding on the appellant.

Story, Agency, §§ 58, 85, 97; Mechem, Agency, §§ 280-311; *Nelson v. Hudson River R. Co.* 48 N. Y. 498; *Meehan v. Forrester*, 52 N. Y. 277; *Hardee v. Hall*, 12 Bush, 327; *Prentice v. United States & C. A. SS. Co.* 58 Fed. 702.

The burden of showing that any particular contract in the general line of the duty of the general managing agent was not within his actual authority is upon the principal.

Patterson v. Robinson, 116 N. Y. 193, 22 N. E. 372; *Holmes v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083; *Hastings v. Brooklyn L. Ins. Co.* 138 N. Y. 473, 34 N. E. 289; *Oakes v. Cattaraugus Water Co.* 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461.

The actual knowledge of some of the trustees that a yacht had been hired, the notice to all of them and to the corporation in-

volved in the numerous entries in the books, the use of the yacht, the payment of her charter money and running expenses, the letting of accommodations to other newspapers, and the published admissions in the Sun that the yacht was in its service under charter, show knowledge and acquiescence on the part of the appellant; and the latter is bound by the contract made.

Eureka Clothes Wringing Mach. Co. v. Bailey Washing & Wringing Mach. Co. 11 Wall. 488, 20 L. ed. 209; *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. ed. 707; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *Scott v. Middletown, U. & W. G. R. Co.* 86 N. Y. 200; *Phillips v. Campbell*, 43 N. Y. 271; *Moss v. Rossie Lead Min. Co.* 5 Hill, 137.

Knowledge of the president is notice to the corporation.

Bank of United States v. Davis, 2 Will, 451.

The authority of an agent need not be expressed in the minutes of the board of trustees. The convincing evidence of it may be found in the course of business of the company, in the things he was permitted by the company to do, and in the conduct of the company with regard to the particular thing done by its agent in its behalf.

Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; *Eureka Clothes Wringing Mach. Co. v. Bailey Washing & Wringing Mach. Co.* 11 Wall. 488, 20 L. ed. 209; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379.

In order to escape from the obligations of unauthorized stipulations made by an agent the principal must return the property. If not returned it is held by the principal subject to the conditions upon which it was obtained. *Qui sentit commodum sentire debet et onus.*

Wharton, Agency, § 89; *Mundorff v. Wick-ersham*, 63 Pa. 87; *Wheeler & W. Mfg. Co. v. Aughey*, 144 Pa. 398, 22 Atl. 667.

Where there is an express contract the law does not imply one, and, if the appellant is liable on any express contract, it is liable on the contract in suit, and on no other.

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607.

If there is an express contract, and the appellant is liable on it at all, it is liable on all its stipulations, for the contract is entire, and the appellant bound to perform all its provisions as the consideration upon which it has obtained the use of the vessel.

Washington, A. & G. Steam Packet Co. v. Sickles, 10 How. 419, 13 L. ed. 479; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648.

As Lord is conceded to have had general authority to hire yachts when they were wanted, and to arrange all details of the hiring, he necessarily had power to enter into incidental engagements connected with the hiring.

Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151; *Nelson v. Hudson River R. Co.* 48 N. Y. 498.

The act of the corporation in taking out insurance on the yacht is a most unequivocal expression of an intention to assume, and to relieve the owner from, all risks that would be covered by an insurance of the vessel by the owner for his own benefit and at his own expense.

The Barnstable, 84 Fed. 895, 36 C. C. A. 199, 94 Fed. 213; *Woolsey v. Funke*, 121 N. Y. 87, 24 N. E. 191.

Absolute stipulations for the return of the vessel, for her repair, and for the assumption of liability for her loss, are not discharged by the impossibility of returning her, arising from her loss.

The Harriman, 9 Wall. 161, *sub nom. The Harriman v. Emerick*, 19 L. ed. 629; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Herter v. Mullen*, 159 N. Y. 28, 44 L. R. A. 703, 53 N. E. 700.

The hirer may so bind himself absolutely to return the thing without allowance for the contingency of its destruction that if he does not return it he is liable, whatever be the cause of his failure.

Steele v. Buck, 61 Ill. 343, 14 Am. Rep. 60; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Drake v. White*, 117 Mass. 10; *Warth v. Mack*, 25 C. C. A. 235, 51 U. S. App. 133, 79 Fed. 915.

The stipulations of the charter in suit are precisely such as, in the case of a lease of real estate, impose upon the lessee an obligation to rebuild, if the buildings are accidentally destroyed during the term without fault of the lessee, and under which the lessee is held in damages for nonperformance.

Walton v. Waterhouse, 2 Wms. Saund 420; *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock & A. Canal Nav. Co. v. Pritchard*, 6 T. R. 750; *Warner v. Hitchins*, 5 Barb. 666.

The sufficiency of the language of the charter to constitute a covenant to repair is beyond question. The single word "repair" obliges the party charged to make good all injuries, even to the complete rebuilding of the subject of the agreement, with the alternative of payment of its value, in the event of total destruction.

Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369; *Compton v. Allen*, Style, 162.

If the charterer had not procured insurance he would clearly have been liable under this covenant for such damages as the owner might have recovered against an insurer.

Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379.

The measure of damages in case of total loss is clearly the value of the ship.

1 Sedgw. Damages, §§ 242, 243.

Where the parties themselves fix values, as of ships, buildings, cargoes, merchandise, or other articles, their agreement is, in the absence of fraud, conclusive upon them.

Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 3 L. ed. 200; *Pleasants v. Maryland Ins. Co.* 8 Cranch, 56, 3 L. ed. 486; *Kane v. Commercial Ins. Co.* 8 Johns. 229; *Whitney v. American Ins. Co.* 3 Cow. 210; *Providence & S. S. Co. v. Phoenix Ins. Co.* 89 N. Y. 559; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *Zimmer v. New York C. & H. R. R. Co.* 137 N. Y. 460, 33 N. E. 642; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Coupland v. Housatonic R. Co.* 61 Conn. 531, 15 L. R. A. 534, 23 Atl. 870.

The principle is well recognized in maritime law, and is constantly observed in ascertaining the value of ships for various purposes and under various circumstances.

North of England Iron SS. Ins. Asso. v. Armstrong, L. R. 5 Q. B. 244; *Irving v. Manning*, 6 C. B. 391; *Shaw v. Felton*, 2 East, 108; 1 Arnould, *Marine Ins.* 6th ed. 300-302.

Damages are deemed liquidated at the stipulated sum when the actual damages contemplated at the time the agreement was made are in their nature uncertain, and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount fixed is not on the face of the contract out of all proportion to the probable loss.

Curtis v. Van Bergh, 161 N. Y. 47, 55 N. E. 398; *Ward v. Hudson River Bldg. Co.* 125 N. Y. 230, 26 N. E. 256.

If a construction of an agreement be doubtful, that construction must be adopted which makes the covenant most beneficial to the promisee.

Marvin v. Stone, 2 Cow. 781.

[645] *Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

All the issues involved are to be determined by ascertaining the nature of the writings, the obligations which arose from their execution, and the conduct of the parties in connection therewith. It is essential, then, to bear in mind the exact form of the writings and their text. They are annexed in the margin.†

†Memorandum of agreement made and entered into this 14th day of May, 1898, by and between William L. Moore of the city of New York, by Thomas Manning, his agent, party of the first part, hereinafter called the owner, and Chester S. Lord of the city of New York, party of the second part, hereinafter called the hirer, witnesseth:

That the said William L. Moore, being the owner of the steam yacht Kanapaha, enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the hirer agrees to hire and hereby does hire, the said yacht as she is now for the term of four months from the 1st day of June, expiring on the 1st day of October now next ensuing, for the sum of ten thousand dollars (\$10,000.00), payable on the signing of this agreement.

183 U. S.

*It would seem to be necessary on the [646] threshold to ascertain whether there was both a principal contract and an accessory contract of suretyship. The two writings are both signed by *Lord in exactly the [647] same character. Judging by the signatures alone, it is impossible to conceive of two contracts, the one principal and the other accessory thereto, as, in the nature of things, if the first evidenced the obligations of the one who hired and the second manifested the agreement of the same person to fulfil his own duty resulting from the hiring, there could be no accessory contract of suretyship, since both documents but expressed the covenants of the same person relating to one and the same transaction. There is, however, this difference between the two papers. In the body of the first "Chester S. Lord" is recited to be the hirer, while in the body of the second paper it is recited that it is made by the Sun Printing & Publishing Association.

The first question to be determined is, assuming for the present that Lord had authority to bind the Sun Association, Was the first document the individual contract of Lord or that of the Sun Association?

The rule of law to be applied in the determination of this question is thus expressed in *Whitney v. Wyman* (1879) 101 U. S. 392, 395, 25 L. ed. 1050, 1051:

"Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed, and not the deed of the agent covenanting for him. *Stanton v. Camp*, 4 Barb. 274.

*"In the latter cases the question is al-[648] ways one of intent; and the court, being untrammelled by any other consideration, is bound to give it effect. As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal or

That the hirer will carry out the provisions of the charter party made on the 1st day of April last, and will until the expiration of this contract keep said yacht in repair, and will pay all its running expenses, including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues, and any and all other dues and charges, and will surrender said yacht with all its gear, furniture, and tackle, at the expiration of this contract, to the owner or his agent, at Manning's basin, foot 26th street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens, or charges of any kind or of any description.

That the hirer will use the said steam yacht

with the name of the principal by the agent, or otherwise.

"The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

Now, while Lord is referred to in the body of the first writing as an individual, he signed the agreement "for the Sun Printing & Publishing Association." Clearly this was a disclosure of the principal, and an apt manner of expressing an intent to bind such principal. *Bradstreet v. Baker*, 14 R. I. 546, 549; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 105.

It results that the first paper or charter party manifested the intent to bind the Sun Association as hirer, if Lord possessed the authority which he assumed to exercise, and consequently that the two papers are in legal effect but one contract, must be interpreted together, and the obligations of the parties arising from them be enforced according to their plain import, seeking al-

ways to give effect to the intention of the parties.

It is not denied that Lord was in some respects the agent of the corporation; but it is asserted that he had not the power or authority to make a contract of the character here involved. The charter of the Sun Association provided for no other officers to manage its concerns but a board of trustees. In the by-laws provision was made for the election of a president and secretary, whose duties were not prescribed, except as to the signing of certificates of stock and the transferring of stock on the books of the company. An examining committee, as also an executive committee, were provided for in article VII. *of the by-laws, as amended June 27, 1893, a copy of which is excerpted in the margin.† The provisions relating to such committees, however, were omitted in the by-laws as amended June 28, 1898. [649]

At the time of the hiring of the Kanapaha, Mr. Paul Dana was the president of the Sun Association, he having been elected to that office on October 26, 1897. Long prior

as a yacht only, and will under no circumstances use her to carry freight, merchandise, or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same do anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars (\$75,000.00), and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars (\$75,000.00), to secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage and shall pay demurrage to the owner at the rate of five hundred dollars (\$500.00) per day for each and every day's detention.

The hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture, or the like.

That the hirer during the continuance of this agreement shall at all times, and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats, and the like, in repair.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Thomas Manning,
Chester S. Lord,

For The Sun Printing & Publishing Association.

Whereas by agreement or charter party dated May 14th, 1898, William L. Moore, of the city of New York, hereinafter called the owner, did or is about to hire or charter unto Chester S. Lord, of the city of New York, hereinafter called the hirer, the steam yacht Kanapaha, enrolled in the Atlantic Yacht Club, as will more fully and at large appear by a copy of said agreement or charter party hereunto annexed and hereby made part hereof.

Now at the request of the said hirer and for

valuable consideration received from him, and in consideration of one dollar (\$1.00) from the said owner received, and receipt whereof is hereby acknowledged:

We, the Sun Printing & Publishing Company, of the city of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

First. That the said hirer will well and faithfully perform and fulfil everything in and by the said annexed agreement on his part to be kept and performed.

Second. That we expressly waive and dispense with notice of any demand, suit, or action at law against the hirer, and expressly waive any and all notice of nonperformance of the terms of said annexed agreement on the part of the hirer to be kept and performed; the intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

Third. That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars (\$75,000.00).

In witness whereof we have hereunto set our hands this 14th day of May, 1898.

Chester S. Lord,
For Sun Printing & Publishing Association.

State of New York, }
County of New York, } ss:

On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the managing editor of the Sun Printing & Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm, under authority of said company, as its act and deed. A. H. Bradley,
of his firm, under authority of said company, as

†The executive committee shall have the supervision of all the property of the association contained in their building, and of the building itself. It shall be their duty to rent such portion of the same as is not required for the use of the association, and to see that all necessary alterations and repairs are faithfully and eco-

to the last-mentioned date, however, from about 1879, Lord had been the managing editor of the Sun. As such, the evidence establishes, he exercised an unlimited discretionary authority in the collection of news for the Sun, making all pecuniary and other arrangements in respect thereto. Prior to the hiring of the Kanapaha he had, solely on his own volition, hired vessels for the use of the Sun for periods of a week at a time. By whom he was vested with this authority does not appear with certainty, but in the absence of direct evidence we are authorized to presume that the authority was conferred, either directly or indirectly, by the trustees of the association, in whom was lodged the power to manage the concerns of the company. *Bank of United States v. Dandridge* (1827) 12 Wheat. 64. 6 L. ed. 552. In the *Dandridge Case*, speaking through Mr. Justice Story, the court said (p. 69, L. ed. p. 554):

"By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances."

After illustrating the application of the principle to cases of public duty and many others, it was said (p. 70, L. ed. p. 554):

[650] *"The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed, and his acts as cashier will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right or matters of duty."

See also *Jacksonville, M. P. R. & Nav. Co. v. Hooper* (1896) 160 U. S. 514, 519, 40 L.

ed. 515, 521, 16 Sup. Ct. Rep. 379, and cases cited.

As said in *Mahoney Min. Co. v. Anglo-California Bank*, 104 U. S. 192, 26 L. ed. 707, speaking through Mr. Justice Harlan:

"An agency may be established by proof of the course of business between the parties themselves, by the usages and practice which the company may have permitted to grow up in its business, and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation."

As, therefore, the trustees of the Sun Association must be presumed to have exercised a supervision over the business of the corporation, they are to be charged with knowledge of the *extent of the power usual-ly exerted by its managing editor, and must be held to have acquiesced in the possession by him of such authority, even though they had not expressly delegated it to him.

It being then within the scope of the general authority possessed by Lord to hire the yacht, the contention that in its exercise he must be assumed to have been without right to incur an absolute liability for the return of the vessel or become responsible for the value thereof, and to stipulate as to such value, is without merit. As Lord was charged with the full control of the business of collecting news, and impliedly vested with power to enter into contracts in respect thereto, he was in effect a general officer of the corporation as to such matters; and it is well settled that the president or other general officer of a corporation has power prima facie to do any act which the directors or trustees of the corporation could authorize or ratify. *Oaks v. Cattaraugus Water Co.* 143 N. Y. 430, 436, 26 L. R. A. 544, 38 N. E. 461, and cases cited. The burden was on the Sun Association to establish that Lord did not possess the authority he assumed to exercise in executing the contracts. *Patterson v. Robinson*, 116 N. Y. 193, 200, 22 N. E. 372, and cases cited. As the trustees of the Sun Association were unrestrained by the charter, and might have authorized Lord to execute the writings in question, and the association failed to rebut the prima facie presumption, he must be held to have been vested with such power.

The argument that if it be granted that the writings embodied an absolute obligation to return and a stipulation as to value in the event of nonreturn, such conditions were so extraordinary that it must be assumed that authority had not been conferred to agree to them, is equally unfounded. The proposition must rest on the assumption that to charter a yacht upon the conditions referred to was *ultra vires* of the corporation, which, as we have seen,

nomically executed; but no expenditure shall be made by the committee exceeding the sum of \$500, unless by authority of the trustees. They shall report their doings to the trustees at each regular meeting.

183 U. S.

It shall be the duty of the examining committee to examine the accounts of the association, and to inquire into both the receipts and disbursements of money. They shall report to the trustees at each regular meeting.

is not correct. Certainly an authority to charter a yacht for the purpose of collecting news was clearly within the corporate powers of the Sun Association; the mere signing of a charter party in execution of such a contract was not illegal, nor can it, we think, with any plausibility be said where, in a case like this, the vessel char-

[652]tered was to be manned, equipped, *and operated by the hirer, to be taken far from her home port, in time of threatened or actual war, on a presumably hazardous venture, that the agreement to absolutely return, or, in default, to pay a fixed value, was so beyond the means incidental to the exercise of the power to charter as to cause the act to be beyond the corporate power. For if the corporation could have done these things, the agent having the broad powers possessed by Lord had a similar right.

But the case in this regard does not depend upon legal presumptions arising from the general course of business in other matters, for the following reasons: The evidence clearly justifies the inference that the president and secretary and the other trustees of the Sun Association knew that Lord had exercised the authority to hire the vessel in question, that the possession of the vessel was pursuant to a contract, and that some obligation had been entered into for its safe return. Mr. Hitchcock was one of the four trustees and the secretary of the Sun Association. It was his duty to affix the seal of the corporation to instruments directed by the trustees to be executed in a formal manner. He was requested by Lord to execute the writings in question, but he declined to do so. The reasons actuating him in refusing do not appear; but as he testified that he had nothing to do with the collection of news, it may well be that he felt he could not execute formal documents in a matter not within his department. He does not, however, appear to have regarded the signing of such documents by Lord as improper; for he subsequently, in conjunction with the business manager, who was also a trustee of the Sun Association, signed a check on behalf of the corporation for a \$10,000 payment, as recited on the books of the association, for "charter Kanapaha to October 1."

President Dana testified that he was not consulted in regard to the drawing of the papers, and did not in April or May, 1898, know of their execution. He, however, was aware in those months that despatch boats were being used by the Sun to obtain news in regard to the progress of events in Cuban waters, such information having been acquired from several sources, including Mr. Lord. President Dana testified that Lord

[653]had *charge of the getting of information as to the progress of events in Cuban waters and in connection with the war; that he had talked with him about the matter early in April, 1898, and had inquired if his arrangements were satisfactory. He further testified that if the arrangements made were satisfactory to Lord, they were to the witness, and that that was understood in the

Sun office, and by the other trustees. Lord attempted no concealment of his actions in respect to the hiring of the Kanapaha. The payments for the hire of the boat, the expenses connected with its management, sundry premiums paid out of the moneys of the Sun Association for insurance upon the yacht, in the sum of nearly \$60,000, covering the first five months of the use of the vessel,—the later policies expiring only a few days before the loss of the ship,—were entered in the books of the Sun. Besides, the association received, under arrangements made by its business manager and trustee, Laffan, money from various newspapers for accommodations furnished to their reporters on board the Kanapaha. All these matters must be presumed to have been brought to the notice of the board, whose duty it was to manage the concerns of the association. The deductions fairly to be drawn from them are susceptible only of the construction that full discretion in the premises had been vested in the managing editor. The strongest possible confirmation of this arises from the fact that Lord, who under oath acknowledged when executing the alleged agreement of suretyship that he possessed the authority to do so, and who was at the time of the trial below in the service of the defendant, and able to be produced in court, was not called to the witness stand.

The contract, then, being that of the Sun Association, made by its agent duly empowered to that end, and inuring to its benefit, we are not concerned with the questions of ratification discussed at bar, and we are thus brought to consider the obligations which the contract imposed, and, before passing from the subject just considered, it is to be observed that the facts to which we have referred, if there be ambiguity in the writings, confirm the conclusion that the two writings embodied but one contract made by the agent of the Sun in its behalf and for its benefit. This is manifest because the taking charge *of the ship [654] by the employees of the association, the payment of all the expenses of the vessel, the payment of the rent, the charging of the amount thereof in the books of the association, the use of the vessel for the purposes of the association, the receipt of revenues derived from such use, and the other facts previously stated, when considered together,—cause it to be impossible in reason to assume that the relation of the Sun Association to the hiring was simply that of a security for Lord as a hirer of the yacht on his personal account.

It is elementary that, generally speaking, the hirer in a simple contract of bailment is not responsible for the failure to return the thing hired, when it is has been lost or destroyed without his fault. Such is the universal principle. This rule was tersely stated by Mr. Justice Bradley in *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518, where it was said (p. 542, L. ed. p. 519):

"A bailee for hire is only responsible for ordinary diligence and liable for ordinary

negligence in the care of the property bailed. This is not only the common law, but the general law on the subject. See Jones, Bailm. p. 88; Story, Bailm. §§ 398, 399; Domat, Lois Civiles, lib. 1, title 4, § 3, pars. 3, 4; 1 Bell, Com. 7th ed. pp. 481, 483."

But it is equally true that where by a contract of bailment the hirer has, either expressly or by fair implication, assumed the absolute obligation to return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling, and must be enforced according to its terms. In *Sturm v. Boker* (1893) 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99, both the elementary principles above stated were clearly expressed by the court, through Mr. Justice Jackson. It was said (p. 330, L. ed. p. 1100, Sup. Ct. Rep. p. 105):

"The complainant's common-law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, *express or fairly implied*, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."

[655] *This statement of the binding effect of contracts upon those who enter into them was, in substance, but a reiteration of the principle clearly announced in *Dermott v. Jones* (1865) 2 Wall. 1, *sub nom. Ingle v. Jones*, 17 L. ed. 762, where it was said:

"It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him."

Among the cases approvingly referred to in *Dermott v. Jones* were *Bullock v. Dommitt*, 6 T. R. 650, and *Brecknock Nav. Co. v. Pritchard*, 6 T. R. 750, holding that an agreement to keep the property in repair created a binding obligation to rebuild and restore the property, even though its destruction had been caused by inevitable accident.

It is to be observed in passing that the principle sustained by these last-mentioned authorities is supported by many adjudications. *Young v. Leary*, 135 N. Y. 578, 32 N. E. 607, and cases cited.

We approach, then, the contract for the purpose of determining whether by express agreement or by fair implication it put the positive duty on the hirer to surrender the vessel at the expiration of the charter and to be responsible for the value, even although impossibility of return was brought about without his fault. The obligation was expressly imposed upon the hirer to keep "said yacht in repair, and to pay all its running expenses, and to surrender said yacht with all its gear, furniture, and tackle, at the expiration of this contract, to the

owner or his agent . . . in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted." Not only this, but the charter party contained the further provision that the hirer "shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture, or the like." This provision is immediately followed by a reiteration of the duty to repair, previously stated, by again stipulating "that the hirer, during the continuance of this agreement, shall at all times and at his own cost and expense keep the said yacht, its hull, machinery, tackle, spars, furniture, gears, boats, and the like, in repair."

*Pausing for a moment to consider the [656] foregoing stipulations, it is difficult to conceive how language could more aptly express the absolute obligation, not only to repair and keep in good order to the end of the hiring and to return, but, moreover, to be responsible for any and all loss and damage to the vessel, her fixtures and appointments. These stipulations seem to us to leave no doubt of the absolute liability to return; in other words, of the putting of the risk of damage or loss of the vessel upon the hirer. But if there could be doubt after considering the provisions just above referred to, such doubt is dispelled when it is considered that the contract proceeds to say that "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of \$75,000. And the said hirer shall procure security or guarantee to and for the owner" in the sum stated, "to secure any and all loss and damage which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of this contract." In other words, having provided for all repairs, having stipulated absolutely for the return of the vessel in full repair, having put the risk of any and all loss on the hirer, the contract then in express terms fixes the value of the vessel, and makes provision for security to protect against any and all loss or damage sustained by a failure of the hirer to fulfil each and all of the positive obligations which the contract imposed.

Concluding as we do that by the charter party the absolute obligation to return was placed on the hirer, and that by that contract the risk was hence cast upon him of loss, even be it without his fault, we are led to determine the amount which the owner of the yacht is entitled to recover.

Before passing to this question, however, we remark that we have not entered into any extended review of the case of *Young v. Leary*, 135 N. Y. 569, 32 N. E. 607, and the conflict of view asserted in argument to exist between the ruling in that case and that made in *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60; *Drake v. White*, 117 Mass. 10, and *Harvey v. Murray*, 136 Mass. 377. We have not done so, because, as we have seen in the *opinion in *Young v. Leary*, the abso- [657]

lute duty to repair and keep in repair was conceded to import an obligation to restore the property, even if the impossibility of doing so was brought about without the fault of the bailee. Whatever differences there may be, if any, in the opinions in the cases referred to, arises, not because they expound a discordant view of the law of bailment, but from different applications made of that law to the contract which was under consideration in the particular case. But not only the legal principles announced in the cases referred to, but also the application made of such principles in each and all of the cases, render it necessary to construe a contract like the one we have before us as meaning that which we find it to mean.

Recurring to the amount of liability, it appears that there are two inquiries involved in deciding it; the first was the obligation imposed by the first writing to pay the agreed value of the vessel in the event of her nonreturn, and, second, if yes, did any modification thereof arise from the second writing? The answer to the first inquiry is afforded by what we have already said in discussing the nature of the obligations assumed by the hirer. As they were to return the vessel in any event, and in default to make good any and all loss arising from a failure to return, the fixing of the value of the vessel can have but one meaning; that is, that the value agreed on was to be paid in case of default in returning. Unless the agreement as to the value meant this, it had no import whatever, and its presence in the contract is inexplicable. That the obligation to return or pay the agreed value was not modified by the second writing we think is clear.

In that writing it is provided that the Sun Association bound itself that the hirer would faithfully fulfil and perform all the obligations expressed in the previous writing. Certainly, because of the contract that all the previous agreements are to be fulfilled, it cannot be that some of them were destroyed. But proceeding to make its significance if possible clearer, the second writing adds that the intention of the parties to it is to hold the Sun Association "primarily liable" for the obligations created [658] *by the prior writing. To stipulate primary liability for prior obligations cannot be so construed as to destroy them.

True, the provisions just referred to are followed by the stipulation that "all our liability hereunto shall in no case exceed the sum of \$75,000." This cannot mean that the obligations expressly assumed were destroyed, but that in case they were not fulfilled, the damage brought about by each and every breach should not exceed \$75,000. The contrary cannot be said without holding that a provision which was manifestly intended to add sanction to the obligations in effect abrogated them. And the import of the clause under consideration is demonstrated by the provision in the first writing by which it was agreed that the second paper should be signed. The provi-

sion is, "The said hirer shall procure security or guarantee, in and for the Sun, in the sum of \$75,000, to secure any and all loss and damage which may occur to said boat or its belongings, which may be sustained by the owner, by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of the contract."

The second writing unquestionably stipulated a penalty for the performance of each and all the obligations, but fixing a penalty in case of a default did not extinguish them. The meaning of the provision becomes quite clear when all the provisions are taken into view in their proper connection. They all naturally divide themselves into two classes, the one relating to the payment of the hire, the payment of the expenses of the operation of the vessel, the making of repairs, etc.—from which we may eliminate the hire, as it was to be paid on the execution of the contract; and the other to the duty to return, or pay in default the value agreed on. We say they naturally so divide themselves, because in no reasonable probability could a default in both cases simultaneously exist. Thus, if the vessel was not returned, and the owner got the value as fixed in the contract, he could suffer no loss for any default of the hirer in failing to pay for repair, etc., or for a breach of the covenant to pay the running expenses of the vessel, as no personal liability therefor could attach to him. And in the event of a return of the vessel, lessened in value by the failure to repair, or *bur- [659] dened with charges, because of default in paying running expenses, no loss could come to the owner if he was indemnified up to the extent of \$75,000, the value of the vessel, which, it will be seen, was, hence in any probable event, the maximum sum of liability which the parties supposed might result from a breach of the covenants contained in the charter party.

The contract arising from the two writings having this import, the court below correctly decided that the sum due, as a consequence of a default in the return of the ship, was not to be diminished by the amount of the hire which had been paid at the inception of the contract. To have otherwise ruled would have destroyed in part the express agreement that the failure to return should be compensated by the payment of the agreed value. Such would have been its inevitable result, as it would have reduced the sum due for the default in not returning the ship, by crediting the hirer with the amount of the hire he had paid without default on an independent and distinct liability.

The foregoing considerations are adequate to dispose of the case, if it be that the rights of the parties are to be administered according to the contract into which they voluntarily entered. In substance, however, it is pressed with much earnestness, and sought to be supported by copious reference to authority, that the intent of the contracting parties should not be given effect to, because it is our duty to disregard

the contract and substitute our will or our conception of what the parties should have done for that which they did plainly do. This contention thus arises.

Upon the trial the Sun Association introduced some evidence tending to show that the value of the yacht was a less sum than \$75,000, and it claimed that the recovery should be limited to such actual damage as might be shown by the proof. The trial judge, however, refused to hear further evidence offered on this subject, and in deciding the case disregarded it altogether. The rulings in this particular were made the subject of exception, and error was assigned in relation thereto in the circuit court of appeals. That court held that the value fixed in the contract was controlling, especially in view of the fact that a yacht had no market value.

[660] The complaint that error in this regard was committed is *thus stated in argument: "The naming of a stipulated sum to be paid for the nonperformance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that *if the amount is disproportioned to the loss*, the court has the right and the duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though it is specifically said to be liquidated damages." Now it is to be conceded that the proposition thus contended for finds some support in expressions contained in some of the opinions in the cases cited to sustain it. Indeed, the contention but embodies the conception of the doctrine of penalties and liquidated damages expressed in the reasoning of the opinions in *Chicago House-Wrecking Co. v. United States* (1901) 53 L. R. A. 122, 45 C. C. A. 343, 106 Fed. 385, 389, and *Gay Mfg. Co. v. Camp* (1895) 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 794, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 67, *viz.*: that "where actual damages can be assessed from testimony," the court must disregard any stipulation fixing the amount, and require proof of the damage sustained. We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court. And we shall, as briefly as we can consistently with clearness, proceed to so demonstrate.

At common law, prior to the statute of 8 & 9 Wm. III. chap. 11, in actions "upon a bond or on any penal sum, for nonperformance of any covenants or agreements contained in any indenture, deed, or writing," judgment, when entered for the plaintiff, was for the amount of the penalty, as of course. *Watts v. Camors*, 115 U. S. 360, 29 L. ed. 408, 6 Sup. Ct. Rep. 91; Story, Eq. Jur. § 1311. Equity, however, was accustomed to relieve in cases of penalties annexed to bonds and other instruments, the design of which was to secure the due fulfilment of a principal obligation. Story, Eq. Jur. § 1313. The effect of the passage of the statute was to restrict suitors in actions for

penalties to a collection of the actual damages sustained. As a result, also, courts of law were thereafter frequently under the necessity of determining whether or not an agreed sum stipulated in a bond or *other [661] writing to be paid, in the event of a breach of some condition, was in reality a penalty or liquidated damages.

Of course courts of common law, merely by reason of the statute of 8 & 9 Wm. III. referred to, did not acquire the power to give relief in cases of contract, where a court of equity would not have exercised a similar power. Now courts of equity do not grant relief in cases of liquidated damages—that is, cases "when the parties have agreed that in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of the damages sustained by such act of omission." Story, Eq. Jur. § 1318. And as long ago as 1768, Lord Mansfield, in *Lowe v. Peers*, 4 Burr. 2225, said—italics in original (p. 2228): "Courts of equity . . . will *relieve against a penalty*, upon a *compensation*; but where the covenant is 'to pay a particular liquidated sum;' a court of equity can not make a new covenant for a man; nor is there any room for *compensation* or *relief*." Commenting upon the judgment of Lord Eldon in one of the leading cases on the subject of liquidated damages (*Astley v. Weldon*, 2 Bos. & P. 346, 350), Jessel, Master of the Rolls, in *Wallis v. Smith*, L. R. 21 Ch. Div. 256, said (p. 260):

"He perfectly well knew that whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief on the ground that agreements were oppressive, where the parties were of full age and at arm's length. It is very likely, and I believe it is true historically, that the doctrine of equity did arise from a general notion that these acts were oppressive. At all events, long before his time, it had been well settled in equity that equity did relieve from forfeiture for non-payment of money, and I think I may say, in modern times, from nothing else."

The doctrine of equity, as respects the withholding of or granting relief against a contract because of inadequacy of consideration, illustrates the conservative disposition of equity not to interfere unnecessarily with the contracts of individuals. Equity declines to grant relief because of inadequacy of price or any other inequality in the bargain; the bargain must be so unconscionable *as to warrant the presumption of [662] fraud, imposition, or undue influence. Story, Eq. Jur. §§ 244, 245.

While the courts of the United States, in actions at law, undoubtedly possess the power conferred upon the courts of common law by the statute of 8 and 9 Wm. III., and while recognition of such power was embodied in the judiciary act of 1789, reproduced in § 961 of the Revised Statutes, the duty of such courts to give effect to the plainly expressed will of contracting parties is as imperatively necessary now as it

was at common law after the adoption of the English statute, as will be made manifest by a reference to some of the adjudications of this court.

The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bona fide, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. Thus, Chief Justice Marshall, in *Taylor v. Sandiford*, 7 Wheat. 13, 5 L. ed. 384, although deciding that the particular contract under consideration provided for the payment of a penalty, clearly manifested that this result was reached by an interpretation of the contract itself. He said (p. 17, L. ed. p. 385):

"In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages, and it will be incumbent on the party who claims them as such to show that they were so considered

[663] by the contracting parties. Much *stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention. These writings appear to have been drawn on great deliberation; and no slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms they have employed."

And, after having thus established that on the face of the contract it stipulated a penalty and not liquidated damages, the opinion proceeded to refute the construction relied on to sustain the contrary view that the contract manifested the intention to assess liquidated damages. In connection therewith the Chief Justice observed (p. 18, L. ed. p. 386):

"The plaintiff in error relies on the case of *Fletcher v. Dyche*, reported in 2 T. R. 32, in which an agreement was entered into to do certain work within a certain time, and if the work should not be done within the time specified, 'to forfeit and pay the

sum of £10 for every week,' until it should be completed.

"But the words 'to forfeit and pay' are not so strongly indicative of a stiputation in the nature of a penalty as the word 'penalty' itself; and the agreement to pay a specified sum weekly during the failure of the party to perform the work partakes much more of the character of liquidated damages than the reservation of a sum in gross."

In *Van Buren v. Digges*, 11 How. 461, 13 L. ed. 771, also construing a building contract, it was said (p. 477, L. ed. p. 777):

"The clause of the contract providing for the forfeiture of 10 per centum on the amount of the contract price, upon failure to complete the work by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. *Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is *never taken as such by* [664] *courts of justice, who leave it to be enforced where this can be done in its real character, viz., that of a penalty.*" [Italics not in original.]

See also *Quinn v. United States*, 99 U. S. 30, 25 L. ed. 269; *Clark v. Barnard*, 108 U. S. 436, 454, 27 L. ed. 780, 786, 2 Sup. Ct. Rep. 878; *Watts v. Camors*, 115 U. S. 353, 360, 29 L. ed. 406, 408, 6 Sup. Ct. Rep. 91; *Bignall v. Gould*, 119 U. S. 495, 30 L. ed. 491, 7 Sup. Ct. Rep. 294. The last-cited case illustrates the character of disproportion apparent on the face of a contract which has influenced a court when endeavoring to ascertain the meaning of parties to a contract in a stipulation for the payment of a designated sum for the breach of a condition. There the penal sum was \$10,000, several breaches of the conditions of the bond might be committed, to each of which the stipulated sum would be applicable, and one such breach might be the failure to obtain a release of a claim of but \$10.

The courts in England, as already intimated, consistently maintain the right of individuals, when contracting with each other, to estimate the value of property, or otherwise determine the *quantum* of damages for a breach of an agreement, where the damage is of an uncertain nature. *Irving v. Manning* (1847) 1 H. L. Cas. 287, 307, 308; *Ranger v. Great Western R. Co.* (1854) 5 H. L. Cas. 72, 94, 104, 118; *Dimech v. Corlett* (1858) 12 Moore, P. C. C. 199, 229; *Elphinstone v. Monkland Iron & Coal Co.* (1886) L. R. 11 App. Cas. 332, 345, 346; *Price v. Green* (1847) 16 Mees. & W. 346, 354.

We content ourselves with a few brief excerpts from some of the decisions just re-

ferred to. In *Ranger v. Great Western R. Co.*, in the course of his opinion Lord Cranworth said (p. 94):

"There is no doubt that where the doing of any particular act is secured by a penalty, a court of equity is in general anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid. On the other hand, it is certainly open to parties who are entering into contracts to stipulate that, on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation."

[665] In *Elphinstone v. Monkland Iron & Coal Co.* (1886) L. R. 11 *App. Cas. 332—a Scotch appeal—Lord Fitz Gerald, in the course of his opinion, said (p. 346):

"I am not aware that there is any enactment in force in Scotland corresponding to our statute of 8 and 9 Wm. III. chap. 11, § 8; nor does the Scotch law seem to have required such aid. We may take it, then, that by the law of Scotland the parties to any contract may fix the damages to result from a breach at a sum estimated as liquidated damages, or they may enforce the performance of the stipulations of the agreement by a penalty."

"In the first instance the pursuer is, in case of a breach, entitled to recover the estimated sum as pactional damages, irrespective of the actual loss sustained. In the other the penalty is to cover all the damages actually sustained, but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way. In determining the character of these stipulations, we endeavor to ascertain what the parties must reasonably be presumed to have intended, having regard to the subject-matter, and certain rules have been laid down as judicial aids."

In *Irving v. Manning* (1847) 1 H. L. Cas. 287, it was recognized that a policy of assurance was a contract of indemnity, but it was declared that in a valued policy the agreed value was conclusive, and each party must be held to have conclusively admitted that the sum fixed by agreement should be that which the other was entitled to receive in case of a total loss. In that case the opinion of the judges was delivered by Mr. Justice Patterson, and we excerpt from the opinion of that justice in *Price v. Green* (1847) 16 Mees. & W. 346, on error from the court of exchequer, as follows (p. 354):

"The £5,000 is expressly declared by the covenant to be 'as and by way of liquidated damages, and not of penalty.' It is a sum named in respect of the breach of this one covenant only, and the intention of the parties is clear and unequivocal. The courts have indeed held that in some cases the words 'liquidated damages' are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language

183 U. S.

*used, it is plain from the whole instrument [666] that the real intention was different."

In *Wallis v. Smith* (1882) L. R. 21 Ch. Div. 256, the leading cases in England on the subject of penalties and liquidated damages were commented upon by the court of appeal. Jessel, Master of the Rolls, classified the decisions and *dicta* on the subject. His summary will be found in the margin,† and measuring the contract in this case by the rules which are embodied in the recapitulation, it follows that the stipulated sum is embraced in the category of liquidated damages.

*In *Strickland v. Williams* [1899] 1 Q. B. [667] 382, Lord Justice A. L. Smith appears to have stated an additional class to those mentioned by Jessel, M. R. He said (p. 384): "In my opinion it is the law that where payment is conditioned on one event the payment is in the nature of liquidated damages." This but seems to reiterate the proposition of Justice Patterson in *Price v. Green*, previously cited. It was undoubtedly meant that the "event" should not be the mere nonperformance of an ordinary

†1. Where a sum of money is stated to be payable either by way of liquidated damages or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the court will not sever the stipulations.

2. Cases in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will, in all human probability, be small—that is, where it is not absolutely necessary that they should be small, but it is so near to a necessity, having regard to the probabilities of the case, that the court will presume it to be so.

Then the question is whether in that class of cases the same rule applies. Now upon this there is no decision. There are a great many *dicta* upon the question, and a great many *dicta* on each side. I do not think it is necessary to express a final opinion in this case, but I do say this, that the court is not bound by the *dicta* on either side, and the case is open to discussion. It is within the principle, if principle it be, of a larger sum being a penalty for non-payment of a smaller sum; but at the same time it is also within another class of cases to which I am now going to call attention.

3. The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are *dicta* there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance the sum has always been treated as liquidated damages.

4. A class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day,—in all those cases the judges have held that this rule does not apply, and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases.

agreement for the payment of money. See also per Bramwell, B., in *Sparrow v. Paris* (1832) 7 Hurlst. & N. 594, 599.

Now the stipulation here being considered obviously would be within the last class, for it was a promise to pay a stipulated sum on the breach of a covenant to return the yacht to its owner.

With the exception of the more recent decisions, the cases generally on liquidated damages and penalties, as well as those decided in England as in this country, are reviewed in 2 Evans-Pothier on Obligations, pp. 88 to 111, and in a note to *Graham v. Bickham*, 1 Am. Dec. 331 *et seq.* A list of some of the later decisions of the state courts is found in the margin.†

[668] The character of the stipulation under consideration renders it unnecessary to review in detail the decisions of the state courts. There is in them much contrariety of opinion on some phases of the doctrine, but our attention has not been called to *any case which sustains the contention that a valuation clause, such as that we are considering, contained in a contract made under circumstances like those which existed when this contract was executed, must be disregarded despite the evident intention of the parties to treat the sum named as estimated and ascertained damages for a breach of the covenant to return the yacht. That the courts of the state of New York do not lend any support to such a contention—which it was strenuously argued at bar they do—we will make evident.

The case of *Ward v. Hudson River Bldg. Co.* (1891) 125 N. Y. 230, 26 N. E. 256, is not an authority for the contention in question. Equitable relief was sought in that case against the enforcement of a stipulation, which the court, however, held to be liquidated damages, and binding on the parties. True, the court did say, on page 235, N. E. p. 257, that “where, however, a sum has been stipulated as a payment by the defaulting party, which is disproportioned to the presumable or probable damage, or to readily ascertainable loss, the courts will treat it as a penalty, and will relieve, on the principle that the precise

sum was not of the essence of the agreement, but was in the nature of a security for performance.” There is nothing, however, in this excerpt, to countenance the claim that where it is clear from the terms of the contract that the precise sum *was* of the essence of the agreement, and *was* the agreed amount of estimated damages, no fraud or imposition having been practised, either a court of equity or of law might rightfully decline to give effect to the stipulation. Nor does the quoted statement support the further claim that a court of law, in an action on a contract to recover a stipulated sum as damages, might let in evidence to establish that a mere disproportion existed between the agreed sum and the actual damage, for the purpose of avoiding the stipulation. The meaning of the court is made clear by the following statement, appearing on the same page with the above excerpt: “We may, at most, say that where they have stipulated for a payment in liquidation of damages, which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, *on the face of the contract*, out *of all proportion to the prob- [669] able loss, it will be treated as liquidated damages.” An inspection of the opinion in the *Ward Case* also shows that the New York court approvingly referred to prior decisions of the courts of that jurisdiction (*Dakin v. Williams*, 17 Wend. 447, and 22 Wend. 201), where it was emphatically recognized that parties might embody in their contract an agreed valuation of property or any other *quantum* of damages, where the damage was uncertain in its nature. We quote in this connection from the opinion as reported in 17 Wend., delivered by Chief Justice Nelson, afterwards a member of this court. It was said (p. 454):

“The next question presented upon the above conclusion is whether the sum of \$3,000 is to be viewed as damages liquidated by the contract of the parties, or only in the light of a *penalty*. There are many cases in the English books in which this question has been very fully examined and considered, but it would be an unprofitable consumption of time to go over them with a view or expectation of extracting any useful general principle that could be applied to this case. The following are the leading cases: *Astley v. Weldon*, 2 Bos. & P. 346; *Barton v. Glover*, Holt, N. P. 43, and note; *Reilly v. Jones*, 1 Bing. 302; *Davies v. Penton*, 6 Barn. & C. 216; *Crisdee v. Bolton*, 3 Car. & P. 240; *Randall v. Everest*, 2 Car. & P. 577; *Kemble v. Farren*, 6 Bing. 141. In our court are the following: *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160; *Slosson v. Beadie*, 7 Johns. 72; *Spencer v. Tilden*, 5 Cow. 144, and note, p. 150; *Nobles v. Bates*, 7 Cow. 307; *Knapp v. Maltby*, 13 Wend. 587. From a critical examination of all these cases and others that might be referred to, it will be found that the business of the court, in construing this clause of the agreement, as in respect to

†Hoagland v. Segur (1876) 38 N. J. L. 230; Wolf v. Des Moines & Ft. D. R. Co. (1884) 64 Iowa, 380, 386, 20 N. W. 481; Burrill v. Daggett (1885) 77 Me. 545, 1 Atl. 677; Jaqua v. Headington (1888) 114 Ind. 309, 16 N. E. 527; Wibaux v. Grinnell Live Stock Co. (1889) 9 Mont. 154, 22 Pac. 492; Wilhelm v. Eaves (1891) 21 Or. 194, 14 L. R. A. 297, 27 Pac. 1053; Hennessy v. Metzger (1894) 152 Ill. 505, 38 N. E. 1058; Willson v. Baltimore (1896) 83 Md. 203, 210, 34 Atl. 774; May v. Crawford (1898) 142 Mo. 390, 44 S. W. 260; Garst v. Harris (1900) 177 Mass. 72, 58 N. E. 174; Illinois C. R. Co. v. Southern Seating & Cabinet Co. (1900) 104 Tenn. 568, 30 L. R. A. 729, 58 S. W. 303; Weedon v. American Bonding & T. Co. (1901) 128 N. C. 69, 38 S. E. 255; Young v. Gaut (1901; Ark.) 61 S. W. 372; Knox Rock Blasting Co. v. Grafton Stone Co. (1901) 64 Ohio St. 361, 60 N. E. 563; Johnson v. Cook (1901; Wash.) 64 Pac. 729; Taylor v. Times Newspaper Co. (1901; Minn.) 86 N. W. 760; Emery v. Boyle (1901) 200 Pa. 249, 49 Atl. 729

every other part thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used, it must be carried into effect. A court of law possesses no dispensing powers; it cannot inquire whether the parties have acted wisely or rashly, in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules the law has fixed [670] as to parties, and there has been *no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement. Men may enter into improvident contracts where the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away if they please without an equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance, a measure of compensation, however extravagant it may be, for a violation of their covenant (they surely may after it has accrued), without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not; and regarding the intent of the parties, it is not to be doubted but that the sum of \$3,000 was fixed upon by them 'mutually and expressly,' as they say, 'as the measure of damages for the violation of the covenant, or any of its terms or conditions.' If it be said that the measure is a hard one, it may be replied that the defendants should not have stipulated for it; or, having been thus indiscreet, they should have sought the only exemption, which was still within their power; namely, the faithful fulfilment of their agreement."

Chancellor Walworth, "in the opinion rendered in the same case by the court for the correction of errors, embodied in his opinion the following (22 Wend. 213):

"In *Huban v. Grattan*, Aleock & N. 389, in which an action was brought to recover the stipulated damages which the defendant had agreed to pay if he did not remove a lime kiln adjacent to the plaintiff's premises, Bushe, Ch. J., says: 'The stipulation consists of two parts, one affirmative that the lime kiln should be prostrated before a particular day, the other, negative that the assignee shall not at any future time erect another lime kiln; and upon those the breaches are assigned. Both bear on one object,—to be relieved from the lime kiln altogether,—and both are essential to that object being accomplished; and both parties agree in measuring beforehand the damages consequent upon a breach of either agreement. Such stipulations as to damages are upheld by courts of law upon two grounds: 1st. Because a man may set a value, not [671] only *upon matters connected with his property, which value is capable of being estimated, but also upon matters of taste or fancy, such as prospect or ornament, which he alone can appreciate; and, 2dly, because even in matters capable of ascertainment

183 U. S.

great difficulties might occur in some cases; and in all cases it is prudent in both parties to provide against the trouble and expense of a future investigation. The cases which seem to have interfered with such compacts are those in which the subject-matter of the stipulation shows that, whatever the form of it may be, the parties could not have contemplated anything more than a penalty to secure against actual damage."

So, also, the case of *Bagley v. Peddie* (1857) 16 N. Y. 469, 471, 69 Am. Dec. 713, makes clear the fact that the New York courts recognize the right of parties to agree beforehand upon damages to be sustained by the breach of a contract, and that evidence *aliunde* the instrument declared on cannot be received respecting the amount of damage. The last two of what were termed "artificial rules" on the subject of liquidated damages and penalties, recited in the opinion as being peculiar to contracts of this character, were as follows:

"Sixth. If, independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated, if they are so denominated in the instrument. Seventh. If the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects."

Following a review of several decided cases in England, the court said (p. 474, Am. Dec. p. 716):

"The above cases will serve to illustrate the kind of certainty as to the sum to be paid as damages for breach of an agreement in order to hold the larger sum agreed to be paid on such breach a mere penalty. They are cases where the lesser sum is named specifically in the instrument itself, or depends on the award of arbitrators. These and similar cases are the cases of certain damages to which the courts allude in the third rule."

*The court then quoted approvingly the [672] prior decision of the supreme court in *Dakin v. Williams*, 17 Wend. 447, and concluded as follows (p. 475, Am. Dec. p. 717):

"The case at bar seems to me to fall within the sixth rule, the damages being wholly uncertain, and depending entirely on proof *aliunde* the instrument declared on."

And in connection with the New York cases it becomes pertinent to notice the case of *Gay Mfg. Co. v. Camp* (1895) 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 794, on rehearing, 15 C. C. A. 226, 25 U. S. App. 376, 63 Fed. 67, much relied upon in argument. As we have previously observed, language is employed in that opinion which, broadly interpreted, seems to countenance the idea that if a jury can ascertain the damages suffered by the breach of a stipulation, an agreement by the parties, embodied in a written contract, fixing such damages, will be treated as a nullity. This

deduction appears to have been drawn from certain rules of construction respecting liquidated damages and penalties enunciated by the trial judge in *Bagley v. Peddie*, 5 Sandf. 192, 194, the judgment in which case, it is proper to remark, was reversed by the appellate court in 16 N. Y. 469, 69 Am. Dec. 713, already referred to. We do not think, however, the interpretation we have noticed as having been put upon the rules in question was warranted; at least, as we have shown, such a doctrine is altogether untenable. Nor do the other authorities cited in the opinion in the *Gay Case* lend support to the asserted doctrine. Those authorities were *Harris v. Miller*, 6 Sawy. 319, 11 Fed. 118, 121, and a note to *Spencer v. Tilden* (1825) 5 Cow. 144, 150. *Harris v. Miller* is referred to because of the statement by Judge Deady that the courts, instead of giving effect to the contract of the parties according to their intentions, assume to control them according to their standard of justice. The note to 5 Cowen need not be commented upon, in view of the reference we have made to later decisions of the courts of New York.

[673] It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract*, and the question of disproportion has been *simply an element entering into the consideration of the question of what was the intent of the parties, whether bona fide to fix the damages, or to stipulate the payment of an arbitrary sum as a penalty, by way of security.

In the case at bar, aside from the agreement of the parties, the damage which might be sustained by a breach of the covenant to surrender the vessel was uncertain, and the unambiguous intent of the parties was to ascertain and fix the amount of such damage. In effect, however, the effort of the petitioner on the trial was to nullify the stipulation in question by mere proof, not that the parties did not intend to fix the value of the yacht for all purposes, but that it was improvident and unwise for its agent to make such an agreement. Substantially, the petitioner claimed a greater right than it would have had if it had made application to a court of equity for relief, for it tendered in its answer no issue concerning a disproportion between the agreed and actual value, averred no fraud, surprise, or mistake, and stated no facts claimed to warrant a reformation of the agreement. Its alleged right to have eliminated from the agreement the clause in question, for that is precisely the logical result of the contention, was asserted for the first time at the trial by an offer of evidence on the subject of damages.

The law does not limit an owner of property, in his dealings with private individuals respecting such property, from affixing his own estimate of its value upon a

sale thereof, or, on being solicited, to place the property at hazard by delivering it into the custody of another for employment in a perilous adventure. If the would-be buyer or lessee is of the opinion that the value affixed to the property is exorbitant he is at liberty to refuse to enter into a contract for its acquisition. But if he does contract, and has induced the owner to part with his property on the faith of stipulations as to value, the purchaser or hirer, in the absence of fraud, should not have the aid of a court of equity or of law to reduce the agreed value to a sum which others may deem is the actual value. And, as pertinent to these observations, we quote from the opinion delivered by Wright, J., in *Clement v. Cash*, 21 N. Y. 253, where it was said (p. 257):

"When the parties to a contract, in which the damages to be *ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages, in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damage, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a cause may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. [See *Kemp v. Knickerbocker Ice Co.* 69 N. Y. 45.] In such cases, there would be room for construction; but certainly none where the meaning of the parties was evident and unmistakable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be \$500.00, or any other sum, to be paid by either failing to perform, it seems absurd for a court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended; but that the intention was to name the sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement."

As the stipulation for value referred to was binding upon the parties, the trial court rightly refused to consider evidence tending to show that the admitted value was excessive, and the circuit court of appeals properly gave effect to the expressed intention of the parties.

The decree of the Circuit Court of Appeals was right, and it is therefore affirmed.

[675]*SOUTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

ISAAC T. BELL.

(See S. C. Reporter's ed. 675-690.)

Railroad land grants—withdrawal from settlement—lands within indemnity limits.

The Secretary of the Interior was not authorized, by the act of July 27, 1866 (14 Stat. at L. 299), making a land grant in aid of the Southern Pacific Railroad, to withdraw from settlement lands within the indemnity limit of such grant in advance of any selections by the railroad company based on ascertained losses in the place limits, in view of the provisions of § 6 that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company as provided in this act," but that the provisions of the pre-emption and homestead laws "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

[No. 20.]

*Argued and Submitted December 5, 6, 1901.
Decided January 13, 1902.*

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of Fresno County in favor of defendant in a suit to recover real property. *Affirmed.*

See same case below, 125 Cal. XIX., 58 Pac. 1116.

Statement by Mr. Justice **Brown**:

This was a complaint in the nature of a bill in equity filed by the Southern Pacific Railroad Company in the superior court of Fresno county, California, against Isaac T. Bell, praying to be declared the rightful owner of a certain quarter section of land in that county, and that it be adjudged that the defendant Bell holds the legal title to said land in trust for the plaintiff, and requiring him to convey the same to it free of all encumbrances.

The facts of the case, as set forth in the complaint, are substantially as follows: By "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast" (14 Stat. at L. 292, chap. 278), such road being incorporated under the name of The Atlantic & Pacific Railroad Company, there was granted to such railroad company—

"Sec. 3. . . . Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United

States, and ten alternate sections of land per mile on each side *of said railroad when- [676] ever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, or occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections," etc.

"Sec. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and the Act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

By § 18 of the same act authority was given to the Southern Pacific Railroad Company, incorporated under the laws of California. "to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its *road on the like regulations, [677] as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

On November 26, 1866, the plaintiff accepted the terms and conditions of the charter and grant of July 27, 1866, as above set forth, and on January 3, 1867, duly fixed the general route of its line of road, designating the same by a plat thereof filed in the office of the Commissioner of the General Land Office. This plat and designation having been duly approved and accepted by the Commissioner and Secretary of the Interior on March 22, 1867, all the odd-numbered sections of land lying within 30 miles of the railroad, as shown upon

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

183 U. S.

383

the plat, were withdrawn from sale or location, pre-emption or homestead entry, and have ever since remained so withdrawn.

Thereafter, and prior to November 8, 1889, the company duly constructed and equipped the entire railroad provided for in said act, and along the line designated upon the plat filed on January 3, 1867, and the road so constructed, except that part which extends from Mojave to the Needles, was duly accepted and approved by the President and Secretary of the Interior.

A certain quarter section of land within the granted limits of the railroad, as constructed and shown on the map, having been granted and otherwise disposed of, prior to the time when the line of the route was designated by the plat filed with the Commissioner of the General Land Office, the quarter section of land in dispute in this case, which was within the indemnity, but not within the granted limits of the road, being more than 20 but within 30 miles on one side of the road as constructed, was selected by the railroad, in lieu of the quarter section above described as having been granted and otherwise disposed of by the United States. The land so selected was at the time the act of July 27, 1866, was passed, vacant and unappropriated public land of the United States, not mineral, to which the United States then had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and such land has ever since so remained, except as it has been affected by the acts of the parties to this suit. The company had not, at the time the selection was made, nor has it since, se-

[678]lected or received "lands to the extent or amount earned and acquired by it in virtue of the grant and the provisions of the granted act.

The complaint further alleged that notwithstanding the rights of the company secured to it by the act of July 27, 1866, the United States issued a patent for the quarter section so selected in lieu of the other, to the defendant, who claims the legal title to said land in fee simple and free from any trust or obligation to the plaintiff.

To this complaint the defendant interposed a general demurrer, which was sustained, and the plaintiff having refused to amend his complaint, a final judgment was entered against it and an appeal taken to the supreme court of California, where the judgment of the superior court of Fresno county was affirmed upon the authority of another case against one Wood. 124 Cal. 475, 57 Pac. 388. Whereupon plaintiff sued out a writ of error from this court.

Mr. Maxwell Evarts argued the cause, and, with **Mr. L.E. Payson**, filed a brief for plaintiff in error:

Selection is unnecessary when the deficiency in the place limits of a grant is greater than the amount of the indemnity lands applicable thereto.

St. Paul & P. R. Co. v. Northern P. R. Co.

384

139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

The words "hereby granted," as used in the various acts of Congress granting lands in aid of railroads, include lands within the indemnity limits of the grant, as well as within the primary limits of such grant.

Northern P. R. Co. v. United States, 36 Fed. 282; *Barney v. Winona & St. P. R. Co.* 24 Fed. 889; *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 786; *Chicago, M. & St. P. R. Co. v. Sioux City & St. P. R. Co.* 3 McCrary, 280, 10 Fed. 435; *Re Chicago, St. P. M. & O. R. Co.* 9 Land Dec. 465; *Wood v. Beach*, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410.

It has been held by this court that a section in the Northern Pacific act of 1864 (13 Stat. at L. p. 365, chap. 217), which is substantially identical with the 6th section of the act in question, was equivalent to a withdrawal of the lands granted to the railroad company by the Secretary of the Interior, and that any withdrawal by the Secretary was only giving publicity to what the law had already done.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Southern P. R. Co. v. Groeck*, 68 Fed. 609.

Indemnity lands are included within the term "lands granted by this act" used in the act of July 26, 1866, which are the equivalent of the words "land hereby granted" found in the section of the act now under consideration, and where there is a withdrawal of such lands they are not subject to sale, entry, or pre-emption by anyone except the railroad company.

Wood v. Beach, 156 U. S. 550, 39 L. ed. 529, 15 Sup. Ct. Rep. 410.

A withdrawal of indemnity lands included within a railroad grant is effective as against a grant of the lands to another railroad under a subsequent act of Congress.

Northern P. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co. 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205.

The indemnity lands granted by the act of 1866 (the act involved in this case) are not open to entry, sale, or pre-emption after the filing of the map of the general route of the grantee, except to such grantee.

United States v. Colton Marble & Lime Co. 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163.

The question involved in the present case has often been before the lower Federal courts in one form or another, and has almost uniformly been decided in favor of the railroad.

Southern P. R. Co. v. Wiggs, 43 Fed. 333; *Southern P. R. Co. v. Araiza*, 57 Fed. 98; *Southern P. R. Co. v. Groeck*, 31 C. C. A. 334, 59 U. S. App. 366, 87 Fed. 970.

The intent of Congress to give the Southern Pacific Railroad Company by the act of 1866 its full amount of 101 sections of land per mile should not be defeated by applying to the grant the rules of the common law,

183 U. S.

which are properly applicable only to transfers between private parties.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095.

Mr. Joseph H. Call submitted the cause for defendant in error:

The act of Congress of July 27, 1866, as amended by the joint resolution of June 28, 1870, required of the Southern Pacific, not only a map of general route, but one of definite location.

United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The route laid down in the charter or articles of incorporation of a railroad company is deemed to be read into the congressional act making a grant of lands or of right of way to the company, and it is presumed that Congress had such line of route in view.

Denver & R. G. R. Co. v. Alling, 99 U. S. 474, 25 L. ed. 438; *Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co.* 160 U. S. 77, 40 L. ed. 346, 16 Sup. Ct. Rep. 231.

Where the termini of a land-grant road are fixed the road must be constructed upon the shortest practicable route.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States v. Northern P. R. Co.* 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598.

In filing its map of general route on January 3, 1867, and securing a temporary reservation at that time, the Southern Pacific did not acquire, by virtue thereof, any right or title to any lands along the line.

New Orleans P. R. Co. v. Parker, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364; *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *United States v. Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261.

Until the selection of indemnity land has been made by the company, and approved by the Secretary of the Interior, no right or title passes to the company.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Ryan v. Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364; *Southern P. R. Co. v. Wood*, 124 Cal. 475, 57 Pac. 388; *Moore v. Cormode*, 20 Wash. 305, 55 Pac. 217.

The decisions of the Interior Department uniformly hold that no right or title to any

particular tract of indemnity land passes until it has been selected and approved, and until that time the land is open to disposal by the Land Department.

Brady v. Southern P. R. Co. 5 Land Dec. 658; *Secretary Lamar to President*, 6 Land Dec. 77; *Re Atlantic & P. R. Co.* 6 Land Dec. 84; *Northern P. R. Co. v. Miller*, 7 Land Dec. 100; *Southern P. R. Co. v. Meyer*, 9 Land Dec. 250; *Northern P. R. Co. v. Walters*, 13 Land Dec. 230; *Southern P. R. Co. v. Wasgalt*, 13 Land Dec. 145; *Southern P. R. Co. v. McWharter*, 14 Land Dec. 610; *Southern P. R. Co. v. Waters*, 17 Land Dec. 270; *Re Southern P. R. Co.* 18 Land Dec. 314; *Northern P. R. Co. v. McMahan*, 21 Land Dec. 402; *Northern P. R. Co. v. Lillethun*, 21 Land Dec. 487; *Southern P. R. Co. v. McKinley*, 22 Land Dec. 493; *Southern P. R. Co. v. Kanawyer*, 23 Land Dec. 500; *Northern P. R. Co. v. Ayers*, 24 Land Dec. 40; *Re Southern P. R. Co.* 25 Land Dec. 223; *Southern P. R. Co. v. Davis*, 26 Land Dec. 595; *Northern P. R. Co. v. Gunther*, 26 Land Dec. 340; *Lund v. Northern P. R. Co.* 27 Land Dec. 348; *Northern P. R. Co. v. Blain*, 27 Land Dec. 361; *California v. Southern P. R. Co.* 27 Land Dec. 542.

When the selection has been approved by the Secretary of the Interior the equitable title passes to the company, but only when patent is issued, under the provisions of § 4 of the act of July 27, 1866, does the full legal title pass, and until patented the land is within the control of the Interior Department.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208; *Brown v. Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; *Rogers Locomotive Mach. Works v. American Emigrant Co.* 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188; *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

The facts found by the Land Department upon the issuance of the patent to defendant Bell are conclusive against the Southern Pacific.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *Heath v. Wallace*, 138 U. S. 573, 34 L. ed. 1063, 11 Sup. Ct. Rep. 380; *United States v. Marshall Silver Min. Co.* 129 U. S. 579, 32 L. ed. 734, 5 Sup. Ct. Rep. 343; *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827.

The controlling principle in this case, namely, that there was no authority to withdraw the indemnity lands as against homestead and pre-emption entries, and that patents issued to settlers under such entries are valid, has been lately presented and fully determined by the court adversely to the contentions of the plaintiff in error in the present case.

Hewitt v. Schultz, 180 U. S. 139, 45 L. 25

ed. 463, 21 Sup. Ct. Rep. 309; *Moore v. Cor-mode*, 180 U. S. 167, 45 L. ed. 476, 21 Sup. Ct. Rep. 324; *Powers v. Slaght*, 180 U. S. 173, 45 L. ed. 479, 21 Sup. Ct. Rep. 319; *Moore v. Stone*, 180 U. S. 180, 45 L. ed. 483, 21 Sup. Ct. Rep. 322.

[678] *Mr. Justice **Brown** delivered the opinion of the court:

This case involves a priority of right as to certain lands within the indemnity limits of the grant to plaintiff by act of Congress of July 27, 1866, and a patent for the same lands issued to the defendant as a settler under the land laws of the United States.

It presents the single question whether the railroad company had a right, on July 26, 1893, to select the land in dispute as lieu lands, notwithstanding the defendant had nearly one year before and on September 15, 1892, received a patent for the same. This involves the further question whether the lands in dispute were subject to pre-emption and sale after the filing of the plat designating the line of the road; and this turns upon the meaning of the words. "land hereby granted," used in § 6, *wherein it is enacted that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act," which language must also be construed in connection with the further proviso in the same section, that the pre-emption act of 1841, the homestead act of 1862, and the acts amendatory thereof, "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

[679] There is no dispute that the land "hereby granted" extends to all the odd-numbered sections within the place limits; that is, within 20 miles of each side of the road. The real question is whether it extends to the indemnity lands, 10 miles beyond this limit, so much of which the company was authorized to select in lieu of lands unavailable to it within the granted limits.

The relative rights of railroads and of settlers under these congressional grants, all of which are couched in similar language, have been the subject of much litigation in this court, the main object of which has been to fix the time when the right of the roads to particular lands within both the place limits and the indemnity limits finally attaches as against both prior and subsequent settlers. Although at the last term of this court the question involved in the case under consideration was practically settled in *Hewitt v. Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309, the progressive steps by which the conclusion in that case was reached will show the difficulties which have attended the solution of these questions, and, as we think, indicate the logical necessity of affirming this case. Two objects have been kept steadily in view: First, securing to the railroad the benefit of the lands actually

granted; second, protecting, as far as possible, the right of the public to lands not actually granted, or necessary to indemnify the roads for lands which have become unavailable to it within its granted limits, by reason of the fact that they had been otherwise disposed of prior to the designation of the line of the road.

In the first of these cases, *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551, it was held that the act of June 3, 1856, granting lands *to the state of Wisconsin, to aid in the construction of railroads, was a grant in *præsenti* of lands within the granted limits, and passed the title to the odd sections designated to be afterwards located; but, until such designation, the title did not attach to any specific tracts, and that when the route was fixed the title which was previously imperfect acquired precision, and became attached to the lands as of the date of the grant. There was no question of indemnity lands involved.

In *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634, it was held that a similar grant, though operating in *præsenti*, did not apply to lands set apart for the use of an Indian tribe under a treaty, and that it was immaterial that they subsequently became a part of the public lands by the extinguishment of the Indian rights. This doctrine was extended in the next case, *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769, to lands within the boundaries of an alleged Mexican or Spanish grant, which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road.

In *Ryan v. Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305, the rule laid down in the last two cases was qualified and limited to lands within the place limits, and it was held that, as the lands in *Ryan v. Central P. R. Co.* were within the indemnity, but not within the place limits, "the railroad company had not and could not have any claim to it until specially selected." The land in dispute was within a tract formerly covered by a Mexican claim, which, although *sub judice* at the date of the act, had been finally rejected as invalid before the railroad company had selected it as part of its lieu lands. When so selected "there was no Mexican or other claim impending over it." This case practically holds that the title to indemnity lands inures to the railroad company only when selection is made.

This view, that the act conferred no rights to specified tracts within the indemnity limits until the grantees' right of selection had been exercised, was subsequently confirmed in *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485, and *Kansas P. R. Co. v. Atehison, T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208, although it had been stated only as a suggestion in *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456.

*In *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336. it was

again held that the grant of the place lands was *in presenti*, and attached to the sections as soon as a map showing the definite location of the road was filed, and that a party who had subsequently entered a portion of the land covered by the grant, and procured a patent for the same, might be required to execute a release of the premises to the company. It was said by Mr. Justice Field, in that case, p. 365, L. ed. p. 202, Sup. Ct. Rep. p. 337, that the grant cut off all subsequent claims from the date of this act, with certain exceptions specifically named, and passed the title as fully as if they had been then capable of identification.

The principle of this case was still further applied in *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334, to two conflicting grants, and it was held that as the title to the lands was within the place limits, it related back, after the road was located, to the date of the grant, priority of date of the act of Congress, and not priority of location of the line of the road, giving priority of title. A distinction was drawn in this case between the land within the place limits and land within the indemnity limits, and it was said that in case of the latter neither priority of grant, nor priority of location, nor priority of construction, gave priority of right; but this was determined by priority of selection.

The case of *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100, is in seeming conflict with *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634, inasmuch as it was held that the grant by act of July 2, 1864 [13 Stat. at L. 365, chap. 217], to the Northern Pacific Railroad, of lands to which the Indian title had not been extinguished, operated to convey the fee to the company subject to the right of occupancy by the Indians; but the case is distinguishable, as there was in the 2d section of the act a proviso that the United States "should extinguish, as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands falling under the operation of this act, and acquired in the donation to the road." The prior case was not cited in the opinion.

The conclusions to be deduced from these cases are—

(1) That as to lands within the primary [682] limits, the grant *takes immediate effect, and attaches to particular lands when the map of definite location is filed; that the Secretary of the Interior may, upon the filing of such map, give notice of a withdrawal from sale of all the odd-numbered sections within the granted limits, and that the title so acquired by the railroad company relates back to the date of the grant, and takes precedence of all titles subsequently acquired, except those specifically named.

(2) That to lands within the indemnity limits, the company takes no title until a deficiency in the place limits has been ascertained and the company has exercised its right of selection, with perhaps some rare

exceptions. See *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

The last case upon this subject is *Hewitt v. Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309, which involved the title to a quarter section of land in North Dakota within the indemnity limits that is (as applied to territories), between the 40 and 50 mile limits of the Northern Pacific Railroad land grant. Plaintiff Hewitt claimed title as a settler under the pre-emption laws; defendant as a purchaser from the railroad company, under its grant of July 2, 1864. 13 Stat. at L. 365, chap. 217. The 3d and 6th sections of this act were, except as to the name of the railroad and a few immaterial words, identical with the corresponding sections of the Atlantic & Pacific act of July, 1866.

On March 30, 1872, the railroad company filed a map of its general route through the territory of Dakota, and the local land office was thereupon directed to withhold from sale or location all the odd-numbered sections within the place limits of 40 miles, as designated on such map. On June 11, 1873, the company having filed a map of the definite location of its line, the local land office was directed to withhold from sale, or entry, all the odd-numbered sections within the 50-mile limits. This action was taken pursuant to the practice at that time prevailing in the General Land Office.

The land in dispute was more than 40, but within 50, miles of the line of definite location; that is, was within the indemnity limits, and the controlling question in the case was whether it was competent for the Secretary of the Interior to withdraw *the [683] odd-numbered sections within such indemnity limits; that is, between the 40 and 50 mile limits.

Hewitt settled upon the land April 10, 1882, more than a year before the withdrawal was made, and it was not until March 19, 1883, that the railroad company filed in the local land office its selection of land, embracing the land in dispute within the indemnity limits.

On April 4, 1883, Hewitt submitted his final proofs for the land, tendered the price, and demanded a patent; but his proof was rejected on the ground that the land had been withdrawn from entry under the act of July 2, 1864. Hewitt appealed to the Commissioner of the General Land Office, who affirmed the decision of the local land office, October 5, 1883. He was ousted of his possession the following year by the defendant Schultz, who had taken a deed from the railroad company. On August 15, 1887, the order of withdrawal of the indemnity lands was revoked, and, upon a review by the Commissioner of the General Land Office of his former decision, the ruling of the local land office was set aside, Hewitt's final proofs admitted, and the selection by the railroad held for cancellation. The company appealed from the decision in favor of Hewitt to the Secretary of the Interior, who affirmed the decision of the Commissioner.

and a patent was issued to Hewitt, June 22, 1895.

It was contended upon the argument in this court that the words "the odd sections of land *hereby granted*," used in the 6th section, referred to the lands described in the "1st" (3d) section of the act; that is, to those within the place limits, which were free from pre-emption and other claims, and unappropriated prior to the definite location of the road; and that, as to "all other lands on the line of said road, when surveyed," the act expressly declared that the pre-emption and homestead acts should extend to them; "that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road which were unappropriated when the line of the railroad was definitely fixed; and that if at the time such line was 'definitely fixed,' it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted, or

[684] *otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the 40 mile and within the 50 mile line, and under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits."

The court, treating the question as one of grave doubt, based its views largely upon the practice of the Land Office since 1888, and of the opinions of Secretary Lamar in the *Atlantic & P. R. Co.* 6 Land Dec. 84, and of Secretary Vilas in *Northern P. R. Co. v. Miller*, 7 Land Dec. 100. The opinion of Secretary Lamar indicated that some of his predecessors had assumed that the power to withdraw lands within the indemnity limits could be exercised upon a definite location of the railroad before the loss in the place limits had been ascertained, but treating it as an original proposition, he thought the words of the act, "that the odd-numbered sections of land *hereby granted* shall not be liable to sale, or entry, or pre-emption," indicated clearly the legislative will that none other should be withdrawn than the odd-numbered sections within the *granted* limits. Mr. Secretary Vilas, considering the same subject, said: "In my opinion.—and it is with great deference that I present it,—the granting act not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it. The difference between lands in the granted limits and land in indemnity limits, and between the time and manner in which the title of the United States changes to and vests in the grantee, accordingly as lands are within one or the other of these limits, has been clearly defined by the Supreme Court, and it is sufficient to state the well-settled rules upon this subject."

The same question arose in *Northern P. R. Co. v. Davis*, 19 Land Dec. 87, and in *Northern P. R. Co. v. Ayers*, [24 Land Dec. 40], wherein Secretaries Smith and Francis

expressed their concurrence in the views announced by Secretaries Lamar and Vilas.

The court rested its decision largely upon this concurrence of views and long-continued practice of the Land Department, and summed up its opinion, in the following words: "If this were *done" (that construction overthrown), "it is to be apprehended that great, if not endless, confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. . . . If the practice in the Land Department could, with reason, be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864."

It is attempted to distinguish the case under consideration from that of *Hewitt v. Schultz*, by the fact that the land in controversy in this case is within the indemnity limits of a grant to a railroad passing through a *state*, and within the department's withdrawal of a 30-mile strip under the 6th section of the act, while the land in the *Hewitt Case* fell within the indemnity limits of the grant within a *territory*, and was beyond the 40-mile withdrawal, and was not withdrawn from sale by the 6th section, but was expressly declared to be still subject to the operations of the pre-emption laws. It is true that the lands withdrawn in that case lay within a territory and outside of the 40-mile strip required to be surveyed, while in this case the withdrawal of all the lands within the 30-mile strip operates as a withdrawal of all lands within the indemnity, as well as within the place limits, because the line ran through a state instead of a territory. But the real question is not whether the indemnity lands lay within or beyond the 40-mile limit, but whether the withdrawal can operate upon indemnity lands at all. It makes no difference in principle whether the indemnity lands are within or beyond the 40-mile limit, which is not a limit of withdrawal, but of *survey*, and the whole argument in *Hewitt v. Schultz* is directed to the question whether it is within the power of a Secretary of the Interior to withdraw indemnity, as well as place lands from settlement. The quantity of lands to be surveyed seems to have been arbitrarily fixed by Congress, with little attention to the actual limits of the grant, so as to include all lands within 40 miles of each side of the railroads, that is, 10 miles beyond the indemnity limits within the states, but 10 *miles inside of [686] those limits within the territories; but the question of withdrawal is not necessarily dependent upon the question of survey, and the fact that in that case the indemnity lands were beyond the 40-mile limit was an incident, rather than a dominant fact. As said by Mr. Secretary Lamar: "It is manifest that the said act gave no especial au-

thority or direction to the executive to withdraw said lands, and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior and in the exercise of his discretion." The power of the Secretary to withdraw lands is exercised for the purpose of carrying out the grant to the railroad, and to prevent lands covered by said grant from being taken up by settlers before the road is completed and the patents issued to the company; but clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of the grant. It was said by Secretary Smith to have been exercised for many years, "but the right of this asserted power on the part of the executive is involved in obscurity." *Northern P. R. Co. v. Davis*, 19 Land Dec. 87, 88.

That the object of § 6 was to direct a survey, and not a withdrawal of lands within the 40-mile strip, seems to have been the opinion of this court in *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 572, 5 Sup. Ct. Rep. 334, in which Mr. Justice Miller, delivering the opinion, says, p. 732, L. ed. p. 876, Sup. Ct. Rep. p. 341:

"The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company, or anyone for it. Was there a vested right in this company, during all this time, to have, not only these lands, but all the other odd sections within the 20-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation, and forbidden to cultivation?

[687] "It is true that in some cases the statute requires the Land Department to withdraw the lands within these secondary limits from market, and in others, the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections.

"It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits. Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands as selected."

If the command of the statute were to withdraw from the market, instead of survey, all odd-numbered sections within the 40-mile strip, the position of the railroad company in this case would be impregnable; but as the withdrawal only extends to the

lands "hereby granted," we must look elsewhere to ascertain the meaning of those precise words. There is good reason for withdrawing lands within the place limits, since these lands already belong to the railroad company, as soon as they are identified by the location of the line, while lands within the indemnity limits may never be required at all, and in most cases are required only to a limited extent. Undoubtedly the company acquires title to both classes of lands by the 3d section of the granting act; but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. In both cases the statute is the origin of the title; but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words "hereby granted" evidently refer to the former.

Treating this case as a reargument of the question involved in *Hewitt v. Schultz*, and it practically comes to that, we still adhere to the principle there announced. It seems to us the more reasonable, if not the necessary, inference to be deduced from the language of §§ 3 and 6. By the former there is "*hereby granted* . . . every al- [688] ternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state." These words terminate the grant, the remainder of the clause being immaterial in this connection, and if the whole clause had been followed by a period, instead of a semicolon, the meaning, perhaps, would have been clearer. But there follows another clause, that "whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be *selected* by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections," etc. There is here a clear distinction between the lands *granted in presenti* in the first clause, and lands to be thereafter *selected* by the company, whenever the deficiency in the granted lands shall be ascertained.

The 6th section carries out the same idea. It requires a survey of 40 miles in width on both sides of the entire line, whether passing through states or territories. This would include only the granted or place limits within a territory, but within a state would cover the indemnity limits as well. There was no order in the act to withdraw any lands from settlement or sale, but such withdrawal seems to have been made in pursuance of the practice of the Interior Department, and for the pur-

pose of preventing lands granted to the railroad company from being taken up by settlers, before the completion of the line and the final issue of patents. As was said by Mr. Secretary Lamar in the *Atlantic & P. R. Co.* 6 Land Dec. 84: "Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when [689] such withdrawal was *made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken." But as the power to withdraw extends only to the "*lands hereby granted*" and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon § 3 to determine what are the lands "hereby granted."

Now, as already observed, there is a clear distinction in § 3 between granted lands and lands to be selected after the deficiency in the granted lands has been ascertained. It is true that, prior to this selection being made, many of these indemnity lands may be taken up, and an insufficient amount left for the railroad (and we do not deny the force of the dissenting opinion in *Hewitt v. Schultz* in that connection), but we think this possibility serves rather as a basis for a further action by Congress, such as was made in the Northern Pacific case by the joint resolution of May 31, 1870 (16 Stat. at L. 378), than as a reason for withdrawing from settlement a vast amount of land which the railroad may never have occasion to require. It was said by Secretary Lamar in the case of the *Atlantic & P. R. Co.* 6 Land Dec. 84, 87: "As to the lands within the indemnity limits, the contract was based upon two contingencies; that of losing lands within the granted limits, and being able to find sufficient to indemnify the company among the odd-numbered sections within a further limit of 10 miles. Here the interest of the company was so remote and contingent, being a mere potentiality, and not a grant, that Congress declined to order a withdrawal for the benefit of the same, or even a survey within the territories." In view of the constant trend of population toward the western territories, it is a serious matter to withdraw these enormous tracts from settlement and hold them, as it were, in mortmain against the protest of those who stand ready to enter upon and possess them.

It becomes still more serious when, as in this case, there was a delay of twenty-seven years between the granting act and the act of selection. It seems intolerable that a settler, who had entered and paid for lands [690] in good faith, should be liable to an *ouster after a possible lapse of twenty-seven years, when the very improvements he may have put upon the lands might be the reason for their selection by the company.

We are therefore of opinion that the act of July 27, 1866, did not authorize the withdrawal by the Secretary of the Interior of the indemnity lands, that such lands remained open to homestead and pre-emption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, approved by the Interior Department, were valid as conveyances of the land as against the selection by the railroad company.

The judgment of the Supreme Court of California is therefore affirmed.

OTTO GROECK *et al.*, Appts.,
v.

SOUTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 690-692.)

Railroad land grants—withdrawal from settlement—lands within indemnity limits.

This case is governed by the decision in *Southern P. R. Co. v. Bell*, ante, 383.

[No. 82.]

*Argued and Submitted December 5, 6, 1901.
Decided January 13, 1902.*

APPEAL from the Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of California in favor of plaintiff in a suit to recover real property. *Reversed* and remanded with directions to dismiss the bill.

See same case below, 31 C. C. A. 334, 59 U. S. App. 366, 87 Fed. 970.

Statement by Mr. Justice **Brown**:

This was a bill in equity filed in the circuit court for the southern district of California by the Southern Pacific Railroad Company, plaintiff, against Otto Groeck and another, defendants, to obtain a decree declaring the company to be the rightful owner of the south half of a certain quarter section of land in Kings county, California, and that defendants hold the legal title thereto in trust for it, a conveyance of which was prayed.

The amended bill, as abstracted by the circuit court of appeals (31 C. C. A. 334, 59 U. S. App. 366, 87 Fed. 970), alleged: "That the appellant accepted the terms of the grant, fixed the general route of its road as contemplated by the act, and on January 3, 1867, filed a map thereof *in the office of [691] the Commissioner of the General Land Office; that on that date the Commissioner accepted and approved the map and the route designated by it, and on March 22, 1867, under the direction of the Secretary of the Interior, he withdrew the odd sections of land lying

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

within 30 miles of the line of road from sale or location, pre-emption, or homestead entry: that on November 2, 1869, the Secretary of the Interior made an order declaring the withdrawal revoked; that on December 15, 1869, the Secretary suspended his order of November 2; that on July 26, 1870, the Secretary restored the withdrawal of March 22, 1867; that on August 15, 1887, the Secretary declared the withdrawal of March 22, 1867, revoked, as to the indemnity sections thereof; that the appellant commenced to build its road during the year 1870, and completed the construction in different sections between that date and the year 1889—the last section, extending from Huron westerly to Alcalde, having been constructed during the year 1888; that the land in suit is opposite to and contemporaneous with that section, and is within the indemnity limits of the grant, and is not included in any exception therefrom; that on September 2, 1885, the appellee Groeck settled on the land in controversy, and during the same month filed his pre-emption claim therefor in the proper land office of the United States, and thereafter complied with the land-office regulations, and on June 7, 1886, made pre-emption proof and payment for the land; that on April 11, 1890, patent was issued from the United States conveying the land to him; that, as the appellant's road was constructed in several sections, such sections were examined by commissioners appointed by the President, as provided by § 4 of the act, and that said commissioners reported that such sections had been completed as required by the act, and thereupon the President accepted and approved the reports; that a map of the definite location of said section between Huron and Alcalde was filed with and approved by the Secretary of the Interior on April 2, 1889, and the President accepted and approved the commissioners' report on that section on November 8, 1889; that on July 13, 1891, the appellant, acting under the direction of the Secretary of the Interior,

selected the land in suit as granted to it by the act."

*To this bill defendants interposed a plea[692] setting up the various steps by which the defendant Groeck obtained the patent of the land as a qualified pre-emptor, and thereby, as alleged, obtained a legal and perfect title in fee simple; and further setting up the defense of laches to the claim of the railroad company.

The circuit court entered an order sustaining the plea upon the ground of laches, with leave to the company to reply to the plea and take issue as to the matters of fact therein alleged. 74 Fed. 585. The company having declined to avail itself of this privilege, the circuit court ordered the bill to be dismissed. Whereupon the railroad company appealed to the circuit court of appeals, which reversed the decree of the circuit court, and remanded the case for further proceedings. 31 C. C. A. 334, 59 U. S. App. 366, 87 Fed. 970. The case coming on again for hearing, a decree was rendered for the plaintiff, another appeal taken to the court of appeals, and the decree of the circuit court affirmed.

Mr. Joseph H. Call submitted the cause for appellants.

Mr. Maxwell Evarts argued the cause, and, with *Mr. L. E. Payson*, filed a brief for appellee.

For contentions of counsel, see their briefs as reported in *Southern P. R. Co. v. Bell*, ante, 383.

Mr. Justice Brown delivered the opinion of the court:

This case resembles the one just decided in all its essential particulars, and is controlled by it.

The decrees of both courts are therefore reversed, and the case remanded to the Circuit Court for the Southern District of California, with directions to dismiss the bill.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINION

[693]**RUBLEE A. COLE, Plaintiff in Error, v. F. S. GARLAND et al.* [No. 339.]

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Rublee A. Cole p. p.

Mr. Jackson H. Ralston for defendants in error.

October 21, 1901. Writ of error dismissed for the want of jurisdiction, on the authority of *German Nat. Bank v. Speckert*, 181 U. S. 405, 45 L. ed. 926, 21 Sup. Ct. Rep. 688.

ALVIN H. ARMSTRONG *et al.*, *Plaintiffs in Error, v. SIMON D. MAYER et al.* [No. 353.]

In Error to the Supreme Court of the State of Nebraska.

Messrs. Charles O. Whedon, L. C. Burr, and Chas. L. Burr for plaintiffs in error.

Mr. Walter J. Lamb for defendants in error.

October 21, 1901. Writ of error dismissed for the want of jurisdiction, on the authority of *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

STATE OF WISCONSIN *ex rel. JAMES L. GATES, Plaintiff in Error, v. COMMISSIONERS OF PUBLIC LANDS et al.* [No. 66.]

In Error to the Supreme Court of the State of Wisconsin.

Mr. Rublee A. Cole for plaintiff in error.

Messrs. E. R. Hicks and Charles E. Buell for defendants in error.

November 4, 1901. Dismissed for the want of jurisdiction, on authority of *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Wilson v. North Carolina*, 169 U. S. 595, 42 L. ed. 871, 18 Sup. Ct. Rep. 435; *Mills County v. Burlington & M. River R. Co.* 107 U. S. 557, 27 L. ed. 578, 2 Sup. Ct. Rep. 654; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 655, 34 L. ed. 1110, 1117, 11 Sup. Ct. Rep. 435; *Walsh v. Columbus, H. Valley & A. R. Co.* 176 U. S. 479, 44 L. ed. 553, 20 Sup. Ct. Rep. 393; *Zadig v. Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; and see *State ex rel. Gates v. Public Land Comrs.* 106 Wis. 584, 82 N. W. 549.

183 U. S.

**J. ELLIS RODLEY, Plaintiff in Error, v. PEOPLE OF THE STATE OF CALIFORNIA.* [No. 296.]

In Error to the Supreme Court of the State of California.

Mr. George D. Collins for plaintiff in error.

Messrs. Tiley L. Ford and C. N. Post for defendant in error.

November 11, 1901. Dismissed for the want of jurisdiction, on the authority of *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *F. G. Osley Store Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

GEORGE BISSERT, *Appellant, v. JAMES J. HAGAN, Warden, etc., et al.* [No. 437.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Roger M. Sherman for appellant.

Mr. Charles E. Le Barbier for appellees.

December 2, 1901. Final order affirmed, with costs, on the authority of *Storti v. Massachusetts*, 183 U. S. 138, ante, 120, 22 Sup. Ct. Rep. 72; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Markusen v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76, and cases cited.

CENTRAL OHIO RAILROAD COMPANY (as reorganized) *et al.*, *Plaintiffs in Error, v. DANIEL J. MAHONEY.* [No. 76.]

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. J. H. Collins and Hugh L. Bond, Jr., for plaintiffs in error.

Mr. Thomas Ewing Steele for defendant in error.

December 9, 1901. Question certified answered in the negative on the authority of *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171.

393

UNITED STATES, *Petitioner*, v. AMERICAN STEAMSHIP LAURADA, ETC. [No. 64.]
On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[695] *Attorney General, Solicitor General Richards, and *Assistant Attorney General Hoyt* for petitioner.

Messrs. Andrew C. Gray and H. H. Ward for respondent.

January 6, 1902. Decree affirmed by a divided court, and cause remanded to the district court of the United States for the district of Delaware.

CHARLES MAYER, *Petitioner*, v. OLIVER C. FULLER, Trustee. [No. 335.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. A. B. Browne, Alex. Britton, and Thos. H. Dorr for petitioner.

Mr. Charles C. Lancaster for respondent.
October 21, 1901. *Denied*.

LOTTIE F. POWERS, *Petitioner*, v. MASSACHUSETTS HOMEOPATHIC HOSPITAL. [No. 394.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Arthur H. Russell and Thos H. Russell for petitioner.

Mr. Solomon Lincoln for respondent.
October 21, 1901. *Denied*.

KATE TOOTLE *et al.*, *Petitioners*, v. R. R. COLEMAN *et al.* [No. 399.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. R. E. Ball for petitioners.

Mr. David Smyth for respondents.
October 21, 1901. *Denied*.

CITY OF GALVESTON, *Petitioner*, v. UNITED STATES MORTGAGE & TRUST COMPANY *et al.* [No. 404.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. James B. Stubbs and D. W. Baker for petitioner.

Messrs. Julien T. Davies, R. S. Lovett, and Brainard Tolles for respondents.

October 21, 1901. *Denied*.

GEORGE L. WHITMAN, *Petitioner*, v. KATE A. NORTON [No. 425]; GEORGE L. WHITMAN, *Petitioner*, v. JOHN WATTS, as Receiver [No. 426]; GEORGE L. WHITMAN, *Petitioner*, v. CITIZENS' BANK OF READING, PA. [No. 427].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Wm. G. Wilson for petitioner.

Messrs. Chas. E. Hughes and Arthur C. Rounds for Norton.

Messrs. Wm. B. Hornblower and McCready Sykes for Watts, Rec'r and Citizens' Bank.

October 21, 1901. *Denied*.

SOUTHERN PACIFIC COMPANY, *Petitioner*, v. KATE YEARGIN, Administratrix. [No. 431.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the *Eighth Circuit. [696]

Messrs. Thomas T. Fauntleroy, Shepard Barclay, and L. E. Payson for petitioner.

No opposition.

October 21, 1901. *Denied*.

JOHN N. STEWART, *Petitioner*, v. VILLAGE OF ASHTABULA, OHIO, *et al.* [No. 432.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Morison R. Waite for petitioner.

Mr. J. H. McGiffert for respondents.

October 21, 1901. *Denied*.

HENRY NELSON, Claimant, *et al.*, *Petitioners*, v. H. BUCHANAN, Claimant, *et al.* [No. 433.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Jackson H. Ralston for petitioners.

No opposition.

October 21, 1901. *Denied*.

JOHN F. KUMLER, *Petitioner*, v. GEORGE W. HALE, Executor, etc. [No. 326.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Orville S. Brumback, Jos. B. Foraker, and Arthur Peter for petitioner.

Messrs. Barton Smith and Rufus H. Baker for respondent.

October 28, 1901. *Denied*.

CAMPBELL PRINTING PRESS & MANUFACTURING COMPANY, *Petitioner*, v. DUPLEX PRINTING PRESS COMPANY. [No. 340.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Louis W. Southgate for petitioner.

Messrs. T. H. Alexander and Arthur E. Dowell for respondent.

October 28, 1901. *Denied*.

WILCOX & GIBBS SEWING MACHINE COMPANY, *Petitioner*, v. THOMAS P. SHERRBORNE, JR., *et al.* [No. 352.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Preston K. Erdman, Geo. Tucker Bispham, and Hubert Howson for petitioner.

Messrs. John G. Johnson and Frank P. Prichard for respondent.

October 28, 1901. *Denied*.

YELLOW POPLAR LUMBER COMPANY, *Petitioner*, v. JOHN F. DANIEL. [No. 374.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[697] *Messrs. Jno. W. M. Stewart, *Jno. N. Baldwin, and Jno. F. Hager* for petitioner.
Mr. Thomas R. Brown for respondent.
 October 28, 1901. *Denied*.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY, *Petitioner*, v. SCHOONER ROBERT GRAHAM DUN, ETC. [No. 424.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Maxwell Evarts for petitioner.
Mr. J. Parker Kirlin for respondent.
 October 28, 1901. *Denied*.

ROBERT HERBST, *Petitioner*, v. STEAMSHIP ASIATIC PRINCE. [No. 435.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. J. Hubley Ashton for petitioner.
Mr. J. Parker Kirlin for respondent.
 October 28, 1901. *Denied*.

KOKOMO FENCE MACHINE COMPANY, *Petitioner*, v. ALVA L. KITSELMAN *et al.* [No. 389.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Ephraim Banning, Thomas A. Banning, and Cassius C. Shirley for petitioner.

Mr. Robert H. Parkinson opposing.
 October 28, 1901. *Granted*.

BANK OF TOPEKA, *Petitioner*, v. WILLIAM S. EATON *et al.* [No. 418.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. N. H. Loomis for petitioner.
Messrs. Edward H. Hutchins, Henry Wheeler, Chas. T. Gallagher, and Mayhew R. Hitch for respondents.
 November 4, 1901. *Denied*.

SIMPSON'S PATENT DRY DOCK COMPANY, *Petitioner*, v. ATLANTIC & EASTERN STEAMSHIP COMPANY. [No. 445.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Eugene P. Carver and E. E. Blodgett for petitioner.

Messrs. Lewis S. Dabney and F. Cunningham for respondent.
 November 4, 1901. *Denied*.

183 U. S.

NASHUA SAVINGS BANK, *Petitioner*, v. ANGL-AMERICAN LAND MORTGAGE & AGENCY COMPANY (LIMITED). [No. 415.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. John S. H. Frink for petitioner.
Mr. Omar Powell opposing.
 November 11, 1901. *Granted*.

*JOHN A. BRILL *et al.*, *Petitioners*, v. PECK-[698] HAM MOTOR TRUCK & WHEEL COMPANY *et al.* [No. 444.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Francis Rawle and Frederick P. Fish for petitioners.

Mr. Henry P. Wells opposing.
 November 11, 1901. *Granted*.

CITY OF AUSTIN, *Petitioner*, v. E. C. BARTHOLOMEW and JOSEPH NALLE, Receivers. [No. 429.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. S. R. Fisher for petitioner.
 No opposition.
 November 18, 1901. *Denied*.

CITY OF NEW ORLEANS, *Petitioner*, v. JAMES JACKSON. [No. 458.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Samuel L. Gilmore for petitioner.
Messrs. J. D. Rouse, Wm. Grant, Richard De Gray, and H. M. Jordan for respondent.
 November 18, 1901. *Denied*. (Mr. Justice White and Mr. Justice Peckham took no part in the decision on this application.)

HARRIET M. ZANE, *Petitioner*, v. COUNTY OF HAMILTON. [No. 344.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. George A. Sanders for petitioner.
Mr. J. M. Hamill opposing.
 November 25, 1901. *Granted*.

WILLIAM J. F. DWYER, *Petitioner*, v. LEWIS NIXON. [No. 446.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Louis Marshall and James M. Beck for petitioner.

Mr. Wm. G. Low for respondent.
 November 25, 1901. *Denied*.

WILLIAM STUBER, *Petitioner*, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY. [No. 448.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Thomas B. Turley and Heber J. May for petitioner.

Mr. H. W. Bruce for respondent.
 November 25, 1901. *Denied*.

AMERICAN ORDNANCE COMPANY, *Petitioner*,
v. DRIGGS-SEABURY GUN & AMMUNITION
COMPANY. [No. 450.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

[699] *Mr. Wm. H. Singleton for petitioner.
Messrs. Ernest Wilkinson and S. T. Fisher
for respondent.

November 25, 1901. *Denied*.

EUSTACE R. TRACY, Executrix, etc., *et al.*,
Petitioners, v. MARY S. EGGLESTON *et al.*
[No. 465.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fifth Circuit.

Messrs. J. D. Rouse, Wm. Grant, and H.
M. Jordan for petitioners.

No opposition.

November 25, 1901. *Denied*.

SAMUEL BELL, *Petitioner*, v. COMMON-
WEALTH TITLE INSURANCE & TRUST COM-
PANY. [No. 463.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Third Circuit.

Mr. Attorney General, Mr. Solicitor Gen-
eral Richards, and Mr. Assistant Attorney
General Beck for petitioner.

Mr. John G. Johnson opposing.

December 2, 1901. *Granted*.

EMPIRE TRANSPORTATION COMPANY, *Peti-*
tioner, v. W. H. PARSONS *et al.* [No. 471.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Ninth Circuit.

Mr. Henry Galbraith Ward for petitioner.

Mr. Wilson R. Gay for respondents.

December 2, 1901. *Denied*.

CENTRAL STOCK & GRAIN EXCHANGE OF CHI-
CAGO, *Petitioner*, v. EMMA BENDINGER.
[No. 472.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Seventh Circuit.

Messrs. Jacob J. Kern and Wm. M. Spring-
er for petitioner.

Mr. Rufus S. Simmons for respondent.

December 2, 1901. *Denied*.

WALTER SCOTT, *Petitioner*, v. GOSS PRINT-
ING PRESS COMPANY. [No. 464.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Third Circuit.

Messrs. Benjamin F. Lee, Wm. H. H. Lee,
and Jas. G. K. Lee for petitioner.

Messrs. L. L. Bond, M. B. Philipp, and C.
E. Pickard for respondent.

December 9, 1901. *Denied*.

LAKELAND TRANSPORTATION COMPANY, ETC.,
et al., *Petitioners*, v. PETER P. MILLER *et*
al. [No. 479.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Sixth Circuit.

Messrs. Harvey D. Goulder, Frank S. Mas-
ten, and Frank S. Bright for petitioners.

Mr. F. H. Canfield for respondents.

December 9, 1901. *Denied*.

Second Petition for a Writ of Certiorari
to the United States Circuit Court of Ap-
peals for the Sixth Circuit.

Mr. Harvey D. Goulder for petitioners.

Mr. F. H. Canfield for respondents.

January 20, 1902. *Denied*.

*METROPOLITAN TRUST COMPANY OF THE CITY [700]
OF NEW YORK *et al.*, *Petitioners*, v. MER-
CANTILE TRUST COMPANY OF THE CITY OF
NEW YORK, Trustee, *et al.* [No. 481.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Sixth Circuit.

Mr. John G. Johnson for petitioners.

Messrs. Laurence Maxwell, Jr., Paul D.
Cravath, and Richard Reid Rogers for re-
spondents.

December 9, 1901. *Denied*.

EDWARD J. HINGSTON *et al.*, *Petitioners*, v.
STEAM VESSEL VULCAN, ETC. [No. 470.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. George Clinton for petitioners.

Mr. John C. Shaw for respondent.

January 6, 1902. *Denied*.

CITY OF NEW YORK *et al.*, *Petitioners*, v.
SAMUEL PINE *et al.* [No. 491.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. George L. Sterling for petitioners.

Mr. Stephen G. Williams opposing.

January 6, 1902. *Granted*.

CHATTANOOGA NATIONAL BUILDING & LOAN
ASSOCIATION, *Petitioner*, v. WILLIAM H.
DENSON *et al.* [No. 492.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fifth Circuit.

Mr. Robert Pritchard for petitioner.

Mr. Oscar W. Underwood opposing.

January 6, 1902. *Granted*.

S. S. WHITE DENTAL MANUFACTURING COM-
PANY, *Petitioner*, v. DELAWARE INSUR-
ANCE COMPANY, ETC. [No. 460.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Third Circuit.

Messrs. Richard C. Dale and Joseph C.
Fraleay for petitioner.

Mr. John G. Johnson for respondent.

January 13, 1902. *Denied*.

CHARLES SWEENEY *et al.*, *Petitioners, v. KENNEDY J. HANLEY.* [No. 494.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. W. B. Heyburn for petitioners.

Mr. Jno. R. McBride for respondent.

January 13, 1902. *Denied.*

GEORGE J. BAER, *Petitioner, v. WILLIAM R. KERR et al.* [No. 499.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

183 U. S.

Messrs. H. Bisbee and H. C. McDougal for petitioner.

Mr. R. H. Liggett for respondents.

January 13, 1902. *Denied.*

*AETNA INSURANCE COMPANY OF HARTFORD, [701] CONN., *Petitioner, v. DANIEL LANGAN.* [No. 500.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Henry E. Davis for petitioner.

Mr. R. C. Langan for respondent.

January 13, 1902. *Denied.* (Mr. Justice Gray took no part in the disposition of this application.)

397

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1901.

Vol. 184.

REFERENCE TABLE

OF SUCH CASES
DECIDED IN U. S. SUPREME COURT,
OCTOBER TERM, 1901,
AND REPORTED HEREIN,

VOLUME 184,

AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 184 U. S.	Title.	Here In.	Off. Rep. 184 U. S.	Title.	Here In.
1-2	Mueller v. Nugent	405	78-83	Illinois v. Illinois C. R. Co. ("Illinois ex rel. Hunt v. Illi- nois C. R. Co.")	442
2-4	" "	406		" "	443
4-7	" "	407		" "	444
7-8	" "	408	83	" "	445
8-10	" "	409	83-86	" "	446
10-12	" "	410	86-89	" "	447
12-15	" "	411	89-91	" "	448
15-17	" "	412	91-94	" "	449
17-18	" "	413	94-96	" "	449
18-20	Louisville Trust Co. v. Com- ingor	413	96-99	" "	449
20-23	" "	414	99	Brainard v. Buck	450
23-24	" "	415	99-101	" "	451
24-26	" "	416	101-103	" "	452
27	Louisville & N. R. Co. v. Eu- bank	416	103-104	" "	453
27-29	" "	417	104-105	" "	454
29-32	" "	418	105-107	" "	455
32-34	" "	419	107-110	" "	456
34-36	" "	420	110-111	" "	456
36-39	" "	421	111-112	Cleveland Trust Co. v. Lander	457
39-42	" "	422	112-113	" "	458
42-44	" "	423	113-115	" "	459
44-47	" "	424	115	" "	459
47-49	" "	425	115-117	Voigt v. Detroit	460
49	United States v. Southern P. R. Co.	425	117-118	" "	461
50-52	" "	426	118-120	" "	462
52	" "	427	120-123	" "	463
52-54	" "	428	123-124	{ United States v. Barlow	464
54-57	" "	429	124-127	{ Barlow v. United States	465
57-59	" "	430	127-129	" "	466
59-61	" "	431	129-132	" "	467
61	King v. Portland	431	132	" "	468
61-63	" "	433	132-134	" "	469
63-65	" "	434	134-137	" "	470
65-68	" "	435	137-139	" "	471
68-70	" "	436	139-140	" "	471
71-72	McDonald v. Thompson	437	140-142	United States v. Ewing	472
72	" "	438	142-145	" "	473
72-75	" "	439	145-147	" "	474
75-77	" "	440	147-150	" "	475
77	Illinois v. Illinois C. R. Co. ("Illinois ex rel. Hunt v. Illi- nois C. R. Co.")	440	150-151	" "	475
78	" "	441	151-152	Lake Benton First Nat. Bank v. Watt ("First Nat. Bank v. Watt")	476
184 U. S.			152	" "	477
			152-155	" "	401

REFERENCE TABLE.

Off. Rep. 184 U. S.	Title.	Here In.	Off. Rep. 184 U. S.	Title.	Here In.
155	Lake Benton First Nat. Bank v. Watt ("First Nat. Bank v. Watt")	478	287-290	Terlinden v. Ames	545
156-157	League v. Texas	478	290-293	Huguley Mfg. Co. v. Galetton Cotton Mills	546
157	" "	479	293-294	" "	547
157-160	" "	480	294-295	" "	548
160-162	" "	481	295-296	" "	549
162-163	Hatfield v. King	481	297	Huguley Mfg. Co., Re	549
163-164	" "	482	297-300	" "	550
164-166	" "	483	300-301	" "	551
166-168	" "	484	301-302	" "	552
168	" "	485	302	Waite v. Santa Cruz	552
169-170	Lykins v. McGrath	485	303-306	" "	559
170-172	" "	486	306-308	" "	560
172-173	" "	487	308-311	" "	561
173-174	Marande v. Texas & P. R. Co.	487	311-314	" "	562
174-175	" "	488	314-316	" "	563
175-176	" "	489	316-319	" "	564
177-179	" "	490	319-321	" "	565
179-182	" "	491	321-324	" "	566
182-184	" "	492	324-326	" "	567
184-190	" "	493	326-329	" "	568
190-191	" "	494	329	Clark v. Titusville	569
191-192	" "	495	330-332	" "	572
192-194	" "	496	332-334	" "	573
194-197	" "	497	334	Rothschild v. Knight	573
197-198	" "	498	334-337	" "	574
199-200	Minnesota v. Northern Securi- ties Co.	499	337-338	" "	575
200-203	" "	500	339-340	" "	579
203-205	" "	501	340-342	" "	580
205-208	" "	502	342	Schuerman v. Arizona	580
208-211	" "	503	343-345	" "	581
211-213	" "	504	345-348	" "	582
213-216	" "	505	348-350	" "	583
216-219	" "	506	350-353	" "	584
219-222	" "	507	353-354	" "	585
222-224	" "	508	354-356	Skaneateles Water Works Co. v. Skaneateles	585
224-227	" "	509	356-358	" "	586
227-229	" "	510	358	" "	588
229-232	" "	511	358-359	" "	589
232-234	" "	512	360-363	" "	590
234-235	" "	515	363-366	" "	591
235-237	" "	516	366-368	" "	592
237-240	" "	517	368	Detroit v. Detroit Citizens' Street R. Co.	592
240-243	" "	518	369-370	" "	595
243-245	" "	519	370	" "	596
245-247	" "	520	370-371	" "	597
247	United States v. St. Louis & M. V. Transp. Co.	520	371-373	" "	598
247-248	" "	521	373-376	" "	599
248-249	" "	524	376-378	" "	600
249-252	" "	525	378-379	" "	604
252-255	" "	526	379-382	" "	605
255-257	" "	527	382-384	" "	606
257	" "	528	384-387	" "	607
258-259	Studebaker v. Perry	528	387-390	" "	608
259-261	" "	530	390-393	" "	609
261-264	" "	531	393-395	" "	610
264-266	" "	532	395-398	" "	611
266-269	" "	533	398-399	" "	612
269	" "	534	399-400	Wilson v. Standefer	612
270-271	Terlinden v. Ames	534	400-403	" "	613
271-274	" "	535	403-405	" "	614
274-276	" "	536	405-408	" "	615
276-277	" "	540	408-411	" "	617
277-280	" "	541	411-413	" "	618
280-283	" "	542	413-416	" "	619
283-285	" "	543	416	United States v. Rio Grande Dam & Irrig. Co.	619
285-287	" "	544	417-418	" "	620

REFERENCE TABLE.

Off. Rep. 184 U. S.	Title.	Here In.	Off. Rep. 184 U. S.	Title.	Here In.
418-421	United States v. Rio Grande		562-564	Connolly v. Union Sewer Pipe	
	Dam & Irrig. Co.	621		Co.	691
421-424	" "	622	564-567	" "	692
424-425	" "	623	567-569	" "	693
425	Booth v. Illinois	623	569-571	" "	694
426-428	" "	625	572	United States v. Camou	694
428-431	" "	626	572-574	" "	695
431-432	" "	627	574-577	" "	696
432-433	Goodrich v. Detroit	627	577	" "	697
433-435	" "	628	578-579	Eidman v. Martinez	697
435-437	" "	630	579-580	" "	698
437-440	" "	631	580-582	" "	700
440-441	" "	632	582-584	" "	701
441-443	United States v. Martinez	632	584-587	" "	702
443-444	" "	633	587-589	" "	703
444-447	" "	634	589-592	" "	704
447-450	" "	635	592	" "	705
450-452	O'Brien v. Wheelock	636	593-594	Moore v. Ruckgaber	705
452-454	" "	637	594-596	" "	706
454-457	" "	638	596-598	" "	707
457-460	" "	639	598	Busch v. Jones	707
460-462	" "	640	598-599	" "	708
462-465	" "	641	599-600	" "	709
465-468	" "	642	600-602	" "	710
468-470	" "	643	602-605	" "	711
470-473	" "	644	605-607	" "	712
473-475	" "	645	607-608	" "	713
475-478	" "	646	608-610	Patton v. Brady	713
478-480	" "	647	610	" "	714
480-482	" "	651	611	" "	715
482-485	" "	652	611-613	" "	716
485-487	" "	653	613-616	" "	717
487-490	" "	654	616-618	" "	718
490-493	" "	655	618-621	" "	719
493-495	" "	656	621-623	" "	720
495-496	" "	657	623-624	" "	721
497	Tullock v. Mulvane	657	624-626	Reloj Cattle Co. v. United	
497-500	" "	658		States	721
500-502	" "	659	626-628	" "	722
502-503	" "	662	628-631	" "	723
503-506	" "	663	631-634	" "	724
506-508	" "	664	634-636	" "	725
508-511	" "	665	637-638	" "	726
511-513	" "	666	638-639	" "	727
513-516	" "	667	639-641	Ainsa v. United States	727
516-519	" "	668	641-643	" "	728
519-521	" "	669	643-645	" "	729
521-524	" "	670	645-647	" "	730
524	Monroe v. United States	670	647-649	" "	731
524-526	" "	671	649	Arivaca Land & C. Co. v.	
526-529	" "	672		United States	731
529-530	" "	673	649-651	" "	732
530-531	Missouri, K. & T. R. Co. v. El-		651-653	" "	733
	liott	673	653-654	United States v. Baca	733
531-533	" "	674	654-656	" "	734
533-534	" "	676	656-659	" "	735
534-537	" "	677	659-660	" "	736
537-539	" "	678	660-661	Emblen v. Lincoln Land Co.	736
539-540	" "	679	661-663	" "	737
540	Connolly v. Union Sewer Pipe		663-664	" "	738
	Co.	679	665-666	Iron Gate Bank v. Brady	
541	" "	682		("Bank of Iron Gate v.	
541-544	" "	683		Brady")	739
544-546	" "	684	666-668	" "	740
546-549	" "	685	668-669	" "	741
549-552	" "	686	669-670	Gwin v. United States	741
552-554	" "	687	670-671	" "	742
554-557	" "	688	671-672	" "	743
557-559	" "	689	672	" "	744
559-562	" "	690	672	" "	745
184 U. S.					403

REFERENCE TABLE.

Off. Rep. 184 U. S.	Title.	Here in.	Off. Rep. 184 U. S.	Title.	Here in.
672-673	Gwin v. United States	746	678-681	Howard v. United States	
673-674	" "	747		("Howard v. United States	
674	" "	748		Use of Stewart")	757
674-675	" "	749	681-684	" "	758
675	" "	750	684-686	" "	759
676	Howard v. United States		686-689	" "	760
	("Howard v. United States		689-691	" "	761
	Use of Stewart")	754	691-694	" "	762
676-678	" "	756	695-701	Memorandum Cases	763-766
404					184 U. S.

THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1901.

[1] *ARTHUR E. MUELLER, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt, Petitioner,

v.
WILLIAM T. NUGENT.

(See S. C. Reporter's ed. 1-18.)

Bankruptcy—amendment of response to order to show cause—power of referee—validity of order of commitment—imprisonment for debt—jurisdiction of bankruptcy court to compel surrender of property.

1. An application to amend a response to an order to show cause why respondent should not be required to pay over to a trustee in bankruptcy money belonging to the bankrupt's estate, in which he had denied jurisdiction on the ground that he had not received the money after the petition in bankruptcy was filed, by asserting that whatever money belonging to the bankrupt came to his hands was held adversely to the bankrupt, may, in the discretion of the district court, to which the question of the validity of the referee's order directing the payment of such money had been certified at the respondent's request, be denied as too late, where first made after the decision by such court had been announced and a written opinion filed, and judgment was about to be entered.
2. A referee in bankruptcy has power in the first instance to enter an order to show cause why a person should not be required to pay over to the trustee in bankruptcy money in his hands belonging to the bankrupt's estate, and, upon the hearing, to enter an order directing the payment of such money by a certain date.
3. An order of commitment of a bankruptcy court, directing that a person be imprisoned until he complies with an order made in a proceeding in equity under the bankrupt act, is not invalid because it does not run in the name of the United States.
4. A person is not imprisoned for debt by an order of the bankruptcy court directing his

imprisonment until he pays over to the trustee in bankruptcy money adjudged to be in his hands belonging to the bankrupt's estate.

5. A bankruptcy court has power by summary proceedings to compel the surrender to the trustee in bankruptcy duly appointed, of property of the bankrupt which has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim.

[No. 257.]

*Argued and Submitted November 13, 1901.
Decided January 20, 1902.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which reversed a decree of the District Court for the District of Kentucky directing the imprisonment of a person for violation of an order in bankruptcy proceedings. *Reversed.*

See same case below, 44 C. C. A. 620, 105 Fed. 581.

Statement by Mr. Chief Justice **Fuller**:

Edward B. Nugent was adjudicated a bankrupt March 23, 1900, on the petition of the Wayne Knitting Mills and others, his creditors, filed in the district court of the United States for the district of Kentucky, February 19, 1900, and the matter was referred to a referee. Arthur E. Mueller was appointed trustee of the bankrupt's estate, and on the 7th of April he obtained an order from the referee requiring the bankrupt to show cause why he should not pay over the sum of \$14,233.45, made up of two items of \$4,133.45 and \$10,100. The response of the bankrupt was held insufficient; he was ordered to pay over; on failure to do so, was adjudged guilty of contempt, and the matter was reported to the court by the referee,

with a recommendation that he be committed. On the suggestion that approaching senile imbecility made the bankrupt an unfit subject of punishment, the court discharged him, without prejudice to a renewal of the matter before the referee if subsequent developments rendered it proper.

April 13, 1900, the trustee filed his petition praying that an injunction might be issued against William T. Nugent, restraining him from disposing of the sum of \$14,435.45, or any part thereof, belonging to the estate of the bankrupt, and for an order requiring him to pay the money to the trustee. This petition stated that William T. Nugent was in hiding. The referee granted the injunction, and entered an order that said William T. Nugent show cause within five days from service thereof why he should not be required to pay over.

A copy of this order was served on William T. Nugent, October 8, 1900, and on October 13 he appeared in person and by counsel, and filed a response to the rule. In this respondent set forth that "neither the court or the referee in bankruptcy herein has any jurisdiction either of this respondent or the matter involved, to make any order or to require this respondent to answer thereto, because he says that said records herein show that if respondent received said money or any part thereof, it was before the petition in bankruptcy was filed; and in that event neither the court or the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay, and he now hereby asks that this be taken as his response herein, and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein has he received said \$14,435.45, or any part thereof."

For further response he said that he had been indicted in the district court for receiving said \$14,435.45, after the filing of the petition, and with retaining the same, and [3]aiding and abetting in the retention thereof, both after the filing and the adjudication, for the purpose of defeating the bankrupt law, and that he ought not to be required to respond, and his response would tend to incriminate him.

The matter came on for hearing October 16, it being stipulated, without prejudice to the objection to the jurisdiction, that the depositions of Edward B. Nugent and others named (not including William T. Nugent), theretofore taken in the cause, might be read. The referee summarized the evidence, as appears from his certificate, thus:

"The testimony shows, and I so find, that on the 9th day of February, 1900, the bankrupt, Edward B. Nugent, borrowed from George L. Erbach and Frank Hohmann, executors, the sum of \$4,500, and as security therefor executed a mortgage upon the house and lot of land owned by said Edward B. Nugent, in the city of Louisville; that after paying the taxes and expenses of procuring the loan there remained from said sum so borrowed the sum of \$4,133.45; that on said day the said balance of \$4,133.45 was deliv-

ered to said W. T. Nugent as the agent of the bankrupt, and the said amount has not been accounted for to the trustee in bankruptcy herein.

"I further certify that on the 19th day of February, 1900, before the hour of 2 o'clock P. M., being more than three hours before the petition praying for an adjudication of said Edward B. Nugent as bankrupt was filed in the clerk's office of said court, the stock of merchandise belonging to the bankrupt was sold to one Hermann Straus for the sum of \$12,000, and on said 19th day of February, 1900, and before the hour of 2 o'clock P. M., the said \$12,000 was paid to said bankrupt by said Hermann Straus, in the form of a check on the German Bank of Louisville, Ky.; that said bankrupt indorsed his name across the said check and delivered the same to said W. T. Nugent, his son, as his agent; that said W. T. Nugent received the cash upon said check on that day before the hour of 2 o'clock P. M., and paid therefrom the sum of \$1,900 for rental on the building where said stock was located and the expenses of making the sale, leaving the sum of \$10,100, which then and there still remained in the hands of said W. T. Nugent as the agent of said bankrupt.

"*I further find that both of said balances, [4] to wit, \$4,133.45 and \$10,100, belonged to the said bankrupt, and became and still are the property of Arthur E. Mueller, trustee in bankruptcy in this cause, and that said W. T. Nugent holds the same as agent or bailee only, and that he has not accounted for any part of said sums."

The referee entered an order on the same day, October 16, 1900, omitting preliminary recitals, as follows:

"And after hearing counsel, now therefore it is ordered and adjudged that the said response to the rule aforesaid be and the same is hereby held insufficient; and it appearing from the evidence in this cause that there came to the hands of W. T. Nugent \$4,133.45, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the city of Louisville, and that there also came to the hands of said W. T. Nugent the further sum of \$10,100, being the net proceeds from the sale of the stock of merchandise sold to Hermann Straus,--the first of said sums having come to the hands of said W. T. Nugent as the agent of the bankrupt on February 9th, 1900, and the second sum, to wit, \$10,100, having come to the hands of the said W. T. Nugent as the agent of the bankrupt on February 19th, 1900, before the hour of 2 o'clock P. M., on said day,--and it further appearing that the petition of the Wayne Knitting Mills and others, praying that the said Edward B. Nugent may be adjudged a bankrupt, was filed in the office of the clerk of the above-styled court on February 19th, 1900, at 5 o'clock P. M., and it appearing that said W. T. Nugent has failed to pay over said sums, or any part thereof, to the trustee in bankruptcy herein, and that said sums are the property of the bankrupt, Edward B. Nugent, and belong to said trustee as part of said estate,

it is ordered that said rule be and the same is hereby made absolute to the amount of said two sums aggregating the sum of \$14,233.45.

"It is further ordered that said W. T. Nugent be and he is hereby required to pay to Arthur E. Mueller, trustee in bankruptcy in this cause, on or before 9.30 o'clock A. M., on October 17th, 1900, the said aggregate sum of \$14,233.45."

[5] Thereupon, October 17, William T. Nugent filed his petition *that the order of October 16 might be reviewed by the District Judge, and the referee made his certificate of the proceedings and the foregoing summary of the evidence, the depositions put in before him being returned therewith, concluding: "And the said question, to wit, the validity of the said order of October 16th, 1900, above set forth in full, is certified to the judge for his opinion thereon."

The referee also reported that William T. Nugent had failed to comply with the order in whole or in part; that he was in contempt of court; and recommended "that he be punished for contempt, and committed to prison until he shall have paid to the said trustee the said sum of \$14,233.45."

The record of the district court shows that on the 1st day of November the cause came on to be heard on the petition of William T. Nugent for a review of the order of court entered by the referee requiring said Nugent to pay over, and the certification of the referee, and his recommendation that said Nugent be punished for contempt, and that the court, being fully advised, delivered a written opinion, which was ordered filed, whereupon William T. Nugent moved the court to postpone the entry of judgment until November 3, and it was so ordered.

The district judge stated the facts at length; pointed out that the response was put upon two grounds: namely, that the court and referee were without jurisdiction, and that respondent had been indicted; held that as to the indictment it was not an indictment for disobedience to the order, but under § 29 of the bankrupt act; that exculpation could not criminate; that he could have denied receiving or concealing the money, or paid it into court, but he had done neither; that he had the money, and that it belonged to the estate; that the response really rested on the denial of jurisdiction; and that the referee had the power to order the money to be surrendered. The matter was summed up in these words:

"The respondent has the money in his hands as agent or bailee only. His possession is that of his principal. His principal was his father up to a certain stage of these proceedings, but whether up to the filing of the petition or up to the adjudication we need not stop to inquire, as it is immaterial [6] in this *case. At one or the other of those times his principal, by operation of law, was changed, and an officer of this court was substituted for his father. That change in no way lessened the duty of paying the money to the proper principal upon notice and demand. After the change, however, the

money was potentially in the custody of the law in these proceedings, and subject to the orders of the court. The rule and its service constituted sufficient notice and demand. The order made was that the respondent should pay the money to the proper officer. Disobedience of that order is made punishable as a contempt by the express provisions of the act.

"The court therefore has jurisdiction of the person and of the subject-matter. The rulings of the referee appear to be right, and are approved and confirmed, and his recommendation as to punishing the respondent for the contempt adjudged will be acted upon with appropriate vigor. . . .

"The judgment of the court, in the exercise of its statutory discretion, will be that the respondent, W. T. Nugent, for his contempt aforesaid, be imprisoned in the county jail until he shall deliver to Arthur E. Mueller, the trustee, said sum of \$14,233.45; and the court will reserve the right to suspend or set aside this judgment and sentence upon the delivery and payment of the money as ordered." 104 Fed. 530.

On the 3d of November the respondent Nugent asked leave to file an amended response, stating that he had not made full response as to the entire facts because the referee had held he could not be examined as to transactions involved in the indictment, and denying that the \$14,233.45, or any part thereof, was now in his possession or under his control, or was on October 8, 1900; and saying "that neither at the time of the filing of the petition in bankruptcy herein against E. B. Nugent, or at any time subsequent thereto, did he have in his hands any amount of money belonging to said Nugent which he held as his agent or bailee. He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee, or in any trust *capacity whatever, but was held ad-[7] versely to said E. B. Nugent."

The district court would not permit the proposed amendment to be filed, and entered this order:

"Came William T. Nugent, respondent herein, and tendered an amended response, and moved to file same, and the court, not having postponed the imposing of the sentence for that purpose, and being of opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the court, filed herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson county, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of \$14,233.45, or otherwise satisfy the said trustee with respect thereto; and the court reserves the

right and power to suspend or set aside the judgment and sentence upon the delivery, payment, or satisfaction aforesaid."

Thereafter William T. Nugent filed a petition for review under subdivision b, § 24, of the act, in the circuit court of appeals, praying "that the orders, judgments, and sentence of the district court be reviewed and revised in the matters of law, so as to adjudge that your petitioner be released and discharged," or "that he be permitted to further respond in said matter."

This petition alleged error in that the district court held that the referee and the court had jurisdiction to proceed against petitioner in a summary way; that the court had jurisdiction on the proceedings and recommendations of the referee to punish petitioner for contempt; that the referee had power to grant the injunction against petitioner, or to proceed on rule to show cause; that the response was insufficient; that the facts were that the money belonged to the bankrupt's estate, and was held by petitioner as the bankrupt's agent, and was not claimed adversely; that the amended [8] response should not be filed; that the petitioner was properly before the court; and that the contempt proceedings should not be dismissed and petitioner discharged.

The amended response was attached as an exhibit to this petition, although it had not been filed in the district court, or made part of the record there by certificate of exceptions or order of identification; and the petition also set up several matters and exhibits which apparently were not before the referee or the district court in the proceeding. The trustee moved to expunge these various matters and exhibits.

To expedite the hearing this motion was reserved, and it was stipulated that "such affirmative allegations of said petition for review as properly should be denied be treated as controverted of record without prejudice to the hearing of said motion."

The circuit court of appeals, December 13, 1900, filed a memorandum opinion, and entered judgment reversing the decree of the district court, with directions to that court to vacate the order of the referee on respondent to show cause and his order adjudging respondent to be in contempt thereof, and that respondent be discharged from imprisonment. An extended opinion was subsequently filed. 44 C. C. A. 620, 105 Fed. 581.

The writ of certiorari was then granted by this court. 180 U. S. 640, 45 L. ed. 711, 21 Sup. Ct. Rep. 927.

Mr. William W. Watts argued the cause, and, with **Mr. John Richard Watts**, filed a brief for petitioner:

The referee's office is "a first court in bankruptcy."

White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

The referee's certificate of the question which was presented, the summary of the evidence, and his findings and order thereon,

constitute the record on which the case is to be reviewed.

Cunningham v. German Ins. Bank, 43 C. C. A. 377, 103 Fed. 932; *Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co.* 41 C. C. A. 614, 101 Fed. 699.

The exercise of the court's discretion in refusing to receive an amended response to an order to show cause, after the case has been heard and determined and a written opinion delivered, will not be disturbed on appeal or review.

Neale v. Neale, 9 Wall. 1, 19 L. ed. 590.

Even if the filing of an amended response was allowable, before the judge, at that stage of the proceedings, a conclusion of law would not be accepted. Facts on which to base intelligent action should be stated.

McCloskey v. Barr, 38 Fed. 165.

The filing of a petition in involuntary bankruptcy is a caveat to all the world, as well as to the respondent.

International Bank v. Sherman, 101 U. S. 406, 25 L. ed. 867.

One whose agency to the bankrupt is established will be summarily ordered by the court to turn over property coming to his possession before the filing of the petition, without beneficial claim in him.

Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557.

A court in bankruptcy, upon adjudication, coming into control of the *res*, has the power to inquire by rule, of one alleged to be an agent, why he shall not deliver over to the trustee in bankruptcy the property in the hands of such agent.

Re Moore, 104 Fed. 869; *Re Francis-Valentine Co.* 36 C. C. A. 499, 94 Fed. 793; *Re Brooks*, 91 Fed. 508; *Re Stokes*, 106 Fed. 312; *Re Rosser*, 41 C. C. A. 497, 101 Fed. 562.

If the law allows to receivers summary process against third persons with respect to the debtor's property, it also allows the same process to trustees in bankruptcy.

White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018.

And the law does allow this fiduciary the summary process invoked in this case.

High, Receivers, 2d ed. § 144; *Re Cohen*, 5 Cal. 494; *Geisse v. Beall*, 5 Wis. 224; *Green v. Green*, 2 Sim. 430; *Miller v. Jones*, 39 Ill. 54; Smith, Receiverships, pp. 64, 122; *Ryan v. Kingsbery*, 88 Ga. 361, 14 S. E. 598; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 52 Fed. 937; *Brandt v. Allen*, 76 Iowa, 50, 1 L. R. A. 653, 40 N. W. 82; *Griffith v. Griffith*, 2 Ves. Sr. 400; *People v. Rogers*, 2 Paige, 103; *Milcs v. New South Bldg. & L. Asso.* 95 Fed. 919; Beach, Receivers, 209; *Bibber-White Co. v. White River Valley Electric R. Co.* 107 Fed. 177; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785.

Two essential facts limit the power of the court in bankruptcy to order the bankrupt and all other persons to deliver over the money or property of the bankrupt. They are that the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt es-

tate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made.

Re Rosser, 41 C. C. A. 497, 101 Fed. 562. See also *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906; *Wasson v. Hawkins*, 59 Fed. 233.

There being no attachment in this case for the taking of the body of the respondent, and no necessity for one, the writ need not run in the name of the government.

Foster, Fed. Pr. 2d ed. pp. 654-656.

This is not a habeas corpus case, but a review of orders made in a civil suit in equity under the provisions of the bankruptcy act.

Goldman v. Smith, 93 Fed. 182.

Mr. W. M. Smith submitted the cause for respondent. *Mr. Fred Forcht, Jr.*, was with him on the brief.

Fraudulent transfers which have been consummated cannot be reached by this summary proceeding.

Re Mayer, 98 Fed. 840.

It may be true that if the money is under the control of the bankrupt, in the hands of a third party, he may be ordered to pay, and in case of refusal can be punished for contempt, as the money is under his control; but the transferee, obtaining possession before bankrupt proceedings, cannot be held for contempt.

Re Rosser, 41 C. C. A. 497, 101 Fed. 562; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845, 21 Sup. Ct. Rep. 642.

The ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

These contempt proceedings are of a criminal nature, and the same rules must govern as in the trial of indictments.

See *Accumulator Co. v. Consolidated Electric Storage Co.* 53 Fed. 793; *Kirk v. Milwaukee Dust Collector Mfg. Co.* 26 Fed. 501; *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354; *Re Ellerbe*, 13 Fed. 532.

In civil matters, a party always has the right to plead over after action upon a plea in abatement or bar, and certainly this is the rule in criminal matters.

1 Bishop, New Crim. Proc. § 755.

The order and sentence thereunder are erroneous and void, because they do not run in the name of the government.

United States v. Wayne, Wall. Sr. 134, Fed. Cas. No. 16,654; *Folger v. Hoogland*, 5 Johns. 235. See also *Re Bronson*, 12 Johns. 460; *Worden v. Searls*, 121 U. S. 27, 30 L. ed. 858, 7 Sup. Ct. Rep. 814.

Messrs. H. M. Lane, W. M. Smith, Zach
184 U. S.

Phelps, and *Fred Forcht, Jr.*, filed a brief for respondent on motion for certiorari.

*Mr. Chief Justice **Fuller** delivered the [8] opinion of the court:

General order in bankruptcy XXVII. (172 U. S. 662, 43 L. ed. 1193, 18 Sup. Ct. Rep. viii.) provides: "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith *certify to the judge the question presented, [9] a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Respondent accordingly filed his petition for a review of the order of October 16. The referee thereupon certified to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon. He pursued in so doing form No. 56 of the forms in bankruptcy. 172 U. S. 718, 43 L. ed. 1226, 18 Sup. Ct. Rep. xlv. The question certified was "the validity of the said order of October 16th, 1900, above set forth in full." At the same time the referee reported the disobedience of William T. Nugent, and recommended that he be committed. No exception was taken before the referee or the district court to the sufficiency of the trustee's application, or to the adequacy of the certificate, and the entire evidence was transmitted.

Subdivision b of § 24 provides: "The several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction." [30 Stat. at L. 553, chap. 541.]

The district court affirmed the order of October 16, and ordered respondent to be committed for his failure to comply therewith, and thereupon respondent filed in the circuit court of appeals his petition for review. The matters of law to be passed on by that court were the validity of the order of October 16, as affirmed by the district court, and the correctness of the order of commitment. And these were to be determined on the record of the district court.

The circuit court of appeals had in prior cases recognized the general proposition that those courts are confined on petitions for review to matters of law arising on the record of the courts below, and may well have assumed that there was no necessity for a specific ruling on the motion to expunge the new matter accompanying the petition in this instance. *Cunningham v. German Ins. Bank*, 43 C. C. A. 377, 103 Fed. 932; *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Breuing Co.* 41 C. C. A. 614, 101 Fed. 699. The record of the district court in respect of the *order of October 16 [10] was the record made before the referee, who had certified the question of the validity of the order at the request of respondent, and

to the adequacy of whose certificate respondent had made no objection as heretofore said.

It is true that after the decision of the district court was announced, and the final order was about to be entered, the entry of the order was suspended, on the application of the respondent, for two days, and that then the respondent undertook, by way of amendment, to set up a denial that he held the money as the bankrupt's agent or bailee, and to assert that he held adversely to him. The district court refused to allow the amendment to be made at that stage of the proceedings, and we do not understand that the court of appeals held that the district court abused its discretion in so refusing.

At an earlier stage perhaps this ruling might have been controlled by the rules of equity practice adopted by this court, but that would not be so after hearing had been had, the decision of the court had been announced, and judgment was about to be entered.

The respondent had denied the jurisdiction on the ground that he had not received the money, or any part of it, after the petition in bankruptcy was filed. When the matter came on to be heard on the rule to pay over, respondent agreed that the enumerated depositions might be read, reserving his exceptions to the jurisdiction. He then carried the matter to the district court, and after it was decided, sought to amend his response to the rule by asserting that whatever money belonging to the bankrupt came to his hands was not received as agent of, but was held adversely to, the bankrupt. He did not even then set forth what money he had received, and how and when it came to his hands, or the circumstances under which he claimed to hold it adversely, but put forward simply a conclusion of law. The district court held it not admissible practice to permit such an amendment at that stage; that is, that the application came too late after the case had been heard and determined, and a written opinion had been delivered and filed; and the district judge may have considered it a mere subterfuge in evasion of the effect of the decision, or that the proposed amendment was insufficient. *If the proposed amended response be treated as properly before us, we agree that the orders under consideration ought not to be disturbed because of this ruling made in the competent exercise of judicial discretion. And, moreover, respondent did not ask to plead over before the referee, but had the case certified to the judge as it stood.

Among the definitions set forth in § 1 of the bankruptcy act are these [30 Stat. at L. 544, chap. 541]: "Court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;" "judge' shall mean a judge of a court of bankruptcy, not including the referee;" "referee' shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead."

By § 2 courts of bankruptcy are vested with power to "(6) bring in and substitute

additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided; . . . (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; . . . (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees."

Section 36 provides that "referees shall take the same oath of office as that prescribed for judges of United States courts."

Section 38, that referees shall have jurisdiction to "(4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

And § 39, that among other duties of referees they "shall "(5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties, in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges."

Section 41 provides that "a person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ;" and that "(b) the referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court."

General order XII. provides that after the order of reference reaches the referee, "all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

General order XXIII. is: "In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof, or that the order was made by consent, or that no adverse interest was represented at the hearing, or that the order was made after hearing adverse interests."

And we repeat general order XXVII.: "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

[13] No objection was made before the referee or the district court to the authority of the referee as such to entertain these proceedings, to enter the order to show cause and thereby to bring in William T. Nugent, and to enter the order of October *16; and we do not find that the act or the general orders are to the contrary.

It is now said that the only power the referee has to direct the taking possession of property is given by subsection 3 of § 38a, providing that the referee may exercise the powers of the judge in that respect on a certificate of the clerk that the judge is absent or unable to act. But that provision seems to refer only to the seizure of property by the marshal or a receiver prior to adjudication and the qualification of the trustee as provided by § 2, § 3e, and § 69, and it is at all events inapplicable here.

We think the referee has the power to act in the first instance in matters such as this, when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases "much of the judicial authority of that court." *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007. By petition for review the matter can be carried to the bankruptcy court, and the entire record and findings laid before that tribunal, as was done here.

And if the order of October 16 was in itself a lawful order, the power of the district court to commit William T. Nugent until he surrendered the money to the trustee, or otherwise satisfied the trustee with respect thereto, was unquestionable under the express provisions of the bankruptcy act in that behalf, as well as the general jurisdiction of the court to enforce its orders in the collection of assets.

It is objected that the order of commitment was invalid because it did not run in the name of the United States. This objection was not made below; nor was this an attachment. It was an order to detain Nugent until he complied with an order made in a proceeding in equity under the bankrupt act. The objection is untenable. Nor was the commitment imprisonment for debt, as also contended. The order to pay over the money was not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt placed in *custodia legis* by the adjudication.

[14] The real question was whether the order of October 16, as confirmed by the district court, was a lawful order. It was to be determined as a mere question of law on the facts found *that the money belonged to the bankrupt's estate, and was then in Nugent's possession as the bankrupt's agent, 184 U. S.

he asserting no adverse claim. And the question of the validity of that order involved the validity of the order to show cause.

The proposition was that, as matter of law, where property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed.

In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be?

If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and in many respects rendered practically inefficient.

The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.

It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction (*International Bank v. Sherman*, 101 U. S. 407, 25 L. ed. 867), and on adjudication title to the bankrupt's property became vested in the trustee (§§ 70, 21c) with actual or constructive possession, and placed in the custody of the bankruptcy court.

There was no pretense that at the date of the filing of this petition in bankruptcy this money of the bankrupt, \$4,133.45 of which had been collected a few days, and \$10,100 a few *hours, before, was held subject to any [15] adverse claim, or that the right or title thereto had been passed over to another.

The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent.

But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely col-

orable, but real even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review.

In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and the district court.

The decisions of this court under the present law sustain the validity of the action we are considering.

In *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, the question related to the jurisdiction of the district court over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of proceedings in bankruptcy. The court said: "Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws, or treaties of the United States, he could have brought suit in the circuit court of the United States. . . . He could not have sued in a district court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, *by special provision of an act of Congress, a district court has the powers of a circuit court, or is given jurisdiction of a particular class of civil suits." And it was held that Congress, by the 2d clause of § 23 of the bankruptcy act, had manifested its intention "that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, 'unless by consent of the proposed defendant.'" The court was dealing there with a suit of the trustee against a third party to recover property fraudulently transferred to him by the bankrupt before the filing of the petition in bankruptcy, and which the third party claimed as his own.

In *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007, where, after an adjudication in bankruptcy and reference of the case to a referee, and before the appointment of a trustee, the referee had taken possession of the bankrupt's stock of goods in a store, a writ of replevin of part of the goods was sued out by third persons against the bankrupt from a state court and executed by the sheriff forcibly entering the store and taking possession of the goods, it was held that the district court of the United States, sitting in bankruptcy, had jurisdiction by summary proceedings to compel the return of the property seized.

In *Bryan v. Bernheimer*, 181 U. S. 188, 44 L. ed. 814, 21 Sup. Ct. Rep. 557, Ab-
412

ham, nine days before the filing of a petition in bankruptcy against him, made a general assignment to Davidson of all of his property for the benefit of his creditors. After the filing of the petition Davidson sold the property to Bernheimer. After the adjudication in bankruptcy, and before the appointment of a trustee, the petitioning creditors applied to the court for an order to the marshal to take possession of the property, alleging that this was necessary for the interest of the bankrupt's creditors. The court ordered that the marshal take possession, and that notice be given to the purchaser to appear in ten days and propound his claim to the property, or, failing to do so, be decreed to have no right in it. The purchaser came in and propounded his claim, *stating that he bought the property for cash [17] in good faith of the assignee, and praying that the creditors be remitted to their claim against the assignee for the price, or that the price be ordered to be paid by the assignee into court, and paid over to the purchaser, who thereupon offered to rescind the purchase, and waive all further claim to the property. This court held that the summary proceeding was properly entertained, that the purchaser had no title in the property superior to the bankrupt's estate, and that the equities between him and the creditors might be determined by the district court, bringing in the assignee if necessary. In that case it was observed that the remark in *Bardes v. First Nat. Bank*, that the powers conferred on the courts of bankruptcy after the filing of a petition in bankruptcy, and in case it was necessary for the preservation of the property of the bankrupt to authorize receivers or the marshals to take charge of it until a trustee was appointed, "can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant,"—was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment." The court also said: "The general assignment made by Abraham to Davidson did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors." And further: "The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself."

In the case before us William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself. If it was competent to deal with Davidson, the assignee in the case of *Bryan v. Bernheimer*, by summary proceeding, William T. Nugent could be dealt with in the same way.

The cases are indeed different, for Bernheimer, the purchaser, submitted himself to the jurisdiction of the bankruptcy court, and the sale was after petition filed; but nevertheless, so far as the question of subjecting a mere volunteer in possession of as-

[18] sets *belonging to the bankrupt's estate to the control of that court by summary proceedings is concerned, the ruling in *Bernheimer's Case* is in point.

We are of opinion that the order of October 16 was a lawful order. In arriving at that conclusion we have confined ourselves to the record of the district court. If in the effort to escape the jurisdiction of the bankruptcy court, that record is not in a condition as favorable to respondent as the actual facts might have justified, he has only himself to thank for it; but lest any injustice should be done, the judgment will be:

Decree of the Circuit Court of Appeals reversed; decree and order of the District Court affirmed; and cause remanded to the latter court with liberty to take such further proceedings as it may be advised.

LOUISVILLE TRUST COMPANY, Trustee,
etc., *Petitioner*,
v.
LEONARD COMINGOR.

(See S. C. Reporter's ed. 18-26.)

Bankruptcy — jurisdiction of bankruptcy court to determine adverse claim—effect of joining general assignee in petition—consent to adjudication of adverse claim—summary proceedings.

1. A court of bankruptcy has no jurisdiction to adjudicate the merits of the claim of a general assignee of the bankrupt to retain out of the bankrupt's estate money disbursed by him or claimed on account of his commission as such assignee before the bankruptcy proceedings were begun, unless such assignee consents to the exercise of such jurisdiction.
2. Because a general assignee was joined with his assignors in a petition in bankruptcy against the latter, which set up no cause of action and prayed no special relief against such assignee, he does not therefore continue to be subject to the orders of the court without other process.
3. An assignee of a bankrupt cannot be deemed to have consented to the jurisdiction of the bankruptcy court to compel him by summary proceedings to pay over to the trustee in bankruptcy money of the bankrupt's estate which he had disbursed or which he had retained on account of his commissions, as such assignee before the bankruptcy proceedings were commenced, because he participated in the proceedings before the referee, where he pleaded such claims at the outset, and made formal protest to the exercise of such jurisdiction before the final order was entered.

[No. 309.]

Argued November 13, 14, 1901. Decided January 27, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which re-
184 U. S.

versed a decree of the Circuit Court for the District of Kentucky requiring a general assignee of a bankrupt to pay to the trustee in bankruptcy money retained by him from the bankrupt's estate. *Affirmed.*

See same case below, 47 C. C. A. 51, 107 Fed. 898.

Statement by Mr. Chief Justice **Fuller**:

*December 5, 1898, Simonson, Whiteson, & [19] Company, the firm consisting of three partners, made an assignment to Leonard Comingor for the benefit of their creditors, under the statutes of Kentucky in that behalf, and a few days thereafter Comingor brought suit involving the administration and settlement of the estate in the circuit court of Jefferson county.

The state statute provided, among other things, that the assignee should give bond with good security to be approved by the county judge, conditioned for the faithful discharge of his duties as assignee, and to be recorded in the county clerk's office; that the assignee should be at all times subject to the orders and supervision of the county court, or the judge thereof in vacation, except as thereafter provided; for the final discharge of the assignee on due notice; and that the assignee or any creditor or creditors representing one fourth of the liabilities might bring suit in the circuit court for the settlement of the estate, whereupon the jurisdiction of the county court should cease, and the circuit court should have all the power and authority to administer and settle up the assigned estate conferred on the county court, in addition to its power and authority as a chancery court. Ky. Stat. 1899, p. 202, chap. 7.

Certain creditors filed a petition in the circuit court of the United States for the district of Kentucky in bankruptcy, on February 14, 1899, against the firm, to which its members tendered a plea and answer. The ground on which the petition was based was that Simonson, Whiteson, & Company had within four months of the filing of the petition made a general *assignment under [20] the statutes of Kentucky for the benefit of creditors to Comingor. The court adjudicated them bankrupts (92 Fed. 904), and one of them prosecuted an appeal to the circuit court of appeals for the sixth circuit, which, July 5, 1899, reversed the judgment, with directions to take further proceedings. 37 C. C. A. 337, 95 Fed. 948.

On September 20, 1899, adjudication was again awarded, and on a second appeal was affirmed February 12, 1900. 40 C. C. A. 474, 100 Fed. 426.

Comingor was made a defendant to the petition in bankruptcy as assignee, but no relief was prayed as against him, and he moved the court to dismiss the petition as to him for want of jurisdiction, and also, without waiving the motion, tendered an answer, but the motion was not acted on nor was his answer filed.

April 1, 1899, an injunction was granted against Simonson, Whiteson, & Company and Comingor from taking any steps affect-

ing the bankrupts' estate, and especially in the action in the Jefferson circuit court.

May 17, 1900, the case was referred to a referee, who, on May 28, without notice, entered an order that Comingor file with him an itemized and detailed statement showing his receipts and disbursements of the money and other assets belonging to the estates of Simonson, Whiteson, & Company and its members. This Comingor did, the statement showing that he had received \$92,865.77; that he had disbursed \$19,876.73; that he had paid his counsel \$3,200; that he had drawn as commissions \$3,300; that he had paid over to the receiver of the state court \$59,623.61; and that he had on hand \$6,766.53. This sum of \$6,766.53 was subsequently paid the trustee in bankruptcy.

[21] June 20, 1900, the referee on his own motion entered an order appointing the Louisville Trust Company receiver, and directing it to apply to the Jefferson circuit court for an order directing the receiver of that court to pay over the entire fund in court, in Comingor's action there; but providing that the trust company should not appear in the Jefferson circuit court as a party to that action, nor receive any less sum than *the whole fund in that court. Application was accordingly made by the trust company, but the Jefferson circuit court declined to entertain the motion to withdraw the funds, because the trust company was not a party to the action and had no standing in court, but the circuit judge suggested that when the trust company filed its petition asserting its claim to the fund, as provided by § 29 of the Code of Kentucky, the court would then be authorized to entertain such motions and make such orders in its behalf as might be necessary and proper.

The trust company appears to have been appointed trustee by the referee June 30, 1900, its bond as such trustee being then approved.

On the same day the referee entered an order that the trust company file a petition to be made a party to the suit in the Jefferson circuit court, and thereupon such petition was filed by it as trustee, stating among other things that the officers of the court had been paid in full and had no claims on the fund in court, and that the fund, to wit, \$46,305.03, belonged to the creditors of the bankrupt concern, and that nobody else had any interest therein, neither officers, attorneys, nor anybody else, and praying that the court be directed to make the trust company a defendant, and that its petition be taken as an answer, and that the receiver of the said circuit court pay to petitioner the said sum of \$46,305.03, and "for all further and proper relief." The Jefferson circuit court thereupon entered an order making the trust company a party defendant, and directing that it be allowed to withdraw from the fund in court the sum of \$46,305.03.

June 20 the referee, on his own motion, entered an order requiring Comingor and his counsel to appear and show cause three days thereafter why they should not pay

over to the receiver the amount of the commissions and fees.

June 23 Comingor responded as to the sum of \$3,398.90 that he had retained the same on account of his commissions as assignee before any bankruptcy proceedings were had, and that he relied on the fact that he would be entitled to more than that sum on the final settlement; that for services rendered to *the estate he believed this court [22] would allow at least said amount; that he was a person of no means; and had used said money from time to time, relying on the fact that it belonged to him, and had none of it left; and that he was unable to pay said money into court, as he had no money or property of any kind.

The referee held the response insufficient, and made the rule absolute. The order to show cause made on the attorneys does not appear to have been pursued, but June 28, 1900, another order was made on Comingor to show cause why he should not be required to pay to the receiver the sums of money paid to them, amounting to \$3,200 in all.

June 30, 1900, Comingor responded that he had paid the \$3,200 to his attorneys for services rendered him as his counsel while acting as the assignee before any proceedings in bankruptcy were taken. He further alleged that he had no money or means of any kind with which to pay, and referred to his former response and made it a part thereof, and insisted that he ought not to be compelled to pay the amount claimed.

The referee adjudged this response insufficient, and made the rule absolute.

Comingor then prayed for a review by the district court in bankruptcy of the orders adjudging his responses insufficient, and ordering him to pay to the receiver the sums of \$3,398.90 and \$3,200 respectively.

The referee reported his findings to be that Comingor was entitled to no compensation whatever, and that he had no legal right to pay attorneys' fees when no allowance had been made by the state court therefor, and that in contemplation of law he must be deemed to have the funds in his possession.

The district judge referred the matter back to the referee July 16, 1900, to take testimony as to the character and value of Comingor's services and those of his counsel. The referee proceeded to do this, pending which, on November 10, Comingor tendered an amended response before the referee, setting forth that as was shown by the pleadings, records, and evidence in the case, and the entire proceedings had, neither that court nor the referee in bankruptcy had any jurisdiction, either of the *respondent or the [23] matter involved, to make any such orders or require respondent to answer thereto, because the records showed that all the transactions in reference to the two sums of money took place before the petition in bankruptcy was filed, and that neither that court nor the referee in bankruptcy could proceed against respondent as attempted by order or rule to pay over or by summary process. He prayed that the rule be dis-

charged and the orders to pay be set aside. This amended response the referee declined to entertain and it was again tendered in the district court on the filing of the referee's report.

December 11, 1900, the referee reported the evidence and his conclusions thereon, that neither Comingor nor his attorneys had rendered any services of value to the estate, and that their services had in fact been injurious to the creditors, but that the fees paid to the attorneys were usual and reasonable according to the scale of compensation allowed for such services by the state court in Louisville.

The district judge confirmed the report of the referee, and as to the objection of want of jurisdiction held that it could not be entertained by the court for the reason that, by long acquiescence in that mode of procedure, respondent must be regarded as having consented thereto. Thereupon an order was entered dismissing the petition for review, and adjudging that Comingor pay to the trust company, as trustee, the said sums of \$3,398.90 and \$3,200, on or before February 16, 1901, to all of which Comingor excepted, and filed his petition for review in the circuit court of appeals for the sixth circuit. That court entered an order staying proceedings in the district court, and thereafter on hearing reversed the decree of the district court affirming the orders of the referee requiring Comingor to pay to the trustee the sums aforesaid, with directions to set aside its order and decree, and the orders of the referee directing Comingor to pay the trustee in bankruptcy the moneys mentioned in said orders. 47 C. C. A. 51, 107 Fed. 898.

Certiorari from this court was then granted. 181 U. S. 620, 45 L. ed. 1031.

Mr. Augustus E. Willson argued the cause and filed a brief for petitioner:

In gathering in the assets of the bankrupt under § 2 (7) of the bankruptcy act, the trustee is not required to resort to a plenary suit when proceeding against a mere agent or custodian of the property.

Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557.

Parties other than bankrupts may by rule be compelled to deliver assets to the trustee where such parties are not holding under adverse title.

Re Brooks, 91 Fed. 508; *Re Kenney*, 95 Fed. 427; *Re Moore*, 104 Fed. 869; *Re Smith*, 92 Fed. 138; *Re Stokes*, 106 Fed. 312.

By responding to the merits of the rule Comingor consented to the jurisdiction.

Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557. See also *Re Steuer*, 104 Fed. 976.

The jurisdiction of the state court was ousted by the adjudication in bankruptcy.

Leidigh Carriage Co. v. Stengel, 37 C. C. A. 210, 95 Fed. 637.

Mr. D. A. Sachs argued the cause, and, with *Messrs. Alexander Pope Humphrey, Morris A. Sachs, J. G. Sachs, and W. M. Smith*, filed a brief for respondent:

184 U. S.

Neither the referee nor district court had the right or jurisdiction to proceed in a summary way against one holding adversely to the bankrupt under a title acquired before bankruptcy proceedings were instituted.

Bardes v. First Nat. Bank, 178 U. S. 538, 44 L. ed. 1182, 20 Sup. Ct. Rep. 1000; *Wall v. Cox*, 181 U. S. 244, 45 L. ed. 845, 21 Sup. Ct. Rep. 642.

Compulsory reference in cases involving more than \$20 would be in direct violation of the 7th Amendment to the Constitution of the United States, providing that "in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved."

United States v. Rathbone, 2 Paine, 578, Fed. Cas. No. 16,121; *Howe Mach. Co. v. Edwards*, 15 Blatchf. 402, Fed. Cas. No. 6,784.

Neither the referee nor district court can obtain jurisdiction in a summary proceeding by the trustee against an adverse claimant who obtained the property before the proceedings in bankruptcy were instituted by consent of the proposed defendant.

Bardes v. First Nat. Bank, 178 U. S. 538, 44 L. ed. 1182, 20 Sup. Ct. Rep. 1000; *Re Steuer*, 104 Fed. 976.

Consent will not avail to give jurisdiction where the law provides the way in which the jurisdiction is to be invoked, and that way has not been complied with.

12 Enc. Pl. & Pr. p. 120.

A person may consent to the forum, but no consent of his can change the mode of procedure.

Windsor v. McVeigh, 93 U. S. 282, 23 L. ed. 917.

The party complaining of the exercise of the jurisdiction of the bankruptcy court is not precluded from raising such objection because he contested a rule to show cause made by such court.

Marshall v. Knox, 16 Wall. 551, 21 L. ed. 481.

*Mr. Chief Justice **Fuller** delivered the [24] opinion of the court:

The circuit court of appeals was called on to review the orders of the referee as confirmed by the district judge, by which Comingor was required to pay over the sums of \$3,398.90 and \$3,200 respectively, and the recommendation that he be dealt with for not complying therewith.

On the face of his responses, from first to last, it appeared that Comingor insisted that the \$3,200 had been paid by him to his counsel while they were acting for him, before the bankruptcy proceedings were commenced, for professional services rendered to him as assignee; and that he had retained and expended the \$3,398.90 as his commissions as assignee in reliance on the belief that he was entitled to that amount on final settlement. He thus asserted a claim to each of these sums adversely to the bankrupt, and as outstanding when the petition in bankruptcy was filed, and these claims were in fact passed upon by the referee and the district judge as being adverse. This brought the controversy within the

ruling in *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, and the questions attempted to be litigated before the referee and in the district court as to the allowance of the two amounts could only be raised in the district court by consent, and then only by plenary suit. If the jurisdiction of the district court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there.

The district court held that Cominger had voluntarily accepted its jurisdiction, and that he had also consented that the court might proceed against him summarily. As the circuit court of appeals said, speaking through Severens, J.: "It was upon the ground of the petitioner's implied consent to the mode adopted that the district judge justified it."

[25] So far as this view rested on the contention that, as Cominger *was joined with the bankrupts in the petition for adjudication, he therefore continued to be subject to the orders of the court without other process, we agree with the circuit court of appeals that it cannot be sustained. As we understand the record, the petition in bankruptcy set up no cause of action and prayed no special relief against Cominger, and he was apparently made a defendant because adjudication would put an end to further action by him as assignee. Clearly, as the circuit court of appeals points out, it would be inadmissible to permit creditors to deprive an assignee of his right to have his claims adjudicated by the proper court and in the customary mode of proceeding, by the device of making him a party to the petition for an adjudication and so attempting to bring him into the case for all purposes. Nor in this matter was any petition by the trustee, or by any other person, filed against Cominger to recover these sums, and the orders were entered by the referee on the record as it stood, so that there was no pretense whatever of a plenary suit in that court, in form or in substance.

The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If Cominger had been entitled to a trial by jury, he could not have obtained it as of right. The collection of the amounts found due would be enforceable, not by execution, but by commitment.

"We think that it could not have been the intention of Congress thus to deprive parties claiming property of which they were in possession of the usual processes of the law in defense of their rights." *Marshall v. Knox*, 16 Wall. 556, 21 L. ed. 484; *Smith v. Mason*, 14 Wall. 419, 20 L. ed. 748.

The question is whether the district court had jurisdiction to finally adjudicate the merits in this proceeding.

We have just held in *Mueller v. Nugent*, 184 U. S. 1, ante, 405, 22 Sup. Ct. Rep. 269, that the district court has power to ascertain whether in the particular instance

the claim asserted is an adverse claim existing at the time the petition was filed. And according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits. Jurisdiction as to the subject-matter may be *limited in various ways, as to civil and criminal cases, cases at common law or in equity or in admiralty, probate cases, or cases under special statutes, to particular classes of persons, to proceedings in particular modes, and so on. In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where, in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.

We are of opinion that even if Cominger could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject-matter, that is, jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered. He had been restrained from settling his accounts in the state court in the action pending there, and the district court, instead of dissolving the injunction declining jurisdiction, and leaving the litigation to the state court, either in due course or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the circuit court of appeals was right in its decree of reversal.

Decree affirmed.

Mr. Justice Harlan dissented.

*LOUISVILLE & NASHVILLE RAIL-ROAD COMPANY, *Plff in Err.*, [27]

v.

T. R. EUBANK, Doing Business under the Name of T. R. Eubank & Company.

(See S. C. Reporter's ed. 27-49.)

Constitutional law — charging more for shorter than for longer haul—interference with interstate commerce.

1. An unconstitutional regulation of Inter-

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* (Va.) 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041, and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

184 U. S.

state commerce is made by Ky. Const. § 218, prohibiting common carriers from charging more for a shorter than for a longer haul, so far as its provisions extend to a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state, as the carrier is thus compelled to adjust, regulate, or fix his interstate rates with some reference to his rates within the state.

2. Any state statute which in its direct result regulates the interstate transportation of a single individual carrier violates the commerce clause of the United States Constitution.

[No. 10.]

Argued November 14, 1900. Ordered for Reargument March 25, 1901. Reargued November 8, 11, 1901. Decided January 27, 1902.

IN ERROR to the Circuit Court of Simpson County, State of Kentucky, to review a judgment in favor of plaintiff in an action against a railroad corporation for unlawful transportation charges. *Reversed.*

Statement by Mr. Justice **Peckham**:

The railroad company has brought this case here by a writ of error to the circuit court of Simpson county, state of Kentucky, that being the highest court of the state in which a decision could be had, for the purpose of reviewing the judgment of that court in favor of the defendant in error (plaintiff below) based upon a violation of § 218 of the Constitution of Kentucky. That section reads as follows:

“It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of [28] passengers, or of property of like kind,* under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this state to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission such common carrier, or person, or corporation owning or operating a railroad in this state may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this state may be relieved from the operations of this section.”

This action involves the question of the validity of the above section, as construed by the court below with reference to interstate commerce.

The plaintiff, T. R. Eubank, on June 9, 184 U. S.

1899, duly filed in the clerk's office of the Simpson county circuit court a petition in which he alleged, in substance, that he was doing business in Franklin, in the state of Kentucky; that the defendant was a corporation chartered under the laws of that state as a common carrier, and that it owned and operated a line of railway for the transportation of freight and passengers from Nashville, Tennessee, running north through Franklin, Kentucky, and continuing on to Louisville, Kentucky, a distance of 185 miles, and that the distance from Franklin, Kentucky, to Louisville, Kentucky, over the defendant's line, is 134 miles, and is included in and a part of the distance of 185 miles from Nashville to Louisville; that during the years 1897 and 1898 the defendant transported tobacco for the complainant from Franklin, Kentucky, to Louisville, Kentucky, at the rate of 25 cents per 100 pounds, and that during all this time the plaintiff was shipping and did ship and transport tobacco from Nashville, Tennessee, to Louisville, Kentucky, over the same road, at the sum of 12 cents for 100 pounds; and the complainant averred in his petition *that the company had no right to [29] charge him a greater freight rate for the transportation of tobacco from Franklin, Kentucky, to Louisville, Kentucky, than 12 cents per 100 pounds, and he therefore brought suit to recover back from the defendant the difference between that sum and the sum paid by him, viz., 13 cents per 100 pounds, the amount carried being 145,245 pounds.

The defendant tendered special and general demurrers to this petition on the ground, among others, that it sought to make a law of the state of Kentucky applicable to a rate charged by defendant from Nashville, Tennessee, to Louisville, Kentucky; and that if the law were so construed it would become a regulation of interstate commerce and be invalid, because in conflict with and repugnant to subsection 3 of § 8 of article I. of the Constitution of the United States, and also in violation of the Interstate Commerce Act.

These demurrers were overruled by the court, and thereupon the defendant tendered its answer, setting up its defenses in four separate paragraphs.

By paragraph 1 it substantially admitted the transportation of the tobacco at the rates stated in the plaintiff's petition. In the 2d paragraph it averred that its rate of 12 cents per 100 pounds for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, was made under and in conformity with the act of Congress called the Interstate Commerce Act, above referred to, and that in pursuance of the 6th section of that act the rate was printed, posted, and kept open to public inspection, and duly filed with the Interstate Commerce Commission, and that by virtue of that act it would have been unlawful for the defendant to have charged either more or less than the rate of 12 cents per 100 pounds from Nashville, Tennessee, to Louisville, Ken-

tucky. The defendant further averred that § 218 of the Constitution of the state of Kentucky applied only to a railroad in that state, and had no application to that portion of any railroad that was without the state of Kentucky, and hence had no application to the railroad of the defendant between Nashville, Tennessee, and the state [30] line between Tennessee and Kentucky; *and it was averred that the rates which the defendant might charge from Franklin, Kentucky, to Louisville, Kentucky, were not and could not become unlawful under the long-and-short-haul laws of Kentucky, by reason of any rates that might be charged by the defendant on traffic transported from Nashville, Tennessee, to Louisville, Kentucky; and that the long-and-short-haul laws of Kentucky could apply only when both the long and short hauls were within Kentucky, and that the hauls from Nashville, Tennessee, to Louisville, Kentucky, were not within the jurisdiction of Kentucky.

Defendant further averred that at the times named in the petition it charged no rate on tobacco to Louisville, Kentucky, from any point in the state of Kentucky on the same line with Franklin and farther from Louisville than Franklin, less than the rate of 25 cents per 100 pounds charged by it from Franklin to Louisville. It was further averred that if the constitutional provision in question were so construed as to make this rate of 25 cents per 100 pounds from Franklin, Kentucky, to Louisville, Kentucky, unlawful by reason of the less rate charged by it from Nashville, Tennessee, to Louisville, Kentucky, the result would be to regulate commerce among the states by the long-and-short-haul laws of Kentucky, and to compel the defendant to, and it would, raise its rates of 12 cents per 100 pounds from Nashville, Tennessee, to Louisville, Kentucky, unless it could obtain the authority from the railroad commission of Kentucky to charge the less rate from Nashville, Tennessee, to Louisville, Kentucky; that thereby the long-and-short-haul laws of Kentucky would regulate commerce among the states, and would be in conflict with and repugnant to the Interstate Commerce Act, and also subsection 3 of § 8, article I. Constitution of the United States, and would therefore be void; and there was contained in the paragraph the following averment: that "the defendant hereby sets up, pleads, and relies on the right and privilege secured to it by the said act of Congress and by said provisions of the Constitution of the United States, to have its interstate traffic and the commerce conducted among the states and between Kentucky and Tennessee regulated by the Constitution and the [31] laws of the *United States, and to be free from the regulation and interference of the Constitution and laws of the state of Kentucky."

By paragraph 3 the defendant set up the statute of limitations of the state of Kentucky.

By paragraph 4 the defendant averred that its rate on tobacco from Franklin to

Louisville during the times mentioned was much less than the defendant's standard tariff rates for that distance, and that the less rate resulted from and was necessitated by the fact of competition existing at Franklin, Kentucky, which arose from the fact that tobacco could be and was hauled by wagon from Franklin, Kentucky, to Bowling Green, Kentucky, and then shipped to Louisville on boats plying the Green and Barren and Ohio rivers at extremely low rates of transportation, and on account of competition the defendant had to and did accept the rate of 25 cents per 100 pounds; that but for that competition it would and could have charged a much higher rate, which higher rate would have been just and reasonable, and that the rate of 25 cents per 100 pounds was just and reasonable in itself by reason of the competition.

It was further averred that Nashville, Tennessee, was situated on the Cumberland river, navigable by boats plying between Nashville and various points on the Ohio river, including Louisville, Kentucky, and that these boats transported tobacco from Nashville to Louisville at extremely low rates of transportation, and that by reason of this water competition Nashville enjoyed extremely low rates for the shipment of tobacco to Louisville and many other places; and if the defendant, at any of the times mentioned, had charged more for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, than 12 cents per 100 pounds, it would not have secured the transportation of any of said tobacco from Nashville to Louisville, but the same would have been shipped from Nashville to Louisville, or some other tobacco market, at rates less than 12 cents per 100 pounds, and thereby the defendant would have wholly lost the transportation of any tobacco from Nashville to Louisville; and that the defendant succeeded in obtaining, even at the low rate of 12 cents per 100 pounds, *the [32] transportation of only twelve hogsheads of tobacco from Nashville to Louisville during the time named in the petition. It was averred that the tobacco transported by the defendant from Nashville to Louisville was transported under the circumstances and conditions thus stated, and that none of the same could have been transported at any higher rate than 12 cents per 100 pounds, and that at none of the times mentioned in the petition was the transportation of tobacco from Franklin to Louisville affected by the circumstances or conditions set forth regarding the transportation of tobacco from Nashville to Louisville, and that the competition at Nashville differed substantially from the competition at Franklin, in that it was far more effective and necessitated a much lower rate, and that in making the difference in rates between Franklin and Nashville the defendant simply recognized the substantial difference in the circumstances and conditions of the transportation from and to the two places.

It was also averred that it was to the advantage of the defendant to transport the

tobacco that it might secure from Nashville to Louisville at the rate of 12 cents per 100 pounds, rather than lose such transportation altogether, as it would have done if it had attempted to charge more than the rate of 12 cents per 100 pounds; but the fact that the defendant did transport tobacco from Nashville to Louisville at 12 cents per 100 pounds did not increase the rate that it charged from Franklin to Louisville, or make the rate from Franklin to Louisville any higher than it would otherwise have been; and that if it had refused to transport tobacco from Nashville to Louisville for any less rate than the rate charged from Franklin to Louisville, the Nashville shippers of tobacco could and would have shipped it to Louisville or other tobacco markets over routes which this defendant could not control and at rates not exceeding 12 cents per 100 pounds; and that the defendant could and did engage in the transportation of tobacco from Nashville to Louisville at the rate of 12 cents per 100 pounds without in anywise injuring Franklin or any person or interest at Franklin.

Other defenses were set up not now material.

[33] *The plaintiff demurred to paragraphs 2, 3, and 4 of the defendant's answer, which demurrer was sustained by the court. The plaintiff then moved for judgment for the plaintiff upon the pleadings, which motion, under objection by the defendant, the court granted, and thereupon it was adjudged that the plaintiff recover of the defendant the sum of \$188.81 and his costs.

Mr. Walker D. Hines argued the cause, and, with *Mr. H. W. Bruce*, filed a brief for plaintiff in error:

Ky. Const. § 218, as construed by the lower court, prohibits charging greater rates on tobacco from Franklin, Kentucky, to Louisville, Kentucky, than from Nashville, Tennessee, to Louisville, Kentucky, unless the railroad commission of Kentucky shall authorize a less rate from Nashville to Louisville, and is therefore in direct contravention of the commerce clause of the Federal Constitution.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The rate from Nashville, Tennessee, to Louisville, Kentucky, which it was contended could not be charged without authority from the railroad commission of Kentucky, was established in accordance with the Interstate Commerce Act, and by virtue of that act it would have been unlawful for the railroad company to have charged either more or less than the rate thus duly established.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

The policy of Congress is not to destroy, but to protect, legitimate competitive interstate traffic.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 184 U. S.

844; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45.

It is only rates for the transportation of persons and property between points within the state, that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

No counsel for defendant in error.

**Mr. Justice Peckham*, after making the foregoing statement of facts, delivered the opinion of the court:

The writ of error in this case does not bring up for review any judgment of the court of appeals of the state of Kentucky, the highest court of that state. It appears that the circuit court of that state is the highest court in which a decision of the case could be had, presumably on account of the amount of the judgment. There was no opinion delivered by the judge holding the court in which the case was tried, and as the case did not go to the highest court of that state, we are without the benefit of any written opinion of the courts of Kentucky in regard to the question involved. We have already held, in the case of *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, ante, 298, 22 Sup. Ct. Rep. 95, that the section of the Kentucky Constitution above set forth, as applied to places all of which are within the state, violates no provision of the Federal Constitution.

The effect of the decision by the state court now under review is to hold that the provision of § 218 of the state Constitution is not confined to a case where the long and short hauls are both within the state of Kentucky, but that it extends to and embraces a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state; and the question is whether the provision of that Constitution as thus construed is or is not a violation of the commerce clause of the Constitution of the United States. [34]

It would seem that the foundation upon which the validity of the constitutional provision is based is the theory that it operates solely upon the rate within the state, making that rate unlawful if it exceed the rate for the longer distance over the same line in the same direction, though, as in this case, the longer distance is from Nashville, Tennessee, to Louisville, Kentucky. The claim must be that the only effect of the provision is to regulate the rate between points within the state, and that it has no direct effect upon, nor does it in any degree regulate or affect, the rate between points outside and those points which are within the

state. The contention is that the state does not prescribe or regulate the rates outside of its borders; that the company may announce and enforce any rate it pleases regarding interstate commerce. It simply directs that between points within the state of Kentucky the charge shall not be greater for a shorter haul than for a longer haul, even though such longer haul may be between a point outside and one inside of the state; that this does not constitute an interference with or a regulation by the state of interstate commerce, and hence the provision is valid.

If this contention were correct, and the constitutional provision as construed by the state court did not by its enforcement regulate or immediately and directly influence and affect the interstate commerce of defendant, either as to amount or rates, the provision in question would be valid. But is it correct? And is there no such immediate influence upon or regulation of the interstate commerce of the defendant?

By the demurrer and the motion for judgment on the pleadings it is admitted that the rates from all points on the defendant's road within the state of Kentucky to Louisville for the transportation of tobacco are not too high, but are in fact just and reasonable in themselves, and to that extent the general obligation of a carrier to make charges that are just and reasonable is fulfilled. There is also a rate for the transportation of tobacco from Nashville to Louisville of 12 cents per 100 pounds, and that rate is arrived at because of the existence [35] of water competition between the two points which absolutely prevents the company from making a greater charge, for if it did it would get no business; and yet on account of the fact that trains are to be run in any event and expenses incurred by reason of the operation of the road, it pays the company to take the tobacco at the rate named, even though it is below what would otherwise be a fair and reasonable compensation for the transportation. It follows, therefore, and the fact is averred, that although under the circumstances it pays the company to transport the tobacco from Louisville at the rate of 12 cents per 100 pounds, yet if it were confronted with the alternative of either giving up such transportation (which a charge of 25 cents per 100 pounds would necessarily result in) or of reducing the charge from Franklin to Louisville to 12 cents per 100 pounds for tobacco, it would be compelled to give up the transportation from Nashville rather than reduce the charge from Franklin to Louisville. If the state of Kentucky has the right to base its provision for the rate of a short haul within its own borders by comparison with the rate for a longer haul partly within and partly without its own borders, notwithstanding the direct effect of a limitation arrived at by such comparison may be the regulation or even the suppression of the interstate commerce of the carrier, then this provision is valid; otherwise it would seem to be the reverse.

That the railroad commission is authorized upon application to permit the company to charge less for longer than for shorter distances is immaterial. If the provision in question, if enforced, does directly affect interstate commerce, its invalidity is not cured by the fact that, if the railroad commission should choose, it might permit the interstate charges to remain. In either case the interference is illegal.

The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the states in the carrying of tobacco. The necessary result of the provision under "the circum-[36]stances set up in the answer directly affects interstate rates, or, in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. The fact is not altered by putting the proposition in another form, and saying that the constitutional provision only prevents the carrier from charging a greater sum for the shorter distance from Franklin to Louisville, both within the state, unless the consent of the railroad commission is obtained, because in either event the charge from Nashville to Louisville enters into and forms a part of the real subject-matter of the provision, the greater sum for the shorter distance within the state being compared with the lesser sum for the longer distance without the state; and the prohibition is absolute, unless the consent of the commission is obtained, from charging any more for the shorter distance within the state than for the longer distance partly within and partly without the state. And in this case, in order to maintain its state rate, it must fix its interstate rate at an amount which prohibits its doing interstate business.

We fully recognize the rule that the effect of a state constitutional provision, or of any state legislation upon interstate commerce, must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated; and in that event the effect of the provision is direct and important, and not a mere incident.

Although not exactly in point, yet the case of *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, is somewhat analogous in principle. In that case chapter 114 of the Revised Statutes of Illinois, § 126, came under consideration. That section enacted that if any railroad corporation should charge for the transportation of freight, etc., upon its railroad, for any distance within the state, the same or a

[37] greater amount of toll or compensation than is at the same time charged, collected,* or received for the transportation in the same direction of any passenger, etc., over a greater distance of the same road, such charges should be deemed prima facie evidence of unjust discrimination prohibited by the act, and penalties were provided for its violation.

An action was brought to recover for a violation of the provisions of the act, and in the declaration it was alleged that the company had charged Elder & McKinney for transporting goods from Peoria in the state of Illinois to New York city at the rate of 15 cents per 100 pounds, and on the same day the company charged Bailey & Swannell for transporting another carload of the same kind of goods from Gilman in the state of Illinois to the city of New York at the rate of 25 cents per 100 pounds, although the carload transported for Elder & McKinney from Peoria was carried 86 miles further in the state of Illinois than the other carload of the same weight; and it was claimed that as the freight was of the same class in both instances, and carried over the same route, except as to the difference of distance, a discrimination against Bailey & Swannell was made in the charges against them, as compared with those given to Elder & McKinney, and hence suit was brought. Mr. Justice Miller delivered the opinion of this court, in which he expressed some doubt whether the statute of Illinois had been correctly construed by the court below, yet as that court had given an interpretation to it which made it apply to commerce among the states, although the contract was made within the state of Illinois and a part of its performance was within the same state, this court was held to be bound as to the construction given to the act by the state court. What that construction was is stated by the court itself. It said:

"We see no reason to depart from the conclusion reached in this case when it was here before. See *People v. Wabash, St. L. & P. R. Co.* 104 Ill. 476. But to avoid misapprehension we deem it advisable to state explicitly that we disclaim any idea that Illinois has authority to regulate commerce in any other state. We understand and simply hold that, in the absence of anything showing to the contrary, a single and entire contract to carry for a gross sum from Gilman, in this state,* to the city of New York, implies necessarily that that sum is charged proportionately for the carriage on every part of that distance; and that a single and entire contract to carry for a gross sum from Peoria, in this state, to the city of New York, implies the same thing; and that, therefore, when it is shown that there is charged for carriage upon the same line less from Peoria to New York (the greater distance) than from Gilman to New York (the less distance), and nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond the limits of this state, a prima facie case is made out of unjust discrimination under our statute oc-

[38] 184 U. S. U. S., Book 46.

curing within this state. We hold that the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the state line proportionately with the balance of the line. The judgment is affirmed." *Wabash, St. L. & P. R. Co. v. Illinois*, 105 Ill. 236.

In regard to this question, Mr. Justice Miller, in the course of his opinion, said:

"It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the state, and so much more to commerce in other states. The transportation, which is the subject-matter of the contract, being the point on which the decision of the case must rest, was it a transportation limited to the state of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the state of Illinois, and the city of New York in the state of New York?"

The court held it was the latter, and said, after examining the other cases (page 575, L. ed. p. 250, Inters. Com. Rep. p. 37, Sup. Ct. Rep. p. 12):

"We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law."

*In regard to the effect of the Illinois[39] statute upon interstate commerce, it was further said:

"Let us see precisely what is the degree of interference with transportation of property or persons from one state to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the state of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the state of Illinois, but when the car which carries these goods is to cross the line of that state, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that state, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that, while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of 15 cents per 100 pounds, he is

not permitted to do so because the Illinois railroad company has already charged at the rate of 25 cents per 100 pounds for carriage to Gilman, in Illinois, which is 86 miles shorter than the distance to Peoria.

[40] "So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of 15 cents per 100 pounds for a carload, but is compelled to pay at the rate of 25 cents per 100 pounds, because the railroad company has received from a person residing at Gilman 25 cents per 100 pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to *prevent unjust discrimination, as construed by the supreme court of that state. The effect of it is that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of 23 miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York."

Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville, and asks the defendant to carry it. It responds that it would like to carry it at the rate of 12 cents per 100 pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than 12 cents, and that if it were to carry at the rate of 12 cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that state, which would entail a loss in the business between those points which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than 12 cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the state to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the state? If it be, is not the law which accomplishes this result a direct interference by the state with interstate commerce? And if it do not lower its state rates, and in consequence must raise its interstate rates in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the state, of that commerce which ought to be free therefrom?

In *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547, it was said: "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with

its freedom, does encroach upon the exclusive power of Congress."

*The vice of the provision lies in the regulation of the rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state. [41]

The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust, or fix his interstate rates with some reference at least to his rates within the state, thus enabling the state by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.

It has been urged that, assuming Congress to have the power to fix interstate rates, if that body should prescribe the interstate rate for the transportation of commodities (tobacco, for instance) from Nashville to Louisville, for a railroad carrier, that the state might then fix the local rates by that standard, and if so, why could it not do the same thing when the carrier itself fixes its interstate rate? In the case supposed, the rate is fixed and the interstate commerce regulated by the body which has the power to impose such rate on the carrier and to regulate its interstate commerce. The state might, in the case supposed, enact that the road should not charge more, or at a greater rate, for a short haul within the state, than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it, the state could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the state, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists.

It seems also to be thought that there is no regulation of commerce, *provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation, than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its direct result regulates the interstate transportation of a single individual carrier, or company of carriers, violates the provision in question; that it is no answer to say the commodity can still be transport-

ed by another carrier or by water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company.

It is also argued that if Congress should enact that an interstate rate shall be the sum of the local rates prescribed by the several states for the parts in the line within its borders, it could not correctly be maintained that such enactment would amount to an interference with the power of the state over local rates, and the mere fact that Congress accepted the local rates and made them the basis of an interstate rate could not be held to be an interference by Congress with local commerce; and if not, how can it be held an interference by the state when it recognizes existing interstate rates as a basis for its legislation concerning local rates? We think there is no analogy between the two cases.

In the case supposed the states have fixed the local rates within their respective borders, and the action of Congress in fixing their sum as the rate for interstate commerce does not in any way regulate or interfere with the respective state rates already, or from time to time, adopted by the state. In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and on the other hand the state by such a statute regulates the local rate, but that it has the right to do.

Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate.

[43] *In the case at bar the state claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to an interference with, and a regulation of, commerce between the states, carried on, though it may be, by only a single company.

We are of opinion that as construed by the state court, and so far as it is made applicable to or affects interstate commerce, the 218th section of the Constitution of Kentucky is invalid, and the judgment of the Circuit Court of Simpson County, Kentucky, is therefore reversed, and the case remanded to that court for such further proceedings therein as shall not be inconsistent with this opinion.

And it is so ordered.

Mr. Justice **Brewer**, with whom concurred Mr. Justice **Gray**, dissenting:

I am unable to concur in the opinion and judgment in this case. We have just held that § 218 of the Constitution of Kentucky and § 820 of the Kentucky Statutes, based thereon, are not in conflict with the Consti-

tution of the United States when applied to a case in which both the long and the short haul are wholly within the state. *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, ante, 298, 22 Sup. Ct. Rep. 95. The constitutional section, briefly stated, forbids a carrier from charging more for a short than for a long haul within which the short haul is included. The prohibition is upon the short-haul charge. There is no prohibition in respect to the long-haul charge, no restriction of the power of the carrier over it, no regulation concerning it, no prescribing by whom or how or when it shall be made,—all this is absolutely untouched by the section.

The proposition now advanced is that while the state may constitutionally prohibit a short-haul charge in excess of a long-haul charge, it can do so only when both[44] hauls are within the limits of the state. Nothing in the section makes such limitation. Nothing in the Federal Constitution, in terms, at least, restricts the power of the state in this respect over its internal commerce. This question may arise under either of two conditions, one in which Congress has prescribed the interstate rate, and the other in which it has left the matter to be fixed by the carrier.

Considering the first of these conditions, suppose Congress in the exercise of its power over interstate commerce should enact that all interstate passengers be charged exactly 4 cents a mile, and the railroad company, while obeying that statute in its charges for carrying passengers from Nashville to Louisville, should from Franklin to Louisville charge 5 cents a mile, could it be pretended that the prohibition of the state Constitution against charging more for a short haul than for a long haul was not operative because an interference with interstate commerce? Has the state no power to compel its corporations to give to parties traveling within its limits the same rates and privileges that Congress prescribes for interstate passengers? And can it not do so by simply prohibiting a greater charge for a long than a short haul clause? In other words, is it interfering with interstate commerce when the state, not prescribing the charges for interstate travel, simply requires that the passenger shall be charged no higher rates for local travel?

The form in which the state legislation is cast cannot be vital in determining the question of power. If an act which in terms prescribes a rate per mile for local travel the same as has been prescribed by Congress for interstate travel is within the power of the state (and that it is cannot be doubted), surely one accomplishing the same thing by simply forbidding the carrier to charge more for a short than for a long haul is likewise within its power. The state is merely using the standard fixed by Congress, and enforcing that standard in respect to local rates. In *Miller v. Swann*, 150 U. S. 132, sub nom. *Miller v. Anderson*, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52, it was held that the construction of that part of the state

statute which authorized the disposal of the [45] state's lands in accordance *with the provisions of the public land laws of the United States involved no Federal question. The reference to the land laws of the United States was simply by way of selecting a standard.

But if a state may select as a standard the interstate rates prescribed by Congress, and make its local rates the same, without interfering with interstate commerce, it would certainly seem that it could in like manner take the interstate rates which the carrier himself prescribes, and compel conformity of local rates thereto, and still not be subject to the charge of interfering with interstate commerce. It is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the state respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words, action by the carrier in pursuit of its own financial interests overturns the Constitution and statute of the state when like action by Congress in the exercise of its constitutional power does not.

It must be borne in mind that there is here no question of reasonableness of rates. It is true the carrier avers that the rate of 25 cents per 100 pounds from Franklin to Louisville was just and reasonable, but it also avers that it made that charge only by reason of water competition, whereas "but for that competition the defendant would and could have charged a much higher rate, which higher rate would have been just and reasonable." According to these allegations, while 25 cents was a just and reasonable rate, a much higher rate would also be just and reasonable; and it is nowhere alleged that a rate of 12 cents—that from Nashville to Louisville—would have been unreasonable as a rate between Franklin and Louisville. If invalid at all, it is not because it is no higher than the rate between Nashville and Louisville, but because it is in and of itself unreasonably low for the services rendered. As the amount of tobacco which the defendant shipped from Nashville to Louisville between February 23 and July 15 was only twelve hogsheads, weighing 20,910 pounds, and paying \$25.09 freight, it is obvious that the loss of this entire amount of freight would not have worked a confiscation of the defendant's railroad property, if that be the test of reasonableness so far as *the power of the legis- [46] lature over rates is concerned, though as to the true test of reasonableness, see *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom.* *Cotting v. Godard*, *ante*, 92, 22 Sup. Ct. Rep. 30.

The question may be looked at in another light. The railroad company avers that it made its rate of 12 cents from Nashville to Louisville in conformity with the act of Congress; that the said rate was duly printed, posted, and kept open to public inspection, and that by virtue of the Interstate Commerce Act it was unlawful for it

to charge either more or less than the rate of 12 cents from Nashville to Louisville. Suppose the legislature of Kentucky, accepting that statement as correct, should pass an act in terms prohibiting this company from charging more than 12 cents from Franklin to Louisville, who would undertake to say that such act was unconstitutional without evidence that in and of itself the rate of 12 cents was unreasonable within some recognized definition of reasonableness? Does the act become *prima facie* unconstitutional because, instead of naming 12 cents, the legislature forbids the carrier from charging more than 12 cents, which the carrier has fixed as its rate from Nashville to Louisville?

Again, Louisville is on the northern border of the state, and the route of defendant's railroad extends through the state, and thence southward to Nashville. Every place on the line of the road within the limits of Kentucky makes, therefore, a shorter haul to Louisville than the haul from Nashville, and is included in the latter. Under the reasoning of this opinion the state of Kentucky has no power to prescribe a rate from any point within the state of Kentucky to Louisville which shall be less than the rate which the company has fixed from Nashville to Louisville. Nor are we to suppose that competition between Nashville and Louisville is limited to the matter of the transportation of tobacco. It is a competition between water and railroad transportation, and naturally extends to all articles of freight, as well as to passengers. By the reasoning of the opinion the state of Kentucky would be powerless to compel the Louisville & Nashville Company to charge a less than the competitive Nashville rate, no matter how reasonable, from any *point with- [47] in its borders to Louisville. It does not seem to me that much is left of state control over local rates.

In the opinion of the court it is said:

"The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the states in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or, in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. . . . We fully recognize the rule that the effect of a state constitutional provision, or of any state legislation, upon interstate commerce, must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated; and in

that event the effect of the provision is direct and important, and not a mere incident."

The fallacy of this is that it makes transportation by the Louisville & Nashville Company essential to commerce between Nashville and Louisville. The burden of the complaint on the part of the company is that there is competition at Nashville for the transportation of tobacco to Louisville, and that it must make a low charge to get a share of that transportation; not that the tobacco will not be transported, not that commerce will be interfered with, but that this company will lose some portion of that transportation. In other words, the power of the state of Kentucky over this corporation, which it has created, in respect to local rates, is denied in order that the corporation may obtain some portion of interstate transportation. I think we may well recall what was said only three weeks since by this court in the opinion in the case referred to, of this same company against the commonwealth of Kentucky:

[48] "It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a state. *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 439, 39 L. ed. 1043, 1046, 15 Sup. Ct. Rep. 896; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532."

Another matter is worthy of consideration. Suppose that Congress enacts that an interstate rate shall be the sum of the local rates prescribed by the several states for the parts of the through line within their borders. Will it be contended that this is an interference with the power of the state over local rates? Does the mere fact that Congress accepts the local rates and makes them the basis of an interstate rate make it an interference by Congress with local commerce? And if that be not so, how, on the other hand, can it be held that a mere recognition by the state of existing interstate rates as a basis for its legislation concerning local rate is an interference with interstate commerce?

I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the legislature of Kentucky may see fit to enforce by simply saying that outside of the state it somewhere touches a competitive point, and is forced to reduce its interstate rates by reason of the competition there existing. In other words, if in the present case there was in fact no water competition between Nashville and Louisville, or if there was no tobacco shipped from Nashville to Louisville, I take

it no one would seriously contend that the railroad company, by affirming that there was, could upset the provisions of the Kentucky legislation. There would be a question of fact to be determined, even according to the theory that competition in interstate rates has anything to do with local rates, and that question of fact might be presented in actions like the present,—actions for overcharges, actions in which the parties would have the right to trial by jury. Suppose that one jury, upon the testimony presented before it, should find that there was water competition between Nashville and Louisville, and that there was tobacco shipped between the two places, and another jury, upon the testimony introduced in a succeeding case, exactly the contrary, is the legislation of Kentucky to be declared unconstitutional in one case and constitutional in the other?

It seems to me, in conclusion, that a state legislature has full power over local rates, subject only to the restriction that it cannot require a carrier to carry without reasonable compensation, and that when it legislates for local rates alone it may fix those rates by figures, or upon the basis of any standard which it sees fit to adopt, and the mere fact that it bases them upon some standard is not legislation regulating that standard,—the local rates are alone the matter regulated. For these reasons I cannot concur in the opinion and judgment.

I am authorized to state that Mr. Justice Gray agrees with this dissent.

UNITED STATES, *Appt.*,
v.
SOUTHERN PACIFIC RAILROAD COMPANY, George Loomis, *et al.*

(See S. C. Reporter's ed. 49-61.)

Public lands—bona fide purchasers of patented lands—notice that government questions the patentee's title—bona fide purchasers of unpatented lands.

1. Purchasers for value and in good faith, of lands patented to the Southern Pacific Railroad Company as within the scope of the grant made to that company by the act of March 3, 1871 (16 Stat. at L. 573, chap. 122), are bona fide purchasers and as such are protected by act of March 2, 1896 (29 Stat. at L. 42, chap. 39), although they had notice of a change of opinion on the part of the officers of the government as to the validity of the title of the railroad company to such lands.
2. Persons who have contracted with the Southern Pacific Railroad Company for unpatented lands so situated with respect to its constructed road as to be apparently within the scope of its grant are protected by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376), not only as to purchases prior to the date of such act, but as to any made before the time of final adjustment.
3. One is not a bona fide purchaser, from a grantee of the Southern Pacific Railroad

Company, of lands apparently within the scope of its grant, which had not been conveyed to or for the use of such company, so as to be protected by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376), § 5, who pays nothing therefor except by giving his legal services and making advances of money in the way of taxes, under his agreement with such grantee to protect it in its purchase money and receive for himself whatever he could obtain over and above that sum.

[No. 25.]

Argued April 18, 19, 1901. Decided January 27, 1902.

APPPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of California, which quieted the title of the United States government to land within the limits of a forfeited railroad grant. *Affirmed in part and reversed in part.*

See same case below, 38 C. C. A. 637, 98 Fed. 45.

Statement by Mr. Justice **Brewer**:

[50] *This is a continuation of the case which was before this court and decided in 1897. 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18. It was brought to quiet the title of the government to some 700,000 acres of land within the limits of the forfeited grant to the Atlantic & Pacific Railroad Company, and claimed by the defendants under certain junior grants to the Southern Pacific Railroad Company. The decree in the circuit court quieted, as against the Southern Pacific Company, the title of the government to all the lands. The other defendants asserted title or claimed rights to certain portions of the land by virtue of conveyances from or contracts with the Southern Pacific Company, and the decree provided: "Nor shall this decree in anywise affect any rights which the defendants, or any of them, other than the said Southern Pacific Railroad Company, now have or may hereafter acquire in, to, or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled 'An Act to Provide for the Adjustment of Land Grants Made by Congress to Aid in the Construction of Railroads and for the Forfeiture of Unearned Lands and for Other Purposes,' approved March 3, 1887."

This decree was affirmed by this court so far as the Southern Pacific Company as well as the trustees in its mortgage were concerned, the court saying, in reference to that portion of the decree just quoted (p. 65, L. ed. p. 382, Sup. Ct. Rep. p. 34):

[51] *"Instead of leaving undetermined the matters in dispute between the United States and the defendants other than the Southern Pacific Railroad Company, the circuit court should have determined, by its final decree, what rights those defendants have by virtue of the above act of March 3, 1887 (24 Stat. at L. 556, chap. 376), in the lands or any of them now in dispute and
426

claimed by the United States. The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that or any other act of Congress. The government was entitled to a decree quieting its title to all the lands described in its pleadings, except those, if any, that are protected, in the hands of claimants, by acts of Congress. *United States v. Winona & St. P. R. Co.* 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; *Winona & St. P. R. Co. v. United States*, 165 U. S. 483, 41 L. ed. 798, 17 Sup. Ct. Rep. 381. But as the government has not appealed, the decree cannot be reversed for the error of the circuit court in not finally disposing of the issues between the United States and the individual defendants who claim under the Southern Pacific Railroad Company.

"The result is that the decree must be affirmed in all respects as to the Southern Pacific Railroad Company, as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the government to proceed in the circuit court to a final decree as to those defendants, and it is so ordered."

On the return of the mandate to the circuit court the United States dismissed their bill against the defendants other than the railroad company and its mortgage trustee, without prejudice as to all, except certain specified tracts, amounting in the aggregate to about 52,600 acres, of which amount 9,284 were patented by the United States to the Southern Pacific, the patents bearing date March 29, 1876, April 4, 1879, December 27, 1883, and January 9, 1885, and 43,315 remained unpatented. In respect to these tracts the case proceeded to final hearing, which resulted in a decree in favor of the defendants (88 Fed. 832), confirming their title to the lands patented, and adjudging them bona fide purchasers within the meaning of the act of Congress of March 3, 1887, of the lands not patented. From *this decree the United States appealed to [52] the court of appeals for the ninth circuit, which affirmed the decree (38 C. C. A. 637, 98 Fed. 45), and thereupon the United States brought the case here on appeal.

Mr. Joseph H. Call argued the cause and filed a brief for appellant:

Purchasers with notice of the adverse claims of the government to these lands are not bona fide purchasers.

Pom. Eq. Jur. 745; *United States v. Winona & St. P. R. Co.* 165 U. S. 463, 483, 41 L. ed. 789, 798, 17 Sup. Ct. Rep. 368, 381; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239; *Nesbit v. Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Lytle v. Lansing*, 147 U. S. 59, 37 L. ed. 78, 13 Sup. Ct. Rep. 254; *Sutliff v. Lake County*, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318.

The lands granted to the Atlantic & Pacific Railroad Company by the act of 1866,

within both granted and indemnity limits, were not operated upon by the subsequent grants to the Southern Pacific Company, and were, by operation of the act of Congress of July 6, 1886, restored to the public domain, and were subject to entry under the settlement laws of the United States.

Coble v. Southern P. R. Co. 6 Land Dec. 679, 812; *Re Southern P. R. Co.* 6 Land Dec. 816, 16 Land Dec. 317; *Moore v. Kellogg*, 17 Land Dec. 391; *Re Union Oil Co.* 25 Land Dec. 351.

Those who purchased or made payments to the railroad after the passage of the act are affected with notice, and charged by that act with knowledge of the rights of the United States.

United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The adjustment act of March 3, 1887, as amended by the acts of 1896, is not prospective in its operation.

Gilson v. Robinson, 68 Cal. 539, 10 Pac. 193; *Durand v. Martin*, 120 U. S. 372, 30 L. ed. 678, 7 Sup. Ct. Rep. 587.

A third person who purchases a right or an interest in property under litigation from a party to the suit is bound by the judgment entered to the same extent as if a formal party to the record, and in contemplation of law such purchaser is represented by the party from whom he purchased.

Murray v. Ballou, 1 Johns. Ch. 566; *Whiteside v. Haselton*, 110 U. S. 296, 28 L. ed. 152, 4 Sup. Ct. Rep. 1; *Union Trust Co. v. Southern Inland Nav. & Improv. Co.* 130 U. S. 565, 32 L. ed. 1043, 9 Sup. Ct. Rep. 606.

To constitute a purchase there must also be a payment, and as to all payments made after notice there is no protection extended to the purchaser.

Lytle v. Lansing, 147 U. S. 59, 37 L. ed. 78, 13 Sup. Ct. Rep. 254.

Where partial payments have been made upon executory contracts, the legal title remains in the railroad company, if not in the government, which is held until full payment shall be made, and an equitable right remains in the purchaser to the extent of the payments.

Williams v. United States, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457; *Jennison v. Leonard*, 21 Wall. 302, 22 L. ed. 539; 1 Story, Eq. Jur. 396.

The acts of Congress of March 3, 1887, February 12, 1896, and March 2, 1896, relating to the rights of bona fide purchasers from land-grant railroads, are upon the same subject, and being in *pari materia* should be construed together and all treated as a single law determining the rights of such bona fide purchasers.

United States v. Hcaley, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247; *Frost v. Wenie*, 157 U. S. 46, 39 L. ed. 614, 15 Sup. Ct. Rep. 532; *Chicago, M. & St. P. R. Co. v. United States*, 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. Rep. 1194; *District of Columbia* 184 U. S.

v. Hutton, 143 U. S. 18, 36 L. ed. 60, 12 Sup. Ct. Rep. 369.

The acts of February 12, 1896, and March 2, 1896, referring to the act of 1887, make further provisions as to "bona fide purchasers." The definition thus given to a "bona fide purchaser" is necessarily carried into all these acts.

Clafin v. Commonwealth Ins. Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507.

Mr. **Maxwell Eyarts** argued the cause, and, with Mr. L. E. Payson, filed a brief for appellees:

The bona fides referred to in the acts of March 3, 1887, and March 2, 1896, are not the same as the bona fides of the common law, but is any "honest transaction between a purchaser and a railroad company."

United States v. Winona & St. P. R. Co. 165 U. S. 463, 483, 41 L. ed. 789, 798, 17 Sup. Ct. Rep. 368, 381. See also 6 Land Dec. 272; *Sethman v. Clise*, 17 Land Dec. 307; *Osborn v. Knight*, 23 Land Dec. 216.

The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon.

Clements v. Warner, 24 How. 394, 16 L. ed. 695; *Tarpey v. Madsen*, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849.

Persons who have bought under contract and paid only a portion of the purchase price are protected by § 3 of the act of March 2, 1896, which speaks of "bona fide purchasers . . . by deed or contract or otherwise."

Schneider v. Linkswiller, 26 Land Dec. 407; *Sethman v. Clise*, 17 Land Dec. 307; *Re Barton*, 26 Land Dec. 489.

It is unimportant whether the immediate transferee of the railroad was a foreigner or not, so long as the owner at the time of the adjustment of the title to the lands was a citizen.

Sethman v. Clise, 17 Land Dec. 307; 11 Land Dec. 229.

All the patented lands involved herein were purchased from the railroad by bona fide purchasers within the meaning of the adjustment acts.

Neilsen v. Central P. R. Co. 26 Land Dec. 252; *Re Seaver*, 23 Land Dec. 108.

Mr. **M. D. Brainard** argued the cause and filed a brief for appellee, Loomis:

This statute is remedial in character.

Act of March 3, 1887; 6 Land Dec. 272.

Statutes of this character are to be construed liberally for the suppression of the mischief and the advancement of the remedy.

23 Am. & Eng. Enc. Law, p. 414.

The whole right of the purchaser from the railroad company to purchase from the government under this section of the act of 1887 is based upon the good faith of the purchase from the company, and the question of notice of defect in the title is immaterial.

United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368.

*Mr. Justice **Brewer** delivered the opinion of the court:

The questions now to be determined arise

between the United States and parties holding title or claiming rights to lands by deed from or contract with the railroad company. The title of the company having been adjudged void, the defendants rely upon the acts of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376), February 12, 1896 (29 Stat. at L. 6, chap. 18), and March 2, 1896 (29 Stat. at L. 42, chap. 39). These acts were passed for the purpose of upholding the titles of parties who in good faith had purchased from railroad companies lands which, though supposed to be part of their grants, proved not to be so. This legislation was fully considered in *United States v. Winona & St. P. R. Co.* 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; and *Winona & St. P. R. Co. v. United States*, 165 U. S. 483, 41 L. ed. 798, 17 Sup. Ct. Rep. 381, and any further discussion of its scope is unnecessary. In respect to it we said:

"The act of 1896 confirming the right and title of a bona fide purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a 'bona fide purchaser,' has nevertheless purchased in good faith from the railroad company.

"Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although [53] within *the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims." P. 481, L. ed. p. 797, Sup. Ct. Rep. p. 373.

In the present case the deeds to the patented lands were executed by the company at different dates, commencing July 23, 1885, and ending July 19, 1892. These lands were apparently within the grant made to the Southern Pacific by the act of March 3, 1871 (16 Stat. at L. 573, chap. 122); that is, they were public lands in the statutory sense of the term along the line of the Southern Pacific as authorized by that act and within the place or indemnity limits of the grant. The road had been constructed, and the Land Department of the United States, the tribunal charged with the duty of administering the public lands, had decided that the company had earned the lands, and had caused patents therefor to be issued to it. No third party claimed title; either the government or the company was the owner. Under those circumstances the purchasers bought the lands; bought them in good faith; paid value for them.

These facts bring the case within the 1st section of the act of March 2, 1896, as here-

tofore construed by us: "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Against this conclusion it is contended that purchasers with notice that the government questioned the company's title to these lands are not bona fide purchasers. And counsel say that "in the year 1886 every department of the government began to operate to protect the title of the United States to these lands, and in every public way gave notice to the world of the rights of the government to them," enumerating the act of Congress of July 6, 1886, forfeiting the grant to the Atlantic & Pacific Company; various rulings of the Interior Department, from that on June 7, 1887 (*Gordon v. Southern P. R. Co.* 5 Land Dec. 691), to the date of the last deed, to the effect that the lands granted to the Atlantic & Pacific were not operated upon by the subsequent grants to the Southern Pacific, and were by the for-[54] feiture act restored to the public domain; and the commencement of the several suits by the government to establish its title to these lands and others similarly situated. Counsel also refer to *Winona & St. P. R. Co. v. United States*, 165 U. S. 483, 41 L. ed. 798, 17 Sup. Ct. Rep. 381, in which it was held that one cannot claim to be a purchaser in good faith from a railroad company if at the time he has notice of facts outside the records of the Land Department disclosing a prior right in some third party.

But we do not think a mere change in the opinions of the officers of the government, as to the validity of the company's title, although made known to parties proposing to purchase from such company, is sufficient to take away from them the protection of good faith. A party may have notice of conflicting claims, and still, in the exercise of an honest judgment as to the rightful owner, buy property and pay for it, and be acting in good faith. So far as suits are concerned, all the decisions of the courts had been, up to the date of the last deed, in favor of the title of the company. Thus the purchasers had not merely the action of the Land Department in issuing the patents, but all past decisions of the courts, justifying their conclusions. The conditions are not like those in *Winona & St. P. R. Co. v. United States*. That was a suit to cancel a certification of a tract of land made for the benefit of a railroad company, and also a deed from it. The certification was wrongfully made, and the company in fact took no title. The purchaser sought protection under these statutes. Before any certification, or any pretense of right in the company, as well as at the time of the conveyance to its grantee, there was and had been for many years a party in actual possession of the land under a title prima facie regular and valid, and it was held that the grantee, charged with notice of that occupancy and that claim of title, could not be adjudged a bona fide purchaser from the rail-

road company within the meaning of the statute. "The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the government were waived." Nothing of that kind appears here; no independent and out-

[55]side *facts are shown, no title in any third party,—simply a change of opinion on the part of the officers of the government as to the validity of the title of the Southern Pacific Company; and it would be harsh indeed if remedial statutes like these were shorn of their beneficent application by reason of the fact that the officials of the government had changed their views of the law. We think the circuit court was right in confirming the title to the lands patented.

With reference to the unpatented lands, they, like the former, were so situated with respect to the constructed road of the Southern Pacific as to be apparently within the scope of its grant, and the same general comments are appropriate here as in reference to the patented land. The act of 1896 refers only to lands patented or certified, and the parties who contracted with the company for unpatented lands must rely for protection upon the act of 1887. Most of the transactions in respect to them were after the date of this act, and it is contended that it is not prospective in its operation, and only purports to protect prior transactions.

The ruling of the Land Department has been to the contrary effect. In *Sethman v. Clisc*, 17 Land Dec. 307, a purchase from the railroad company was made prior to the act of 1887, but after the act the purchaser conveyed to a transferee, and it was held that the latter was entitled to relief under the statute.

"The act directed the manner of making adjustments, and it was the evident intention of Congress, as expressed in the 5th section of the act, that when, in the adjustment of these grants, it was ascertained that land had been bought from the railroad companies for which they could convey no good title, such buyers or their transferees, if bona fide, should be allowed to purchase the tracts claimed by them. And it can make no difference, I think, whether a transferee, otherwise entitled to purchase, bought the land before or after the day of the approval of the act, if it was originally purchased in good faith from any said company." P. 312.

In *Andrus v. Balch*, 22 Land Dec. 238, was presented the case of a purchase from the railroad company after the act of March 3, 1887, and it was held that that did not

[56]prevent the *operation of the act. The same proposition was reaffirmed in *Briley v. Beach*, 22 Land Dec. 549; *Re Seaver*, 23 Land Dec. 108; *Grandin v. La Bar*, 25 Land Dec. 194; *Neilsen v. Central P. R. Co.* 26 Land Dec. 252. There has been no decision to the contrary. This uniform ruling
184 U. S.

and practice of the Land Department would, in case of doubt, be of great weight in determining the true construction of the act. *Knowlton v. Moore*, 178 U. S. 41, 56, 92, 44 L. ed. 969, 975, 990, 20 Sup. Ct. Rep. 747; *Fairbank v. United States*, 181 U. S. 283-306, 44 L. ed. 862-872, 21 Sup. Ct. Rep. 648.

But the act itself bears upon its face evidence that it was not intended to be limited to cases of purchases from the railroad company prior to its date. While the 1st section directs the Secretary of the Interior "to immediately adjust" the several land grants, § 3 provides "that if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights, and allowed to perfect his entry by complying with the public land laws." This seems to imply an intent that all mistakes of the nature referred to which shall have occurred up to the very completion of the adjustment may be rectified. Section 4 makes provision for the issue of patents to certain purchasers from railroad companies, providing proof shall be made "within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted." While other sections may not be so specific, yet, placing them alongside of those from which quotations have been made, it is reasonable to hold that the act applies not merely to transactions had before its date, but to any had before the time of final adjustment. In this case the several grants to the Southern Pacific have not yet been finally adjusted. Further, it must be borne in mind that this is a remedial statute, and is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed; and the mere date of the transaction between the purchaser and the railroad company is not of itself vital in determining *whether there is or is not an equity in[57] behalf of the purchaser. As said in *Potter's Dwarrior on Statutes*, 231:

"A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule, a remedial statute ought to be construed liberally. Receiving an equitable, or rather a benignant, interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes it has been said the construction made is contrary to the letter; which should be read, *ultra* the letter, and confined to ancient statutes."

See also the letter of Attorney General Garland to the Secretary of the Interior, in response to a question as to the true construction of this act (6 Land Dec. 275):

"The whole scope of the law from the 2d to the 6th sections, inclusive, is remedial.

Its intent is to relieve from loss settlers and bona fide purchasers who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their rights or acquired equities. . . . The 5th section expressly refers to such lands as had been sold, which had not been conveyed 'to or for the use of such companies.' It is not required that the sale by the railroad companies shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith. That it was sold under a claim of the grant to another in good faith is the ground of his equity."

The remaining question arises on the ruling that one of the defendants, Jackson A. Graves, was a bona fide purchaser, and entitled to the protection of the 5th section of the act of March 3, 1887, and affects something like 35,000 acres. These were purchased from the railroad company in 1885 by the Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, a corporation organized under the laws of Great Britain. This suit was commenced on May 17, 1890. On September 25, 1891, an amended bill of complaint was filed, in which the fibre company was made party defendant. Its answer was filed March 14, 1892. On January 27, 1893, it conveyed the lands to Graves, who thereafter caused himself to be substituted for it as party defendant. Said § 5, so far as is applicable, reads:

"Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being conterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns."

The fibre company was an alien, and therefore not within the terms of the section. Graves, it is true, was a citizen, and the ruling of the Department has been that the right of purchase from the government conferred by this section is not limited to the immediate purchaser from the company, but may be exercised by a subsequent grantee who has the necessary qualifications, and that in such case it is immaterial what were the qualifications of such purchaser. See letter of Secretary Noble to the Commissioner of the General Land Office (11 Land Dec. 229), in which the Secretary said:

"It can make no difference, in my judgment, whether the applicant is the imme-

diat purchaser from the company or a purchaser one or more degrees removed. If he is a bona fide purchaser of the land and has the required qualifications as to citizenship he is within the intendment of the statute, and if he be not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers, may have been. If his immediate grantor was a foreigner, and his purchase was simply for the purpose of acquiring title from the government for the benefit of the foreigner, he would not be a bona fide purchaser, and would not therefore come within the terms of the act." *Union P. R. Co. v. McKinley*, 14 Land Dec. 237; *Union Colony v. Fulmele*, 16 *Land[59] Dec. 273; *Sethman v. Clise*, 17 Land Dec. 307; *Ray v. Gross*, 27 Land Dec. 707.

Within the scope of these rulings Graves is entitled to the protection of the statute if he can be considered a bona fide purchaser. He bought *pendente lite*, and while he testified that he purchased in good faith and for value, that he was holding the lands under the conveyances, and had paid all legal taxes and assessments levied and assessed since the deeds, he further testified as follows:

Q. 19. Did you buy these lands in good faith?—A. Yes, expecting to make title to them.

Q. 20. And do you hold them as said purchaser and as a citizen of the United States?—A. I do.

Q. 21. And as an innocent purchaser?—A. Well——

Q. 22. For value received?—A. I hold them for a valuable consideration.

Q. 23. Well, do you claim to be an innocent purchaser of said lands, under the act of Congress of March 3, 1887?—A. I think I am protected under the act of Congress of 1887. I would like to understand this "innocent." What you mean by that? Of course I have notice of the defect,—I have notice of the congressional action taken, and of the pendency of this suit; had it when I bought. Outside of that I consider myself an innocent purchaser. Of course I had that notice of that suit. There is no use denying that. At the same time, I understand—I think I understand—the act of Congress of 1887, and I think I am protected under it.

Cross-examination:

Q. 24. How much did you pay the Atlantic & Pacific Fibre Importing & Manufacturing Company for these lands?—A. I have not paid them anything in coin. But I have agreements with them which are the equivalent of the coin.

Q. 25. What is the nature of the agreements?—A. I am to protect them in the title, that is, protect them in their original purchase money; make what I can out of it over and above that.

Q. 26. And devote your legal services to

that end?—A. Yes. They have to have somebody on this end.

[60] *Now while the statute is, as we have stated, remedial and to be liberally construed, in order to carry out the purpose of its enactment, yet to sustain this purchase as one made in good faith would ignore the plainest provisions of law in respect to bona fide purchasers, and would uphold almost any kind of speculative purchase. Congress expressly limited the privileges granted by the act of 1887 to citizens of the United States or those who had declared their intention to become such. It excluded aliens, and in so doing acted in harmony with the general scope of public land legislation. True, in the act of 1896, in respect to patented lands, it recognized aliens as entitled to the benefits of a bona fide purchase, but the fact that in a later statute, and in respect to a different class of lands, it extended certain privileges, is no reason for ignoring the limitations contained in this act as applied to the lands covered by it.

While according to the construction of the Land Department the grantee of a purchaser from the railroad company is entitled to invoke the protection of this statute, yet it is one who is himself a bona fide purchaser, and not one whose "purchase was simply for the purpose of acquiring title from the government for the benefit of the foreigner." It seems to us that the testimony plainly discloses a purely speculative transaction. Graves paid nothing. His agreement was, as he says, to protect the company in its title, or rather in its purchase money, and then he would make what he could over and above that. He was not buying with the purpose of owning the land, but was simply engaged in an effort to secure to the original purchaser from the railroad company the money which it had invested in its purchase, advancing, it is true, in that effort, some money in the way of taxes, and devoting his legal services to that end, and hoping to make a profitable speculation out of the matter.

Another matter worthy of notice, as tending to show a community of interest with the fibre company, is his testimony in respect to the matter of possession. When asked, "Q. Are you in possession of the same?" he replied, "A. Well, we are exercising possession; we are keeping other people off of them. Not farming them, but,—yes, we are in possession."

We do not think that defendant Graves [61] has shown that he *was a purchaser in good faith. As to him the decree cannot be sustained. The decree of the Court of Appeals will therefore be affirmed in all respects except as to the lands standing in the name of Jackson A. Graves. As to those lands it will be reversed, and the case remanded to the Circuit Court for the Southern District of California, for further proceedings in conformity with this opinion.

184 U. S.

A. N. KING, P. J. Mann, A. S. Nichols, Multnomah Investment Company, and Fred N. Pendleton, *Plffs. in Err.*,
v.

CITY OF PORTLAND, Board of Public Works, Common Council of said City, *et al.*

(See S. C. Reporter's ed. 61-70.)

Constitutional law—due process of law—assessments for street improvements.

Property is not taken without due process of law by an assessment for the cost of a street improvement, under a city charter providing for the assessment upon each abutting lot of the full cost of the improvement of half of the street in front of and abutting on such lot, and of a proportionate share of the cost of improving street intersections, where the cost of such improvement is apportioned according to the benefits, which are equal to such cost, and the charter not only gives a hearing upon the question of benefits to the property owner before the formation of the district to be improved, but, as construed by the state courts, gives notice and an opportunity to contest the assessment.

[No. 307.]

Argued November 18, 19, 1901. Decided January 27, 1902.

IN ERROR to the Supreme Court of the State of Oregon to review a decision which affirmed a judgment of the trial court sustaining the validity of assessments for local improvements. *Affirmed.*

See same case below, 38 Or. 402, 63 Pac. 2. The facts are stated in the opinion.

Mr. Martin L. Pipes argued the cause, and, with Mr. Arthur P. Tiff, filed a brief for plaintiffs in error:

A rule of assessment that places the whole burden upon particular property without apportionment is not taxation, but taking property without compensation for public use.

Thomas v. Gain, 35 Mich. 154, 24 Am. Rep. 535; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 192; *State, Agents, Prosecutor, v. Newark*, 37 N. J. L. 416, 18 Am. Rep. 729; *Tide-water Co. v. Coster*, 18 N. J. Eq. 519, 90 Am. Dec. 634;

NOTE.—As to the validity of assessments upon abutting property made by charging upon each piece the cost of the improvement in front of it—see *Davis v. Litchfield* (Ill.) 21 L. R. A. 563, and note.

As to the necessity of special benefit to sustain assessments for local improvements—see *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755, and note.

As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

Re Canal Street, 11 Wend. 154; *Cooley*, Taxn. 453, 454; *Cooley*, Const. Lim. 3d ed. p. 508; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Seattle v. Yesler*, 1 Wash. Ter. 572; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379.

A rule of assessment that charges each lot with the cost of the improvement in front of it is void.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Motz v. Detroit*, 18 Mich. 495; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888; *Cooley*, Taxn. 453, 454; *Cooley*, Const. Lim. 3d ed. p. 508; *Burrough*, Taxn. 465, note 5; *Woodbridge v. Detroit*, 8 Mich. 301; *People v. Lynch*, 51 Cal. 23, 21 Am. Rep. 677; *Chicago v. Larned*, 34 Ill. 203; *Illinois C. R. Co. v. Bloomington*, 76 Ill. 447; *New Whatcom v. Bellingham Bay Improv. Co.* 9 Wash. 639, 38 Pac. 163; *State, Van Tassel, Prosecutor, v. Jersey City*, 37 N. J. L. 129; *St. John v. East St. Louis*, 50 Ill. 92; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848.

A rule of assessment is void that is not based upon benefits to the property assessed, and the assessment limited to the benefits.

Re Madera Irrig. Dist. Bonds, 92 Cal. 296, 14 L. R. A. 755, 28 Pac. 272, 675; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Masters v. Portland*, 24 Or. 167, 33 Pac. 540; *Bloomington v. Chicago & A. R. Co.* 134 Ill. 458, 26 N. E. 366; *Elma v. Carney*, 9 Wash. 466, 37 Pac. 709; *Allegheny City v. Western Pennsylvania R. Co.* 138 Pa. 375, 21 Atl. 763; *Illinois C. R. Co. v. Bloomington*, 76 Ill. 447; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Chicago v. Larned*, 34 Ill. 279; *Tide-water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Wilson v. Salem*, 24 Or. 512, 34 Pac. 9, 691; *Meier v. Kelly*, 20 Or. 96, 25 Pac. 73; *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450; *Oregon & C. R. Co. v. Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452; *Charles v. Marion*, 98 Fed. 166; *Fay v. Springfield*, 94 Fed. 409.

The benefits must be special—that is, must make the property more accessible or more enjoyable in its use, and do not include benefits common to the community, nor those merely speculative.

Tide-water Co. v. Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634; *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *State, Kellogg, Prosecutor, v. Elizabeth*, 40 N. J. L. 274; *State, New Jersey R. & Transp. Co., Prosecutor, v. Elizabeth*, 37 N. J. L. 330; *Boston v. Shaw*, 1 Met. 130; *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103.

Property that from its physical situation

cannot be benefited cannot be assessed for improvements, and the courts will inquire into and decide this question.

Oregon & C. R. Co. v. Portland, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452; *Bloomington v. Chicago & A. R. Co.* 134 Ill. 458, 26 N. E. 366; *Allegheny City v. Western Pennsylvania R. Co.* 138 Pa. 375, 21 Atl. 763; *State, New Jersey R. & Transp. Co., Prosecutor, v. Elizabeth*, 37 N. J. L. 330.

The owner must have notice and an opportunity to contest the amount of his assessment and the extent of his benefits.

Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 753; *Tide-water Co. v. Coster*, 18 N. J. Eq. 519, 90 Am. Dec. 634; *Philadelphia v. Miller*, 49 Pa. 440; *People ex rel. Butler v. Saginaw County*, 26 Mich. 22; *Wilson v. Salem*, 24 Or. 509, 34 Pac. 9, 691; *Cook v. Portland*, 35 Or. 383, 58 Pac. 353; *Norfolk v. Young*, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886; *Charter of Portland*, § 138; *Sess. Laws 1898*, p. 156.

Mr. Joel M. Long argued the cause and filed a brief for defendants in error:

The notices required by the city charter when given by the common council constituted a sufficient notification to those interested and gave them an opportunity to be heard before the council. This constitutes due process of law.

Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *King v. Portland*, 38 Or. 402, 63 Pac. 2; *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691; *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S. 320, 43 L. ed. 463, 19 Sup. Ct. Rep. 873; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Kentucky Railroad Tax Cases*, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623, 645; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644, 645; *Detroit v. Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624.

The legislature has power to create and fix a district which shall be liable for a given tax without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local improvement.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

The legislature has a right to decide for itself the question of benefits.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 624; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

The legislative taxing district and apportionment is determined by the provisions of the charter providing for the manner of laying the assessment, and is due process of law.

Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Davidson v. New Orleans*, 96 U. S. 107, 24 L. ed. 621; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623, 645; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

The notices issued under the statute were all the notices that plaintiffs were entitled to upon the question of apportionment, and as such, they constituted due process of law.

Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

The state's interpretation of the law whereby due process of law is secured is controlling upon a tax question.

Lombard v. West Chicago Park Comrs. 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345.

The notices given by the board of the proposed acceptance of the work, and by the auditor, were sufficient to require the complainants to make objections, if they had any, as to the apportionment of the assessment, and as to whether the assessment had been correctly apportioned as required by the statute.

Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *King v. Portland*, 38 Or. 402, 63 Pac. 2.

184 U. S.

*Mr. Justice McKenna delivered the opinion of the court: [61]

The object of this suit was to restrain the enforcement of certain street assessments levied upon the property of the plaintiffs in error under the charter of the city of Portland, Oregon.

The question presented is whether the ordinances under which the assessments were made deprived plaintiffs in error of their property without due process of law, and thereby violated the 14th Amendment of the Constitution of the United States.

The assessments were sustained by the trial court, and its judgment was affirmed [62] by the supreme court of the state (38 Or. 402, 63 Pac. 2), and the case was then brought here by writ of error.

The charter of the city was passed by the legislature in 1898 (Special Session 1898, p. 101), and the provisions for improving streets are found in §§ 126 to 161 inclusive. They were summarized by the supreme court of the state as follows:

"By § 127 the common council are authorized to improve streets. By § 128 the common council are not authorized to improve any streets until they pass a resolution of intention so to do, and describe the improvement, which resolution shall be posted for ten days, and published for ten days, and also posted on the street. All these notices shall state the fact of the passage of the resolution aforesaid, the character of the work proposed, and the time within which written objections or remonstrances may be made. Section 130 provides that if no remonstrance is filed by a majority of the property owners the common council shall be deemed to have acquired jurisdiction.

"Section 131 provides that the auditor shall immediately transmit this ordinance to the board of public works.

"Section 132 requires the city engineer to file with the board estimates and specifications. When these are filed they shall give notice that they will let the contract to bidders.

"Section 133 provides that proposals for doing the work shall conform as near as possible to estimates prepared by city engineer.

"Section 136 provides that the city auditor shall prepare an apportionment of the expenses of the street work.

"Section 137 provides that when the work is so far completed as to enable the board to determine the cost of the whole thereof, the city engineer shall file written acceptance of the work completed. Thereupon the board shall advertise in an official paper for six days, stating when and where any objection may be heard to the said improvement, and any person may at this time appear and object to the acceptance thereof. If no objections are filed, or if the objections are overruled and the street is accepted, the board shall report the same to the common council.

"By § 138 the auditor is required to prepare an assessment and report the same to the common council. Section 138 also provides how the cost shall be apportioned,

viz.: Each lot or part thereof within the limits of the proposed street improvement abutting upon the street shall be liable for the full cost of making the improvement upon one half of the street in front and abutting upon it, and also for the proportionate share of improving the intersections of two streets.

"Section 139 provides that when the probable cost of any improvement has been ascertained or determined, and the proportionate share thereof chargeable to each lot, the common council must declare the same by ordinance and direct the auditor to enter a statement in the docket of liens.

"Section 138 provides that regular lots are 50 feet by 100 feet; regular blocks are 200 feet square. It also particularly provides for irregular blocks and apportionment of the assessment upon unplatted tracts."

The main issues of fact were found against plaintiff in error by the trial court as follows:

"That the city engineer did make a report and estimate of the probable cost of the improvement mentioned in the complaint.

"That the common council did, before making said improvement, estimate the probable cost thereof, and give notice of the said probable cost.

"That in making the assessments upon the property of the plaintiff, set forth in the complaint, the common council did take into consideration whether the property of plaintiffs was benefited by said proposed improvements, and the amount of said benefits.

"That said common council did apportion the cost of making the said improvement according to the benefits to the said property from said improvement.

"That the property set forth in the complaint can be used in connection with the said elevated roadway, and it is accessible from said elevated roadway, and it is so situated that it is and can be benefited by said roadway.

[64] "That the costs assessed against said property do not exceed *or equal the benefits that have accrued to said property by reason of said improvement.

"That plaintiffs, and each of them, did have notice of the amount of said assessment before the said assessments were made and before the same were entered in the docket of city liens, and before said work was fully completed by said contractors, and said plaintiffs and each of them did have an opportunity to be heard to contest the fairness of said apportionment. And plaintiffs, and each of them, did have an opportunity to contest the question whether their said property was benefited and the amounts of the benefits, and also as to the amounts of the assessments.

"That said assessments were not made or entered on said city lien docket without any notice.

"That in making said assessments the common council did not act arbitrarily or

unjustly, and that the common council did use and exercise discretion and judgment concerning said assessments and the amounts thereof.

"That in accepting said improvement the board of public works did not act arbitrarily or unjustly, and said board of public works, in accepting said improvement, did use and exercise their discretion and judgment concerning the same.

"That upon the giving of the notice of intention to make said improvement, and prior to the passage of the time and manner ordinance set out in plaintiffs' complaint, the common council considered the question of cost of said improvement in front of each of the lots within the limits of the proposed street improvement and abutting upon said street, and also the proportionate share of the cost of improving intersections of two of the streets bounding the blocks in which such lot is situated, and found that each of said lots abutting on said street, and each of said lots assessed for intersection of blocks, would be benefited by said improvement in an amount greater than the cost of said improvement as assessed against each of said lots."

Afterwards the court made an additional finding of fact in accordance with a stipulation "that the plaintiffs and each of them did not have any notice or knowledge of the amount of the assessments before the assessments were made, or before the *same were [65] entered into the docket of city liens, or before said work was fully completed by said contractors, other than as stated in the complaint and the proceedings therein set forth."

That is, as we understand, except such notice as was given by the proceedings preceding the making of the assessment.

The findings of the court has narrowed our inquiry. That the improvement was a benefit to the abutting property must be accepted as true, and that the benefits were equal to the cost of the improvement; and, further, that the common council of the city apportioned the cost according to the benefits. Our inquiry therefore is confined to the validity of the rule of assessments prescribed by § 138, and to whether the plaintiffs in error were afforded an opportunity to contest the assessment.

Nor need we follow the details of counsel's arguments. The contentions of plaintiffs in error are made to depend upon the validity of the rule of assessment prescribed by the city charter, and upon what notice the charter requires to be given to property owners, and what opportunity such property owners are given to be heard upon the benefits to them of the contemplated improvement, the relation of benefits to cost, and the apportionment of the assessment; and these several propositions in turn depend upon the opinion of the supreme court of the state.

The duty of defining the district to be improved is devolved by the charter of Portland upon the council of the city, to be exercised by passing a resolution of intention

so to do, and giving notice thereof, which notice was required to "state the fact of the passage of the resolution aforesaid, its date, and, briefly, the character of the work or improvement proposed, and the time within which written objection or remonstrance may be made thereto."

A resolution of intention was passed in the case at bar, and notice thereof in accordance with the charter was posted in the places and by the officers required, and published as required, and proof made thereof.

Passing upon the action of the council and the provisions of the charter, the supreme court of the state said:

[66] *"Now let us look at the law, and ascertain, if we can, whether it is legally sustainable upon principle. The common council is empowered by the legislature to fix and determine the taxing district. This it did by adopting the resolution of intention to make the improvement. Its action in this regard is legislative in character, and it was not requisite that the legislature should have provided for notice before the council was authorized to act. In prescribing the district it must be presumed, as would have been the case if the legislature had itself acted directly, that it took into consideration the exceptional benefits that would accrue to the property which it was intended should be charged with the burden, because it could inaugurate or make such an assessment upon no other basis. A notice in the present instance was required by the charter, and given, however, and, while it was for the purpose of acquiring jurisdiction, it gave the property holders an opportunity to appear and file objections to the improvement; and it was perfectly competent for them to raise both the objection that as a district the costs would be in excess of the exceptional benefits to the property involved, and that as it respects individual holders and between themselves the assessment would not be proportional to the relative benefits to be derived from the improvement. This is what in fact was done by the plaintiffs, as shown by the record, and upon this issue they were accorded a hearing. It was also possible for the common council to determine the matter with reasonable accuracy, as the probable cost and distributive share thereof among the holders was known to them, as was also the locality and situation of the property to be assessed."

The charter therefore gives a hearing on the question of benefits to the property owner before the formation of the district to be improved. And the trial court found that the common council before making the improvement estimated the probable cost thereof, and that it "considered the question of cost of said improvement in front of each of the lots within the limits of the proposed street improvement and abutting upon said street, and also the proportionate share of the cost of improving intersections of two of the streets bounding the blocks in which such lot is situated, and found that each

of said lots *abutting on said street, and[67] each of said lots assessed for intersection of blocks, would be benefited by said improvements in an amount greater than the cost of said improvement as assessed against each of said lots." And especially as to the property of plaintiffs in error it was found that the council took into consideration whether that property was benefited by the improvements and the amount of the benefits, and that the cost assessed against the property did not exceed, or equal, the benefits which would accrue. Every requirement of due process of law, therefore, was satisfied as to plaintiffs in error.

What notice the charter of the city gives to property owners of the specific amount of the assessment against their property, and what opportunity to be heard thereon was afforded, the supreme court observed as follows:

"There are four several notices required along the way: First, of the proposed improvement; second, inviting proposals for doing the work; third, touching the acceptance of the work; fourth, ten days' notice of the entry of the assessment in the docket of city liens. Ample opportunity was thus afforded the owners to appear and interpose the constitutional objections, which is all that is sought to be done in this proceeding."

That is, as we understand, to object not only to the rule of assessment, but to the amount of the assessment, for the court further said:

"The improvement consists of an elevated roadway ranging from 10 to 15 feet in height throughout, except at one intersection, which was a fill, and it is apparent that the cost of the work was practically uniform throughout, and the assessment against the lots was therefore as nearly proportional according to benefits as could be devised. At least, it is not apparent that there is any substantial excess of costs above benefits, nor is there such a disproportionate distribution of the burden as to justify the court in declaring the assessment an arbitrary exaction by the legislature. It is beyond the power of human ingenuity to adopt any plan or mode of assessment that will operate to produce exact uniformity, and all that may be expected is a reasonable approximation to such a standard, and the rule adopted under the charter fulfils that condition as applied *to the present contro-[68] versy. There is no doubt that the property was benefited in excess of the costs and expenses."

But it is denied that the rule of the Portland charter constitutes an apportionment of the taxes, and it is said, quoting Cooley on Taxation, p. 453:

"If such a regulation constitutes the apportionment of a tax, it must be supported when properly ordered by or under the authority of the legislature. But it has been denied, on what seem the most conclusive grounds, that this is permissible. It is not

legitimate taxation, because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property; and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot, those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing districts whatever."

But if "accidental circumstances" may take from the rule the effect of apportionment, they do not prevent the application of the rule to cases where such circumstances do not exist. Where they exist they can be properly dealt with. Presumably the rule of the Portland charter was prescribed by the legislature in view of the conditions which existed in that city and in the expectation that the common council would so exercise its power and judgment in the creation of districts that the cost of the improvement ordered would be apportioned by the application of the rule prescribed. The expectation has been justified by the experience of the city. Under the rule of the charter the opening and grading of the streets have been done for years, and the courts have been watchful against abuses,—watchful to protect the rights of property owners. In *Oregon & C. R. Co. v. Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452, the collection of an assessment was enjoined because it was imposed on [69] property which was not benefited by the improvement ordered. And in its opinion in the case at bar the supreme court said:

"But we are inclined to believe that the better doctrine, deducible from adjudged cases, including those of the Supreme Court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners."

From which we infer that the plan or method of assessment must have that result of itself. If that result is produced by a particular application of the plan or method, the latter will not be enforced, as was the case in *Oregon & C. R. Co. v. Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452.

Upon the claim of plaintiffs in error that they did not have "notice or knowledge of the amount of assessments before the assessments were made, or before the same were entered into the docket of city liens, or be-

fore said work was completed," we need not deal at length. The taxing district being formed upon a consideration of the utility of the work proposed, and the benefits to property owners, and the cost of the work and its apportionment, the amount of the assessment then followed as a certain deduction, and the property owner having notice of all the proceedings and the right to contest them, it would seem useless to give him a further right to contest the assessment. But if notice and an opportunity to contest the assessment be necessary, the supreme court has interpreted the statute as giving such notice and opportunity. The court said:

"The manner of notice and the specific period of time in the proceedings when he may be heard are not very material so that reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement (see *Towns v. Klamath County*, 33 Or. 225, 53 Pac. 604; *Weed v. *Boston*, 172 Mass. 28, 42 L. R. A. [70] 642, 51 N. E. 204), or the assessment is to be enforced by a suit to which he is to be made a party (*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192), or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined. *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335. In such case he cannot be heard to complain that his property is being taken without due process of law. The case of *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750, covers the question of the right to notice and a hearing quite fully, and it is significant that special reference is made to the ten days' notice required to be given under § 104 of the charter as it then stood, after the assessment had gone upon the docket of city liens and before collection can be proceeded with, which is almost the exact provision now contained in § 141. While the court at the time declined to decide that such a notice was sufficient, yet, if the cause had been dependent upon it alone, it is not altogether clear that it would have held it insufficient. So it was held by this court, in conformity with the prevailing rule, that if provision is made for notice to and hearing of each proprietor at some stage of the proceeding upon the question of what proportion of the tax shall be assessed upon his land, there is not a taking without due process of law. *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691."

We are of the opinion, therefore, that, under the facts of this case and the interpretation given of the charter of Portland by the supreme court of the state, plaintiffs in error have not been deprived of their property without due process of law, and the judgment of the Supreme Court is affirmed.

[71]*JOHN W. McDONALD, Receiver, etc.,
Appt.
v.
DAVID E. THOMPSON.

(See S. C. Reporter's ed. 71-77.)

Limitation of actions—statutory liability of shareholders in national banks—action by receiver to enforce—demand.

1. An action brought by a receiver of a national bank under U. S. Rev. Stat. § 5234, to enforce the individual liability of a shareholder prescribed by § 5151, is not an action upon a "contract or promise in writing," within the meaning of the Nebraska statute of limitations, but is governed by the provision of that statute requiring actions "upon a contract not in writing, express or implied," or "upon a liability created by statute," to be begun within four years.
2. The objection that the statute of limitations does not bar the right of the creditors of a national bank, under the act of June 30, 1876, § 2 (19 Stat. at L. 63, chap. 156), to enforce the individual liability of its shareholders prescribed by U. S. Rev. Stat. § 5151, so long as there are any outstanding claims against the bank, cannot be raised by the receiver of a national bank, in an action brought by him under § 5234 to recover an assessment upon a stockholder, with interest from the date when payable, in which a demurrer to the bill on the ground that it sets forth a cause of action barred by the statute of limitations has been sustained.
3. A demand which starts the running of the statute of limitations against the right of a receiver of a national bank to enforce the statutory liability of its shareholders is shown by the allegations of the bill filed by the receiver to enforce such liability, that on a specified date the Comptroller of the Currency made an assessment upon the shareholders of such bank, and "did thereby make demand upon each and every share of the capital stock of the said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders.

[No. 95.]

Argued January 13, 14, 1902. Decided February 3, 1902.

APPEAL from the Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a judgment of the Circuit Court for the District of Nebraska dismissing a bill in a suit to enforce the statutory liability of a shareholder in a national bank. *Affirmed.*

See same case below, 41 C. C. A. 290, 101 Fed. 183.

Statement by Mr. Justice **Brown**:

This was a bill in equity originally filed May 20, 1898, in the circuit court for the district of Nebraska, by Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska (of whom the present appellant is the successor in office), against David E. Thompson, to recover defendant's proportion of an assessment upon the stockholders of the bank to the amount of the par value of their shares. The bank failed on January 23, 1893, and a receiver was shortly thereafter appointed. On June 10, 1893, the Comptroller of the Currency ordered the assessment, which was made payable July 10, 1893.

The bill alleged Thompson to have been the owner of 210 shares of the capital stock, which he had acquired upon subscription to such stock and as a part of the original issue; that he, knowing the bank to be in a failing condition and practically insolvent, and in anticipation of its approaching failure, had sold and caused such stock to be transferred to certain irresponsible parties, and that such transfer was made with intent to defraud the bank, its depositors and creditors.

Defendant demurred upon the ground that it appeared by the bill that the cause of action was barred by the statute of limitations. The demurrer was sustained, the bill amended, another demurrer interposed and sustained, and the bill dismissed. An appeal was taken to the circuit court of appeals, which affirmed the judgment of the circuit court.

Mr. J. R. Webster argued the cause, and Messrs. John H. Ames and A. E. Harvey filed a brief for appellant:

The receiver of a national bank cannot exercise the right to enforce the individual liability of the stockholders in the absence of a direction so to do by the comptroller, because the latter is alone in a situation to know whether and to what extent the necessity for so doing exists.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476.

The right of action is solely in the receiver in all cases for the collection of the assets of the bank, and in only this particular instance is the authority of the comptroller requisite, and that solely for the special reason named.

National Bank of the Metropolis v. Kennedy, 17 Wall. 19, 21 L. ed. 554.

The stockholder's liability, besides being a contract liability, is a liability not to the bank, but to its creditors.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788.

It is a part of the assets of the bank, so long as the claim of creditors can be enforced against any of the bank's assets.

Irons v. Manufacturers' Nat. Bank, 21 Fed. 197; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Mokelumne Hill Canal & Min. Co. v. Woodbury*, 14 Cal. 265; *Allen v. Sewall*, 2 Wend. 327; *Moss v. Oakley*, 2 Hill, 265; *Harger v. McCullough*, 2 Denio, 119; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904; 1 Wood, *Limitation of Actions*, § 149; *Fleischer v. Rentchler*, 17 Ill. App. 402.

In order to start the running of the statute of limitations there must first be a call or assessment by the board of directors or by a court of equity, and a demand of and refusal of payment.

Glenn v. Howard, 81 Ga. 383, 8 S. E. 650;

Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; *Aldrich v. Yates*, 95 Fed. 78; *Western Nat. Bank v. Reckless*, 96 Fed. 70; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867; *Glenn v. Williams*, 60 Md. 93.

The order of the comptroller does not suffice until followed by an actual demand.

Aldrich v. Yates, 95 Fed. 78.

If the action is upon the contract of subscription or of shareholdership the contract is in writing.

Stuart v. Hayden, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Peninsular R. Co. v. Duncan*, 28 Mich. 147; *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866.

A party can be held liable upon a contract in writing without his signature being subscribed to such contract, and the acceptance of a certificate by defendant was equivalent to signing, and makes his contract a written one within the meaning of the statute of limitations.

Plumb v. Campbell, 129 Ill. 101, 18 N. E. 790; *Kennedy v. Siemers*, 120 Mo. 73, 25 S. W. 512; *Indianapolis Natural Gas Co. v. Kibbey*, 135 Ind. 357, 35 N. E. 392; *Rigdon v. Conley*, 141 Ill. 565, 23 N. E. 1060; *Campbell v. McFadin*, 71 Tex. 28, 9 S. W. 138; *Grove v. Hodges*, 55 Pa. 516; *Vogel v. Pekoc*, 157 Ill. 339, 30 L. R. A. 491, 42 N. E. 386; *Johnson v. Dodge*, 17 Ill. 440; *Stone v. Pennock*, 31 Mo. App. 544; *Griffin v. Bristle*, 39 Minn. 456, 40 N. W. 523; *Brandon Mfg. Co. v. Morse*, 48 Vt. 327; *Bulwinkle v. Cramer*, 27 S. C. 376, 3 S. E. 776; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Howell Bros. v. Roberts*, 29 Neb. 483, 45 N. W. 923; *Davis v. Weed*, 44 Conn. 569; *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759; *Pittsburgh & C. R. Co. v. Clarke*, 29 Pa. 146.

Mr. Halleck F. Rose argued the cause and filed a brief for appellee:

The statute imposing the liability sought to be enforced, being in derogation of the common law, is to be strictly construed, and not extended beyond its plain terms.

Dane v. Dane Mfg. Co. 14 Gray, 488; *Gray v. Coffin*, 9 Cush. 192; *Ripley v. Sampson*, 10 Pick. 371; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Moyer v. Pennsylvania Slate Co.* 71 Pa. 293; *Means's Appeal*, 85 Pa. 75; *Libby v. Tobcy*, 82 Me. 397, 19 Atl. 904; *Chase v. Lord*, 77 N. Y. 1.

The liability of the individual shareholder of a national bank under U. S. Rev. Stat. § 5151, rests upon an implied contract not in writing.

Carrol v. Green, 92 U. S. 509, 23 L. ed. 738; *Terry v. McLure*, 103 U. S. 442, 26 L. ed. 403; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *First Nat. Bank v. Hawkins*, 174 U. S. 372, 43 L. ed. 1011, 19 Sup. Ct. Rep. 742; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. Rep. 19; *Van Pelt v. Gardner*, 54 Neb. 705, 74 N. W. 1083, 75 N. W. 874; *Aldrich v. McClaine*, 45 C. C. A. 631, 106 Fed. 791; *Thomp-*
438

son v. German Ins. Co. 76 Fed. 892; *Hutchings v. Lampson*, 82 Fed. 960; *Hayden v. Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60; *Hawkins v. Iron Valley Furnace Co.* 40 Ohio St. 512.

The statute of limitations commences to run against a stock subscription, payable as called for, from the date of the call.

Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867; *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914.

The assessment made by the comptroller is held, by analogy, equivalent to a call upon the shareholder; and the cause of action on the assessment therefor accrues on the day when, by the terms of the comptroller's order, it is made due and payable.

Glenn v. Marbury, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914; *Aldrich v. Yates*, 95 Fed. 81; *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663.

The allowance of a claim against the corporation by the receiver does not operate to suspend the statute of limitations in favor of the stockholder.

Green v. Beckman, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670; *Stilphen v. Ware*, 45 Cal. 110; *Young v. Rosenbaum*, 39 Cal. 646; *Hynan v. Coleman*, 82 Cal. 653, 23 Pac. 62; *Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738; *Terry v. McLure*, 103 U. S. 442, 26 L. ed. 403; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. Rep. 19.

*Mr. Justice Brown delivered the opinion [72] of the court:

This bill is founded upon Rev. Stat. § 5151, which declares that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares," etc. By § 5234 the Comptroller of the Currency is authorized to appoint a receiver of insolvent banks, who "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

The case turns upon the applicability of the state statute of limitations, which, so far as it is material, reads as follows:

"Sec. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued."

"Sec. 10. Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment.

"Sec. 11. Within four years, an action upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty."

As the cause of action in this case accrued on July 10, 1893, when the assessment was

made payable (*Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790, 12 [73] Sup. Ct. Rep. 914; *Thompson v. *German Ins. Co.* 76 Fed. 892; *Van Pelt v. Gardner*, 54 Neb. 701, 74 N. W. 1083, 75 N. W. 874), and the action was begun on May 20, 1898, more than four but less than five years thereafter, the case really turns upon the question whether the action is upon a "contract or promise in writing," or "upon a contract not in writing, express or implied," or "upon a liability created by statute." If the cause of action be upon a written contract, the action was brought in time. If upon a contract not in writing, or a statutory liability, the statute of limitations is a complete bar.

Used in this connection and as distinguished from a contract not in writing, express or implied, we think it entirely clear that § 10 contemplates an action between the immediate parties or their privies to a written contract, and that the only contract covered by that definition in this case is the one arising from the allegation of the bill that Thompson was the owner of 210 shares of the original capital stock, and "that he acquired the same upon subscription to such capital stock," and by a receipt of certificates for such shares. The only contract to be gathered from this allegation is one between the bank on the one hand and the defendant on the other, by which the latter agreed to take and pay for a certain number of shares, and the former agreed to issue certificates to him for the same. Had the action been brought upon this contract,—as, for instance, by the bank to recover an unpaid assessment upon the original shares,—the case would have fallen within § 10, and the suit might have been brought within five years.

But there was no contract in writing with the creditors or depositors of the bank, and none with the bank itself, to which the receiver could be said to be a privy, except to pay for the stock as originally issued. Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; but it was not a contract in writing within the meaning of the Nebraska act, since the writing—that is, the subscription—contained no reference whatever to the statutory obligation and no promise to respond beyond the [74] amount of the subscription. In *none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association. *Carrol v. Green*, 92 U. S. 509, 512, 23 L. ed. 738, 739; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 184 U. S.

419; *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

While § 10 does not use the words "express contract," but the words "contract or promise in writing," we think that, taken in connection with § 11, which is confined to contracts not in writing, express or implied, express contracts are primarily and principally intended by the earlier section. These are defined to be those contracts in which the terms of the agreement are fully and openly incorporated at the time the contract is entered into, while implied contracts are such as arise by legal inference and upon principles of reason and justice from certain facts, or where there is circumstantial evidence showing that the parties intended to make a contract. 2 Bl. Com. 443. As contracts for subscription to stock contain no stipulation with reference to the rights of creditors and depositors, it is clear that such rights can only be asserted upon the theory that the subscriber impliedly bound himself to respond to any liability arising indirectly from his contract of subscription.

Whether the promise raised by the statute was an implied contract not in writing or a liability created by statute, it is immaterial to inquire. For the purposes of this case it may have been both. The statute was the origin both of the right and the remedy, but the contract was the origin of the personal responsibility of the defendant. Did the statute make a distinction between them with reference to the time within which an action must be brought, it might be necessary to make a more exact definition; but as the action must be brought in any case within four years, it is unnecessary to go farther than to declare what seems entirely clear to us, that it is not a contract in writing within the meaning of § 10 of the Nebraska act. *Hawkins v. Iron Valley Furnace Co.* 40 Ohio St. 507.

*Plaintiff, however, insists that defendant's [75] contract here sought to be enforced was not entered into between him and the bank, but between him and the creditors of the bank; that the order of the Comptroller of the Currency for the assessment of the shareholders did not create a cause of action or set the statute of limitations running, nor in any way affect the validity or duration of the right which belongs to the creditors to have this liability enforced; and that the action not being upon the contract of subscription, but upon the contract of the shareholder with the creditors of the bank, entered into by himself with the creditors through the agency of the officers of the bank, different considerations apply, and the statute of limitations does not operate as a bar so long as there are any outstanding claims against the bank.

In support of this proposition we are referred to § 2 of the act of June 30, 1876 (19 Stat. at L. 63, chap. 156), which declares "that when any national banking association shall have gone into liquidation under the provisions of § 5220 of said [Revised] Statutes, the individual liability of

the shareholders provided for by § 5151 of said Statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditors' bill, brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof," etc.; and we are cited to several cases holding that claims against shareholders under similar statutes do not become barred until the expiration of the time at which the claims against the corporation also became barred.

There are several answers to this position. Section 5220, to which the 2d section of the act of June 30, 1876, is supplementary, contemplates only a voluntary liquidation, providing, as it does, that "any association may go into liquidation and be closed by the vote of its shareholders owning two thirds of its stock." *Richmond v. Irons*, 121 U. S. 27, 47, 30 L. ed. 864, 870, 7 Sup. Ct. Rep. 788, 797. Now, the Capital National Bank did not go into voluntary liquidation, but, as averred in the bill, "the Comptroller of the Currency of the United States became and was satisfied of the insolvency of the said Capital National Banking Association," and thereupon appointed a receiver. In other [76] words, the proceedings *were taken under § 5234 as supplemented by § I of the act of June 30, 1876, authorizing the Comptroller of the Currency to appoint a receiver when the association had refused to pay its circulating notes and is in default, or he is otherwise satisfied of its insolvency.

But it is also sufficient to say of this that the action is not brought by the creditors under the 2d section of the act of June 30, 1876, but by the receiver under Rev. Stat. § 5234. In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run. *Scovill v. Thayer*, 105 U. S. 145, 26 L. ed. 963; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739. Upon the theory of the plaintiff, if the statute of limitations were pleaded, it would become necessary for the receiver to show that there were outstanding claims against the bank which were not barred by the statute, and therefore that the bill might be maintained. This would involve a departure from the whole theory of the bill in this case, which is based upon the allegation that the Comptroller of the Currency made an assessment upon the stockholders June 10, 1893, payable July 10, from which latter date plaintiff claimed interest. Defendant demurred to this upon the ground that the bill set forth a cause of action barred by the statute, and plaintiff went to a hearing upon this demurrer and was defeated. Obviously he cannot now set up a right to recover, if the creditors had brought a bill under another statute, to which no allusion is made in the bill in this case, and which provides for a wholly separate and independent remedy.

Plaintiff's final contention, that no cause of action arises until a demand has been made, is also fully met by the allegation of the bill that on June 10, 1893, the Comptrol-

ler of the Currency made an order in which he declared that he had made an assessment and requisition upon the shareholders, "and that he did thereby make demand upon each and every share of the capital stock of the said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders. Having made this allegation himself, we do not understand upon what theory the plaintiff now assumes that no demand was made.

*In the view we take of the statute of limitations, we have not thought it worth while to consider the points made by the defendant, that the action should have been at law, and that the bill is defective for the want of proper parties.

There was no error in the decree of the court below, and it is therefore affirmed.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. GEORGE HUNT, Attorney General, Appt.,

v.
ILLINOIS CENTRAL RAILROAD COMPANY et al.

(See S. C. Reporter's ed. 77-99.)

Appeal—conclusiveness of prior decision on second appeal—effect of decision on subsequent proceedings in lower court—piers erected by riparian proprietors—extension beyond point of practical navigability—question of fact—concurrent findings.

1. Every matter embraced by a decree of a United States circuit court, and not left open by a decree of the United States Supreme Court affirming the former decree in all respects but one, and as to that one remanding the case for further investigation of the facts upon which it depended, is conclusively determined, as between the parties, by such affirmation, and is not subject to re-examination on a second appeal.
2. In determining whether piers erected in Lake Michigan by a railroad company by virtue of its riparian proprietorship extended into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake, the circuit court to which the cause has been remanded for further investigation of the facts on which this question depends is not confined to the consideration of the size and capacity of vessels habitually employed on the lake at the commencement of the litigation or at the date of its original decree.
3. Piers, docks, and wharves erected in Lake Michigan by a railroad company by virtue of its riparian proprietorship cannot be said to extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on that lake, where such structures extend no farther into the lake than is necessary to accommodate a great number of vessels of moderate capacity, and the average depth of water at the outer line of the

NOTE.—On the conclusiveness of prior decisions on subsequent appeals—see note to *Hastings v. Foxworthy* (Neb.) 34 L. R. A. 321.

structures is insufficient for the accommodation of a vast amount of commerce carried on in vessels on the lake.

4. The concurrent findings of the two lower courts that piers, docks, and wharves erected in Lake Michigan by a railroad company by virtue of its riparian proprietorship do not extend into the lake beyond the point of practicable navigability will not be disturbed unless clearly in conflict with the evidence.

[No. 28.]

Argued March 15, 1901. Decided February 3, 1902.

A PPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court of Cook County, Illinois, confirming the title of the Illinois Central Railroad Company to certain piers, docks, and wharves constructed by it on the lake front of the city of Chicago. *Affirmed.*

See same case below, 34 C. C. A. 138, 91 Fed. 955.

The facts are stated in the opinion.

Mr. John H. Hamline argued the cause, and, with **Messrs. Edward C. Akin, Frank H. Scott, and Frank E. Lord**, filed a brief for appellant:

The opinion forms a part of the mandate and this court may construe its own mandate.

Re Sanford Fork & Tool Co. 160 U. S. 256, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

The lower court should have looked into the opinion in construing the mandate.

Ibid.

It erred in construing the inquiry to relate to the date of the final decree, rather than to the time the bill was filed or the structures built. Docks built *pendente lite* are at builders' risk.

Miller v. New York, 109 U. S. 392, 27 L. ed. 971, 3 Sup. Ct. Rep. 228.

Twenty feet was declared to be beyond the line of practical navigability at Detroit, though the Michigan courts recognize the right of riparian owners to dock out in Detroit river.

Grand Trunk R. Co. v. Baekus, 46 Fed. 215.

Messrs. Benjamin F. Ayer and John N. Jewett argued the cause, and, with **Mr. J. M. Dickinson**, filed a brief for appellee:

Whatever was presented and decided on the former appeal in this case has become *res judicata*, and the same matter between the same parties cannot be reopened and subsequently considered.

Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167; *Roberts v. Cooper*, 20 How. 467, 15 L. ed. 969; *Himely v. Rose*, 5 Cranch, 313, 3 L. ed. 111; *Skillern v. May*, 6 Cranch, 267, 3 L. ed. 220; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Browder v. M'Arthur*, 7 Wheat. 58, 5 L. ed. 397; *The Santa Maria*, 10 Wheat. 431, 6 L. ed. 359; *West v. Brash-ear*, 14 Pet. 51, 10 L. ed. 350; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. ed. 658; *Chaires v. United States*, 3 How. 611, 11 L. ed. 749; *Corning v. Troy Iron & Nail* 184 U. S.

Factory, 15 How. 451, 14 L. ed. 768; *Sizer v. Many*, 16 How. 98, 14 L. ed. 861; *Peck v. Sanderson*, 18 How. 42, 15 L. ed. 262; *Roberts v. Cooper*, 20 How. 467, 15 L. ed. 969; *Whyte v. Gibbs*, 20 How. 541, 15 L. ed. 1016; *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, *sub nom. Dubuque & P. R. Co. v. Litchfield*, 17 L. ed. 514; *Noonan v. Bradley*, 12 Wall. 121, 20 L. ed. 279; *Tyler v. Magwire*, 17 Wall. 253, 21 L. ed. 576; *Wayne County v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *The Lady Pike*, 96 U. S. 461, *sub nom. Pearce v. Germania Ins. Co.* 24 L. ed. 672; *Stewart v. Salamon*, 97 U. S. 361, 24 L. ed. 1044; *Clark v. Keith*, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518; *Re Washington & G. R. Co.* 140 U. S. 91, 35 L. ed. 339, 11 Sup. Ct. Rep. 673; *Northern P. R. Co. v. Ellis*, 144 U. S. 458, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; *Gaines v. Rugg*, 148 U. S. 228, *sub nom. Gaines v. Caldwell*, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; *Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121.

To serve a useful purpose, a wharf must reach water of sufficient depth to float vessels when laden. They must of necessity occupy a part of the stream (or lake) over which a vessel could float if they were not there.

Ailee v. Northwestern Union Packet Co. 21 Wall. 393, 22 L. ed. 620.

The concurrent decisions of two courts upon a question of fact will not be disturbed unless it is manifest that some serious or important mistake has been made in the consideration of the evidence. The burden is always on the appellant to show the error and the proof of error must be plain and palpable.

The Carib Prince, 170 U. S. 655, *sub nom. Wuppermann v. The Carib Prince*, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; *Baker v. Cummings*, 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. Rep. 767; *Compania De Navigacion La Flecha v. Brauer*, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12; *Dravo v. Fabel*, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. 170; *The Richmond*, 103 U. S. 540, *sub nom. The Sabine v. The Richmond*, 26 L. ed. 313; *The Mareellus*, 1 Black, 414, *sub nom. Baxter v. Camp*, 17 L. ed. 217; *Morewood v. Enequist*, 23 How. 491, 16 L. ed. 516.

*Mr. Justice **Harlan** delivered the opinion-[78] ion of the court:

This case has been heretofore in this court. *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110. The decree then under review was affirmed in all respects except one, and as to that one the cause was remanded for further investigation of the facts upon which it depended.

The case involved the asserted ownership

by the Illinois Central Railroad Company of certain piers, docks, and wharves constructed by it on the lake front of the city of Chicago, east of Michigan avenue.

The state contended that the structures in question were erected, without authority of law, on lands belonging to it, and that the decree now before us was erroneous in not so declaring.

The railroad company contended that the mandate of this court on the former appeal left open for consideration by the circuit court only one question, namely, whether those structures extended beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on Lake Michigan; and that that issue of fact having been found in its favor, the circuit court could not properly have passed any other decree than one confirming the company's title to such structures.

The history of the litigation relating to this property is fully disclosed in *Illinois C. R. Co. v. Illinois*, above cited. But it will be appropriate and will contribute to a clear understanding of the present appeal if the essential facts be restated in this opinion.

In the year 1883 an information was filed in the circuit court of Cook county, Illinois, by the People of that state against the Illinois Central Railroad Company, the city of Chicago, and the United States of America. That case was removed into the circuit court of the United States for the northern district of Illinois, and a motion to remand it to the state court was overruled. 16 Fed. 881. In the same case the city of Chicago filed a cross bill against the state and its codefendants. At the same time there was pending in the circuit court of the United States for the same district an information [79] in *equity filed by the government against the Illinois Central Railroad Company, the Michigan Central Railroad Company, the Chicago, Burlington, & Quincy Railroad Company, the Baltimore & Ohio Railroad Company, and the city of Chicago.

At the hearing of those causes in the circuit court certain maps were used; one being known as the map of "Fort Dearborn addition to Chicago" made by direction of the Secretary of War, under the authority of an act of Congress approved March 3d, 1819; the other being known as the Morehouse map. Both maps were made part of the opinion of this court in *Illinois C. R. Co. v. Illinois*, and for convenience are here reproduced [See opposite page.]

[82] *The questions involved in the above suits are indicated by the following extract from the opinion of the circuit court at the original hearing: "The state, in the original suit, asks a decree establishing and confirming her title to the bed of Lake Michigan, and her sole and exclusive right to develop the harbor of Chicago by the construction of docks, wharves, etc., as against the claim by the railroad company that it has an absolute title to said submerged lands, de-

scribed in the act of 1869,†*and the right—[83] subject to the paramount authority of the United States in respect to the regulation of commerce between the states—to fill the bed of the lake, for the purposes of its business, east of and adjoining the premises between the river and the north line of Randolph street, and also north of the south line of lot 21; and also the right, by constructing and maintaining wharves, docks, piers, etc., to improve the shore of the lake for the purposes of its business and for the promotion generally of commerce and navi-

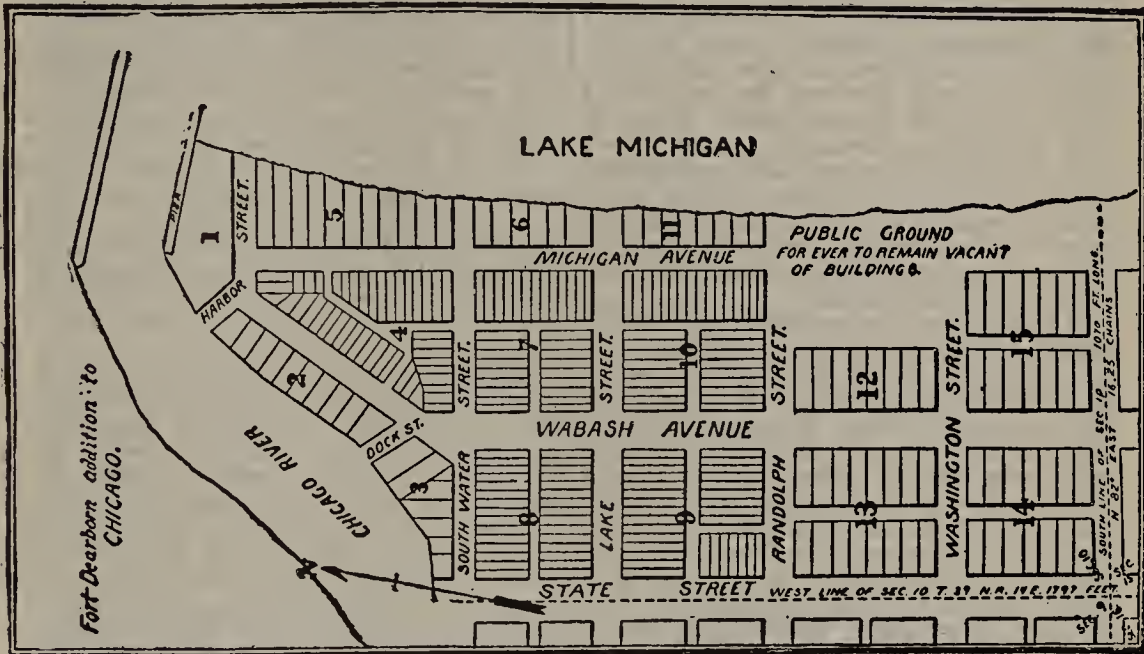
†"An act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago. Passed over veto, April 16, 1869." The 3d section of that act reads:

"§ 3. The right of the Illinois Central Railroad Company under the grant from the state in its charter, which said grant constitutes a part of the consideration for which the said company pays to the state at least 7 per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands, submerged or otherwise, lying east of the said line, running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15, township and range as aforesaid, is hereby confirmed; and all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of 1 mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot 21, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: *Provided*, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same; and that all gross receipts from use, profits, leases, or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the state treasury, semiannually, the percentum provided for in its charter, in accordance with the requirements of said charter: and *Provided*, also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor: and *Provided*, further, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now, or which may hereafter be, on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation."

gation. The state insisting that the company has, without right, erected, and proposes to continue to erect, wharves, piers, etc., upon the domain of the state, asks that such unlawful structures be directed to be removed, and the company enjoined from constructing others. The city, by its cross bill, insists that since June 7th, 1839, when the map of Fort Dearborn addition was recorded, it has had the control and use for public purposes of that part of section 10 which lies east of Michigan avenue and between Randolph street and fractional section 15; and that, as successor of the town of Chicago, it has had possession and control since June 13th, 1836, when the map of

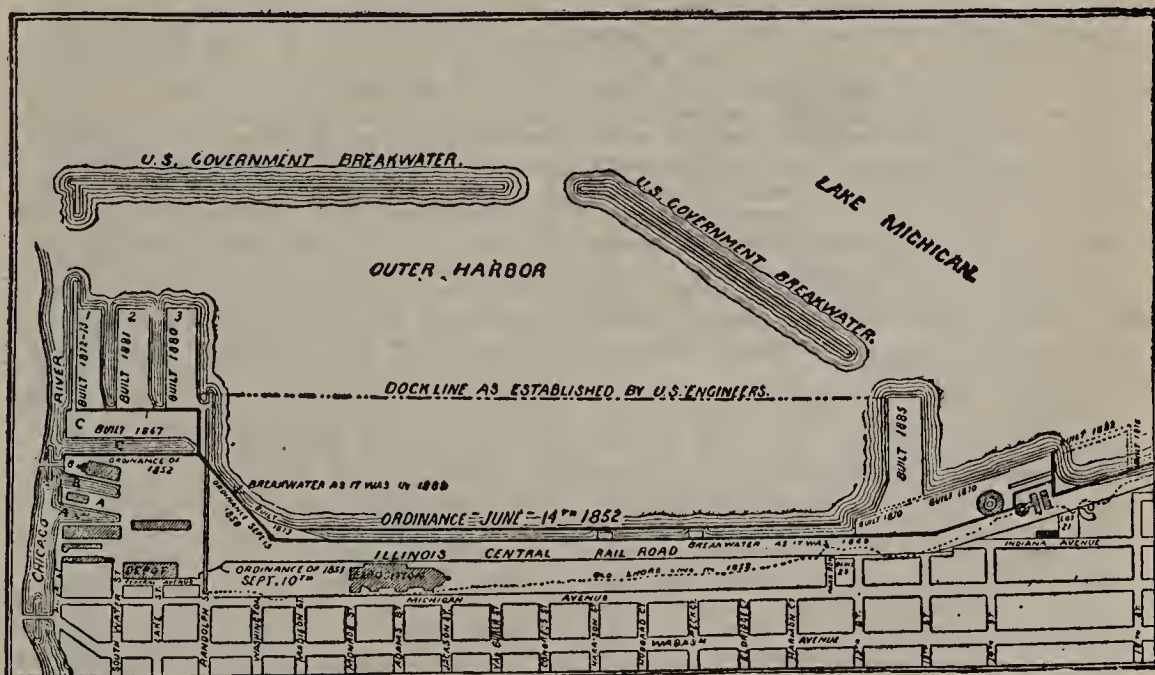
fractional section 15 addition was recorded, of the lands in that addition north of block 23. It asks a decree declaring that it is the owner in fee, and of the riparian rights thereunto appertaining, of all said lands, and has, under existing legislation, the exclusive right to develop the harbor of Chicago by the construction of docks, wharves, and levees, and to dispose of the same, by lease or otherwise, as authorized by law; and that the railroad company be enjoined from interfering with its said rights and ownership. The relief sought by the United States is a decree declaring the ultimate title and property in the 'Public Ground' shown on the plat of the Fort Dearborn

[80]



[81]

MOREHOUSE MAP.



addition, south of Randolph street, and also in the open space shown on the plat of fractional section 15 addition, to be in the United States, with the right of supervision and control over the harbor and navigable waters aforesaid; that the railroad companies and the city be enjoined from exercising any right, power, or control over said grounds, or over the waters or shores of the lake; that the Illinois Central Railroad Company be restrained from making or constructing any piers, wharves, or docks, and from driving piles, building walls, or filling with earth or other materials in the said lake, or from using any made-ground, or any piers, wharves, or other constructions made or built by or for it in or about the outer harbor, to the east of the 200-foot strip of its way-ground, or from taking or exacting any toll for such use; and that the Illinois Central Railroad Company be required to abate and remove all obstructions placed by it in said outer harbor, and to quit possession of all lands, waters, and made-ground taken and held by it without right as aforesaid. The state, the city, and the general government all unite in contending that the lake front act of 1869 is inoperative and void." 33 Fed. 730, 750.

A final decree was rendered in the circuit court on the 24th day of September, 1888. By that decree it was adjudged that the fee of certain streets, avenues, and grounds was in the city of Chicago in trust for public use; and that the city of Chicago, as riparian owner of such grounds on the east or lake front of said city, between the north line of Randolph street and the north line of block 23, each of the lines being produced to Lake Michigan, and in virtue of authority to that end conferred by its charter, had, among other powers, the power to establish, construct, erect, and keep in repair on the lake front, east of such premises, within the lines given, and in such manner as would be consistent with law, public landing places, wharves, docks, and levees, subject, however, in the execution of that power, to the authority of the state by legislation to prescribe the lines beyond which piers, docks, wharves, and other structures, other than those erected by the general government, might not be extended into the waters of the harbor that were navigable in fact, and to such supervision and control as the United States might rightly exercise in and over such harbor, and subject also [85] to the enjoyment by the Illinois *Central Railroad Company of the rights then to be defined and described.

It was further adjudged:

"That the Illinois Central Railroad Company is the owner in fee of all the wharves, piers, and other structures erected by it in the city of Chicago, east of Michigan avenue, south of Chicago river, and north of the north line of Randolph street, extended eastwardly as shown upon said Morehouse map, including the station grounds lying west of the slip C, the pier marked C, lying east of slip C, and represented upon the Morehouse map to have been built in 1867,

and piers 1, 2, and 3, lying east of pier C last mentioned, and represented upon said map to have been built as follows: Pier 1 in 1872 and 1873, pier 2 in 1881, and pier 3 in 1880, and is also entitled to the use, for the purposes of its business, of the slips marked on said Morehouse map.

"That said company is likewise the owner in fee of all the wharves, piers, and other works made and constructed by it in the city of Chicago, east of its main tracks, between the north line of block 23, in fractional section 15 addition to Chicago, and the center line of Sixteenth street extended, including the pier or line of piling represented upon the said Morehouse map to have been built in 1870, and the station grounds lying west of the said pier and contiguous thereto; also of the wharf or pier projecting into the lake from the grounds last mentioned, and represented upon the said Morehouse map to have been built in 1885; which said wharves, piers, and other works so constructed and so far as constructed by the said Illinois Central Railroad Company, as aforesaid, are lawful structures and not encroachments upon the domain of the state of Illinois or upon the public right of navigation, or upon the property interests or estate of the said city of Chicago."

"And the court doth further find and declare, and it is hereby adjudged and decreed, that the 3d section of the act of the general assembly of the state of Illinois, passed over the governor's veto April 16, 1869, entitled, 'An Act in Relation to a Portion of the Submerged Lands and Lake Park Grounds Lying on and Adjacent to the Shore of Lake Michigan, on the Eastern *Frontage of [86] the City of Chicago,' so far, at least, as it confirms 'the right of the Illinois Central Railroad Company under the grant from the state in its charter, . . . and under and by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control in and to the lands, submerged or otherwise, lying east of the said line running parallel with and 400 feet east of the west line of Michigan avenue in fractional sections 10 and 15,' is a valid and constitutional exercise of legislative power, and legalizes as well what was done by said company prior to April 16th, 1869, in the way of filling in the lake and constructing wharves, piers, tracks, warehouses, and other works between the Chicago river and the north line of Randolph street extended eastwardly, as its occupancy and use for way-ground of the two said triangular pieces of ground immediately south of Randolph street; and that the subsequent act of the general assembly of Illinois, passed April 15th, 1873, in so far as it sought by repealing the said act of April 16th, 1869, to revoke or annul said confirmatory clause of the last-named act, was void under the Constitution both of Illinois and of the United States; but the court is of opinion, and so adjudges and decrees, that the said act of April 15th,

1873, repealing said act of April 16th, 1869, had the effect in law to withdraw from said railroad company the grant to it, its successors and assigns, by the 3d section of said act of April 15th (16th), 1869, of 'all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of 1 mile, and between the south line of the pier extended eastwardly and a line extended eastward from the south line of lot 21, south of and near to the roundhouse and machine shops of said company, in the south division of said city of Chicago;' and to reinvest the state with such right and title as it had in and to said premises prior to the passage of said act of April 16th, 1869; and said repealing act had the further effect to withdraw from said company the additional power conferred upon it by said act of April 16th, 1869, to improve the harbor [87] of Chicago, and *to engage in the business of constructing and maintaining wharves, piers, and docks for the benefit of commerce and navigation generally, and not in the prosecution of its business as defined and limited by its original charter and the laws of the state, saving, however, to said company as unaffected by said repeal the right to hold and use as part of its way-ground or right of way, and not otherwise, the before-mentioned part of the submerged lands east of its breakwater between Monroe and Washington streets extended eastwardly, which was reclaimed from the lake in 1873, presumably upon the faith of the act of 1869, and is marked on the Morehouse map with the words 'built 1873.'

"It is further ordered, adjudged, and decreed that the defendant, the Illinois Central Railroad Company, be, and it is hereby, perpetually enjoined and restrained from erecting structures in or filling with earth or other materials any portion of the bed of Lake Michigan as it now exists and as shown on said Morehouse map east or in front of said fractional sections 10 and 15,—that is, east or in front of the grounds now occupied and used by it between Chicago river and the north line of Randolph street extended eastwardly, or east or in front of the grounds now occupied and used by it between the north line of Randolph and the center line of Sixteenth street, each extended eastwardly, except that said company may complete the slip or basin already commenced immediately north of Sixteenth street extended, with a wharf on each side of it not exceeding 100 feet in width each, where vessels coming into such slip or basin may load and unload, and upon which tracks of the company may be laid; and it is considered and ordered by the court that the Illinois Central Railroad Company and the city of Chicago each pay one half of the costs herein, and that execution issue therefor."

The railroad company not having obtained all it claimed, the cause was brought by it to this court, which affirmed the de-

creed of the circuit court *except as modified in certain particulars*, to be presently indicated. *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 449, 464, 36 L. ed. 1018, 1041, 1046, 13 Sup. Ct. Rep. 110, 117, 122.

Referring to the 3d section of the act of the Illinois legislature *of 1869 this court [88] said: "The section in question has two objects in view: one was to confirm certain alleged rights of the railroad company under the grant from the state in its charter and under and 'by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident thereto, in and to the lands submerged or otherwise lying east of a line parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15. The other object was to grant to the railroad company submerged lands in the harbor. The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed, from its ownership of lands in sections 10 and 15 on the shore of the lake. Whether the piers or docks constructed by it *after the passage of the act of 1869* extended beyond the point of navigability in the waters of the lake must be the subject of judicial inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined that such piers and docks do not extend beyond the point of *practical* navigability, the claim of the railroad company to their title and possession *will be confirmed*; but if they, or either of them are found on such inquiry to extend beyond the point of such navigability, then the state will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the state and the facts established, may be authorized by law."

The modifications in the original decree of 1888 which this court directed to be made are distinctly shown by the following extract from our opinion:

"It follows from the views expressed, and it is so declared and adjudged, that the state of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the 3d section of the act of April 16th, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15th, 1873, repealing the same, is valid and effective for the purpose of restoring to the state the same control, dominion, *and ownership of said [89] lands that it had prior to the passage of the act of April 16th, 1869.

"But the decree below, as it respects the pier commenced in 1872, and the piers completed in 1880 and 1881, marked 1, 2, and 3, near Chicago river, and the pier and docks between and in front of Twelfth and Sixteenth streets, is *modified* so as to direct the court below to order such investigation to be made as may enable it to determine whether those piers erected by the company, by virtue of its riparian proprietorship of

lots formerly constituting part of section 10, extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake; and if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, then the said court shall direct the said pier or piers, to the excess ascertained, to be abated and removed, or that other proceedings relating thereto be taken on the application of the state as may be authorized by law; and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the state as may be authorized by law. *Except as modified in the particulars mentioned*, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company; and it is so ordered." *Illinois Central R. Co. v. Illinois*, 146 U. S. 387, 449, 464, 36 L. ed. 1018, 1041, 1046, 13 Sup. Ct. Rep. 110, 117, 122.

The mandate of this court embodied the above extract from its opinion, and upon the return of the causes to the circuit court the parties took additional proof on the single matter so reserved for investigation.

[90] *Upon final hearing in the circuit court, May, 1896, a decree was entered by which it was found and adjudged "that the said piers and docks referred to in the aforesaid judgment and mandate of the Supreme Court and there described as piers marked 1, 2, and 3, near Chicago river, and the piers and docks constructed by the said railroad company in front of the shore between Twelfth and Sixteenth streets, all in the city of Chicago, in the state of Illinois, do not extend, nor does either of them extend, into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake. It is therefore ordered, adjudged, and decreed that the title and possession of the said Illinois Central Railroad Company to the said piers, and each of them and every part thereof, be, and the same is hereby, affirmed."

That decree was affirmed by the circuit court of appeals (34 C. C. A. 138, 91 Fed. 955), and the case is here upon appeal by the state of Illinois. No appeal was taken by the United States or by the city of Chicago.

In view of these facts, what matters are open for consideration on this appeal?

446

This question was fully discussed at the bar. It is not in our opinion difficult of solution.

We have seen that by the original decree of the circuit court rendered September 24th, 1888, the railroad company was adjudged to be the owner in fee of the particular structures in question, namely, the piers marked 1, 2, and 3 on the Morehouse map, as well the piers and docks between and in front of Twelfth and Sixteenth streets, and were entitled to use and control them in its business. This court held that view to be correct, *provided* the structures did not "extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake." If, upon investigation, it was found that the structures referred to did in fact extend beyond that point, then the circuit court was directed to make such decree as would effect their removal "to the excess ascertained;" and if the contrary was found to be the case, then a decree was to be entered recognizing the right of the railroad company in respect of the structures in question to be such as were declared by the original decree of the circuit court.

*As already shown, the circuit court found, [91] upon full inquiry, that the structures did not extend beyond the point of practical navigability, having reference to the manner in which commerce was conducted on the lake; and in conformity with the mandate a decree was entered confirming the title of the railroad company.

In *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. ed. 1167, this court said: "A final decree in chancery is as conclusive as a judgment at law. 1 Wheat. 355, 4 L. ed. 119; 6 Wheat. 113, 116, 5 L. ed. 219, 220. Both are conclusive on the rights of the parties thereby adjudicated. No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (3 Wheat. 591, 4 L. ed. 467; 3 Pet. 431, 7 L. ed. 731); or to reinstate a cause dismissed by mistake (12 Wheat. 10, 6 L. ed. 534); from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. . . . Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. . . . After a mandate, no rehearing will be granted. . . . and on a subsequent appeal nothing is brought up but the proceeding subsequent to the mandate. 5 Cranch, 316, 3 L. ed. 112; 7 Wheat. 58, 59, 5 L. ed. 397; 10 Wheat. 443, 6 L. ed. 362."

In *Roberts v. Cooper*, 20 How. 467, 481,

184 U. S.

15 L. ed. 969, 973, the court said: "On the last trial the circuit court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to [92] the court *below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members. . . . We can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial." To the same effect are numerous cases, some of which are cited in the margin.†

It is clear, under the adjudged cases, that upon the return of this cause to the circuit court nothing was before that court except to inquire whether the structures erected by the railroad company, and specifically described in the opinion and mandate of this court, extended into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels was conducted on the lake. That matter, and nothing more, has been or could have been determined by the final decree of the

circuit court, and therefore on this appeal we can only inquire as to the soundness or unsoundness of its conclusion upon the sole question reserved for investigation. We therefore do not stop to consider, as the appellant insists we should do, whether this court erred in any particular *in its opin-[93] ion or judgment on the former appeal, in respect of any matter then determined. Every matter embraced by the original decree of the circuit court, and not left open by the decree of this court, was conclusively determined, as between the parties, by our former decree, and is not subject to re-examination on this appeal.

We come, then, to consider the merits of the case as involved in the only question now before us, namely, whether the structures referred to extend beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake.

Judge Showalter in the circuit court found that the facts relating to the structures north of Randolph street and those between Twelfth and Sixteenth streets fully protected the railroad company under the rule prescribed by the mandate of this court. Referring to vessels of the largest class continuously used in lake navigation, he said: "Such vessels, when laden, require from 16 to 20 feet of water in which to float. A vessel drawing more than 12 feet, as I find from the evidence in the case, would hardly reach the structure here in question in the ordinary stages of water, and in the lowest water vessels requiring more than 10 feet could not reach or land at these docks. Without being specific as to the exact depth of the water, I find that the two piers and docks between Twelfth and Sixteenth streets do not extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lakes, and I make the same finding as to the piers and docks north of Randolph street.

In the circuit court of appeals, Judge Jenkins, speaking for the court, said: "The right [of the riparian owner] is a relative right, having relation, in the language of the Supreme Court in this cause, 'to the manner in which commerce in vessels is conducted on the lake.' To serve any useful purpose these piers must reach water of sufficient depth to float vessels when laden, and alongside of which vessels can be brought to be conveniently loaded or unloaded. A sufficient depth of water to float vessels such as navigate the waters of the lake is essential, and *it is a necessary incident of the riparian [94] right that the pier shall penetrate the water to a distance from the shore necessary to reach water which shall float vessels, the largest as well as the smallest, that are engaged in the commerce of the lakes. *Atlee v. Northwestern U. Packet Co.* 21 Wall. 393, 22 L. ed. 620; *Langdon v. New York*, 93 N. Y. 151. . . . We must have regard to the object for which this right is conferred. It is to reach out to accommodate the vessels that plow the waters of the lake. It is

†*Martin v. Hunter*, 1 Wheat. 304, 355, 4 L. ed. 97, 110; *Browder v. M'Arthur*, 7 Wheat. 58, 5 L. ed. 397; *Washington Bridge Co. v. Stewart*, 3 How. 413, 425, 11 L. ed. 658, 664; *Chaires v. United States*, 3 How. 611, 620, 11 L. ed. 749, 753; *Corning v. Troy Iron & Nail Factory*, 15 How. 451, 466, 14 L. ed. 768, 774; *Peck v. Sanderson*, 18 How. 42, 15 L. ed. 262; *Whyte v. Gibbs*, 20 How. 541, 15 L. ed. 1016; *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, 73, *sub nom.* *Dubuque & P. R. Co. v. Litchfield*, 17 L. ed. 514, 515; *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. ed. 279, 281; *Wayne County v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Stewart v. Salamon*, 97 U. S. 361, 24 L. ed. 1044; *Brooks v. Burlington & S. W. R. Co.* 102 U. S. 107, 26 L. ed. 91; *Northern P. R. Co. v. Ellis*, 144 U. S. 458, 464, 36 L. ed. 504, 506, 12 Sup. Ct. Rep. 724; *Gaines v. Rugg*, 148 U. S. 228, 241, *sub nom.* *Gaines v. Caldwell*, 37 L. ed. 432, 436, 13 Sup. Ct. Rep. 611; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 691, 39 L. ed. 859, 863, 15 Sup. Ct. Rep. 733; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396, 42 L. ed. 210, 17 Sup. Ct. Rep. 905; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

in aid of the commerce of the lake, and that right for that purpose should be liberally interpreted and upheld."

After referring to the harbor line adopted by the United States government at the request of the city of Chicago, the court proceeded: "Without undertaking to say to what extent these proceedings of the city of Chicago were authorized as between it and the people of the state of Illinois, it is sufficient to say that these things have been done without any adverse action on the part of the state of Illinois. If they have no other effect, they tend to strengthen, if support be needed, the general drift of all the evidence in the case, that the necessities of the commercial marine of the Great Lakes require substantially a depth of water of 20 feet to float the larger class of vessels, and indicate that that depth at the present time marks 'the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake.' It is conceded that the piers in question do not intrude into the waters of the lake to that extent, and that the depth of water can be obtained at them only by dredging. Conceding, then, as we must, the right of the railroad company to reach that point of practical navigability, these structures were not and are not unlawful, and its rights to them must be sustained. The title to submerged lands resting in the state is held in trust in aid of navigation. Courts have at all times been diligent to protect and enforce rights of navigation, in aiding and protecting whatever may tend to build up and encourage commerce upon the seas. It does not comport with our sense of duty in the protection of a mere naked legal title to submerged land, to deny a conceded riparian right—conceded because so declared by the ultimate tribunal—when that [95] bare legal title is *held in trust for the very purpose to which these structures are devoted, namely, the accommodation of the commerce of the lake. To compel the abatement or removal of these structures to the extent demanded, or to any extent, in view of the establishment of the harborline as indicated, would be to render them useless for the accommodation of the commerce of the lakes, and to practically deny to the appellee a substantial and valuable riparian right to which the Supreme Court has determined it is entitled."

The words of our mandate, "*practical navigability, having reference to the manner in which commerce in vessels [on the lake] is conducted,*" admonished the circuit court that the question as to the extent to which the railroad company could rightfully continue to occupy the bed of the lake with piers, docks, or wharves was not to be determined upon narrow, technical grounds, but upon grounds which, under all the circumstances, would be fair and reasonable as between the company and the public, having reference to the manner in which commerce was commonly or habitually conducted in vessels of various sizes.

It is said that, in determining whether

the piers and docks in question extended into the lake beyond the point of practical navigability, the circuit court could only take into view the size and capacity of vessels habitually employed on the lake at the commencement of this litigation or at the date of the original decree in the circuit court.

We are of opinion that nothing in our mandate or opinion compelled the circuit court to frame its decree upon that theory. That court was directed to ascertain whether the structures complained of extended beyond practical navigability, having reference to the manner in which commerce "is conducted on the lake." There was no intention to withhold the power to determine the particular matter reserved for investigation in the light of the situation as it was when that investigation was made. If this court had intended that investigation should relate to the situation as it was when the litigation commenced, or when the original decree was rendered, it would have so declared. If, having reference to the manner in which commerce *in vessels was con- [96] ducted at the time of the investigation below, the structures in question did not extend into the lake beyond the point of practical navigability, then the circuit court, in the execution of the mandate of this court, properly confirmed the title and possession of the railroad company as established by the original decree.

It appears from the evidence that in 1847 the largest vessel on the lake had capacity sufficient to carry 18,000 bushels of corn; that in 1860 some grain vessels carried as much as 20,000 bushels, having a draft of about 12 or 12½ feet. In 1869 some vessels had a draft of 13 feet. Later, and during the period covered by the investigation, there were vessels on the lake carrying 100,000 bushels of corn, while others carried as much as 160,000 bushels, the latter drawing from 16 to 18 feet of water. The proof shows that the tendency for many years prior to the rendition of the decree was to increase the carrying capacity of vessels. That was particularly so in the case of metal steamers, some of which carried as much as 4,000 or 5,000 tons, while others varied in draft from 10 to 18 feet. There were, at the time of the investigation below, vessels regularly engaged in commerce on the lake whose draft was as much as 20 feet.

It is safe to say that according to the evidence in the cause a wharf or pier in the lake would not have adequately accommodated commerce, as carried on in many vessels on the lake, unless it had reached water not less than from 14 to 18 feet deep; and even such a structure could not have been used by the largest vessels on the lake. It was shown by soundings that the structures in question extended no farther into the lake than was necessary to accommodate a great number of vessels of moderate capacity. When the investigation below was entered upon, pursuant to our mandate, the depth of water in the channel of Chicago

river over the La Salle and Washington streets tunnels was about 16 feet and 8 inches,—a greater depth than exists at the outer edge of the piers, docks, and wharves in question, except that at the mouth of the Chicago river, against the ends of some of the company's structures, there is a depth [97] of 18 to 20 feet, obtained *by dredging. The average depth of water at the outer line of the structures in question does not exceed 12 or 13 feet at the utmost, which is insufficient for the accommodation of a vast amount of commerce carried on in vessels on the lake. An examination of the evidence will disclose this fact beyond all serious controversy.

We are therefore of opinion that there was no error in holding that, in view of the manner in which commerce was conducted on the lake during the period of the investigation below, such structures did not extend into the water beyond the point of practical navigability. Regard being had to the weight of the proof, the same conclusion would be reached if we looked at the capacity of the vessels used on the lake at the time of the original decree in the circuit court.

Confirmation of these views will be found in the testimony of many witnesses whose opinions are entitled to respect. Captain Marshall of the Engineer Corps of the United States Army, having accurate knowledge of the harbor of Chicago and⁸ of its needs, was asked the question: "Having reference to the manner in which commerce in vessels is now conducted on the lakes at the port of Chicago, what, in your opinion, is the reasonable and necessary depth of water in a slip or dock for the accommodation of that commerce?" His answer was: "At present no vessel with a deeper draft than about 16 feet can carry on commerce in the Chicago river, so that I should think that a foot deeper than that—17 feet—would be a proper depth to accommodate the largest as well as the smallest vessels that come to Chicago now." He was also asked: "If you were to construct a pier or wharf in the said outer harbor for the accommodation of vessels engaged in lake commerce, or were to advise in relation thereto, what would be the depth of the water you would consider it necessary to reach in order that such pier or dock should be available for the uses intended?" He replied: "17 feet at present, and ultimately they should construct their docks with 20 feet of water. Piling and bulkheads so as to stand dredging to 20 feet." Many other witnesses testified substantially to the same effect.

[98] *It does not follow from what has been said that the railroad company can, of right, further extend into the lake either the structures in question or new structures. While sustaining the title and possession of the railroad company in respect to piers and docks, so far as then constructed, the original decree of 1888 perpetually enjoined the railroad company from erecting structures in or filling with earth or other materials any portion of the bed of Lake Michi-
184 U. S.

gan as it then existed and was shown on the Morehouse map east or in front of the fractional sections 10 and 15, that is, "east or in front of the grounds now [at the date of the original decree] occupied and used by it between Chicago river and the north line of Randolph street extended eastwardly, or east or in front of the grounds now [then] occupied and used by it between the north line of Randolph and the center line of Sixteenth street, each extended eastwardly, except that said company may complete the slip or basin already commenced immediately north of Sixteenth street extended, with a wharf on each side not exceeding 100 feet in width each, where vessels coming into such slip or basin may load or unload, and upon which tracks of the company may be laid." These restrictions imposed by the original decree were confirmed by the former decree of this court, leaving open only the question whether the structures complained of, and as then constructed and maintained, extended into the lake beyond the point of practical navigability. So that the railroad company cannot acquire by the present decision any authority to further extend its structures into the lake. It must stand upon the original decree of the circuit court in respect of its rights.

We may add that, the circuit court and the circuit court of appeals having concurred in finding that the structures in question did not extend into the lake beyond the point of practical navigability,—which is largely, if not entirely, a question of fact,—the decree should not be disturbed unless it was clearly in conflict with the evidence. *Compania de Navegacion la Flecha v. Brauer*, 168 U. S. 104, 123, 42 L. ed. 398, 406, 18 Sup. Ct. Rep. 12; *Stuart v. Hayden*, 169 U. S. 1, 14, 42 L. ed. 639, 643, 18 Sup. Ct. Rep. 274; *Baker v. Cummings*, 169 U. S. 189, 198, 42 L. ed. 711, 716, 18 Sup. Ct. Rep. 767; *The Carib Prince*, 170 U. S. 655, *sub nom. Wupperman v. The Carib Prince*, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753.

*For the reasons stated, the decree of [99] which the State complains must be affirmed. It is so ordered.

The CHIEF JUSTICE, having been of counsel for the city of Chicago in the earlier stages of this litigation, took no part in the consideration or decision of this case.

WILLIAM H. BRAINARD, Edward Albert Brainard, and Eva Hammore, *Appts.*,
v.

LEFFERT L. BUCK and James Coleman.

(See S. C. Reporter's ed. 99-111.)

Pleading—amendment changing cause of action—conclusiveness of concurrent findings—resulting trust—laches.

1. An amendment to a bill in equity does not

NOTE.—On resulting trusts—see notes to *Fink v. Umscheid* (Kan.) 2 L. R. A. 146; *Hinton v.*

set forth a new and different cause of action, so as to forbid its allowance in the court's discretion, although the reasons for relief are stated more fully and in some respects differently from those in the original bill, where the purpose of both bills is the same,—to establish a resulting trust arising from the same transactions and based on the same general rule of law applicable to resulting trusts.

2. The concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous.
3. Delay in commencing a suit to establish a resulting trust is not such laches as will bar the relief sought, where complainant first learned the facts shortly before the death of the resulting trustee, and, after the death of the latter's wife, who was complainant's sister and who conveyed the premises to him and was by him permitted to remain thereon until her death, took and retained possession with no reason to believe that his title was not perfect until ejectment was brought against him, when he discovered that the legal title to the premises did not pass to his sister under the will of her husband because it was after-acquired property, and commenced the suit within a year after the ejectment suit was begun.
4. One seeking to establish a resulting trust in real property is entitled to the legal title, and not merely to a decree for an accounting, where the evidence shows that his money alone has been paid for such premises, and that, while such money was used in the purchase with his assent, he was unaware that the title was taken in his agent's name.

[No. 110.]

Argued January 15, 16, 1902. Decided February 24, 1902.

APPEAL from the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District of Columbia establishing a resulting trust and enjoining the further prosecution of an action of ejectment. *Affirmed.*

See same case below, 16 App. D. C. 595.

Statement by Mr. Justice **Peckham**:

The above appellants seek a review in this court of the judgment of the court of appeals of the District of Columbia in this case, affirming a judgment of the supreme court of the district enjoining the appellants from the further prosecution of an action of ejectment brought by them against appellee Coleman in the supreme court of the district, to recover a one-fifth interest in a house and lot in the city of Washington, in the possession of Coleman as tenant of appellee Leffert L. Buck, who claims to be the owner thereof. The appellees, Buck and Coleman, commenced this suit in April, 1898, and in their bill of complaint they alleged the bringing of the action of ejectment on or about July 26, 1897, by William H. Brainard, as one of the heirs of his brother, the late Charles F. Brainard, to recover an

undivided one-fifth interest in the real estate mentioned. The bill further alleged that the complainant Buck was the brother of one Cornelia A. Brainard, whose husband was Charles F. Brainard, both of whom lived in the city of Washington up to the time of the death of Charles on May 13, 1881, and the *widow thereafter continued to live in that city until her death on March 31, 1892. On June 12, 1872, Charles F. Brainard, the husband, made and executed his last will and testament, by which he devised and bequeathed to his wife all of his property of every kind and description for her own use and benefit. Afterwards and on July 18, 1879, there was conveyed to Charles F. Brainard by deed the premises in question. After the death of Charles F. Brainard and on March 31, 1882, his widow, by deed, duly conveyed her title to the premises to her brother, the complainant Buck. The bill then contained the following averments:

"8. The plaintiffs further show that the plaintiff, Leffert L. Buck, was the brother of the said Cornelia A. Brainard, and that her husband, the said Charles F. Brainard, was in his lifetime employed as a clerk in the Treasury Department; that he had little or no means of support outside of the salary which he received, and that the plaintiff, Leffert L. Buck, being willing to aid and assist his sister, and being solicited by her and her husband so to do, furnished and advanced the money to pay for the said property and premises first above described; that the said premises were purchased with money so advanced by the said plaintiff, L. L. Buck, in part directly to the said Brainard to pay for and on account of said property, and in part to the wife of the said Brainard, and in part in taking up and paying encumbrances which had been put upon said property for the purchase price thereof; that said money was so advanced and said property purchased for the sole and only purpose of giving to the said Cornelia A. Brainard, the sister of the said L. L. Buck, a home, and that it was so understood by the said Brainard at the time of said purchase; that the said property was conveyed to the said Brainard instead of to his wife for the reason that prior to said conveyance the said Brainard had executed his will, by which said will he had devised and bequeathed to his said wife all of his property of every kind, and it was understood and believed by the said Brainard and his wife that if she should survive him the property would descend to her, and that in event she should not survive him, her said husband, she would have a home on said property during her lifetime, *and that during said period said Brainard should hold the title to said property as trustee for said plaintiff, Leffert L. Buck."

The bill then set forth the names of the

Pritchard (N. C.) 10 L. R. A. 401, and Ducie v. Ford, 34 L. ed. U. S. 1091.

As to laches as a defense—see notes to Hammond v. Hopkins, 36 L. ed. U. S. 135; Felix v. 450

Patrick, 36 L. ed. U. S. 720; Middletown v. Newport Hospital (R. I.) 1 L. R. A. 191; Calhoun v. Delhi & M. R. Co. (N. Y.) 8 L. R. A. 248, and Coffey v. Emigh (Colo.) 10 L. R. A. 125.

184 U. S.

surviving heirs at law of Charles F. Brainard, and averred that some of them had quitclaimed the property to the plaintiff Buck. It is also averred that from the time of the death of Charles F. Brainard his widow lived in the house, and that she conveyed the premises to Buck by deed on March 31, 1882, and that he believed that the legal title was in him until the commencement of the ejectment suit, when he was advised that the will of Charles F. Brainard did not convey the property to his sister for the reason that it was acquired by Brainard after the execution of the will, which did not operate to convey after-acquired property.

For relief, the bill asked that the plaintiffs in the action of ejectment might be perpetually enjoined from further prosecuting the same, and that it might be declared that the land in question was charged with a trust in favor of, and ought to be held for, the use and benefit of the plaintiff Buck, and that the defendants, or such of them as should appear to have the legal title to the lands, should be decreed to convey such legal title free and clear of all encumbrances done or suffered by them or any or either of them unto the plaintiff Buck.

The defendant William H. Brainard demurred to the bill on the ground, among others, that the promise set forth in the bill was not in writing or signed by the deceased, Charles F. Brainard, and was within the meaning of the statute for the prevention of frauds and perjuries; also that Buck had been guilty of gross and inexcusable laches in bringing his suit.

The demurrer was sustained with leave to the plaintiffs to amend. Pursuant to such leave the plaintiff served an amended bill, which was a full and complete bill, taking the place of the original, and restated all the facts set forth in the original bill, but left out the above quoted 8th paragraph. The complainants in the 9th, 10th, 11th, and 12th paragraphs of the amended bill made the following averments:

[102] "9. That from March 12, 1875, until June 3, 1880, the said plaintiff, Leffert L. Buck, sent to the said Charles F. Brainard, for investment as agent for him, the said Leffert L. Buck, various *sums of money,—the particular amounts of which, and the dates at which they were received by said Charles F. Brainard, deceased, are stated in 'Exhibit D,' hereto annexed,—and authorized the said Charles F. Brainard, as agent for him, the said Leffert L. Buck, to invest the same in real estate, bonds, and securities in the city of Washington; that on or about the 18th day of July, 1879, the said Charles F. Brainard purchased the said property and premises hereinbefore described for the sum of \$6,350, and paid on said purchase price the sum of \$2,550 out of the moneys so sent to him for investment by the said plaintiff, Leffert L. Buck, as aforesaid; that upon said purchase the said Charles F. Brainard took the deed of said property to himself without the knowledge, consent, or authority of said plaintiff
184 U. S.

so to do; that said deed is the same deed hereinbefore mentioned as 'Exhibit B;' that thereafter and on or about March 12, 1880, said Charles F. Brainard made a further payment of \$1,266.66 on said property out of said moneys so sent to him for investment by said plaintiff, Leffert L. Buck, as aforesaid; that on the 8th day of June, 1880, there still remained in the hands of said Charles F. Brainard out of the said moneys so received by him for investment as agent for the said plaintiff, Leffert L. Buck, the sum of \$793.58, no part of which has ever been repaid to or received by said plaintiff; that on or about the 25th day of July, 1879, said Charles F. Brainard executed to John F. Waggaman and James A. Harban, trustees, a deed of trust on said property to secure payment of the balance of the purchase money then unpaid thereon, and that said deed of trust was executed without the knowledge, consent, or authority of said plaintiff, Leffert L. Buck; that after the 8th day of June, 1880, and before his death, the said Charles F. Brainard made further payments on said property, not exceeding in amount the sum of \$650, out of the said moneys so received by him from said plaintiff for investment as aforesaid, the particular dates of which payments plaintiffs are unable more definitely at this time to state, for the reason that the books and accounts of the Western Building Association, to which said payments were made, have been destroyed.

*"10. That after the death of the said Charles Brainard the plaintiff Leffert L. Buck was informed by his said sister, Cornelia A. Brainard, that she held the legal title to said property under the last will and testament of her said husband, which is the instrument hereinbefore mentioned as 'Exhibit A,' and that there remained unpaid upon said trust deed the sum of \$1,971.81; that thereupon, and on or about the 17th day of March, 1882, said plaintiff, Leffert L. Buck, paid the balance due upon said trust deed, which was thereupon discharged, to wit, the sum \$1,971.81; and thereafter, and on the 31st day of March, 1882, the said Cornelia A. Brainard conveyed the said property to him by the deed referred to as 'Exhibit C,' and the said plaintiff, Leffert L. Buck, thereupon and on that day entered into and has ever since remained in undisturbed possession of said premises.

"11. And the plaintiffs further show that all of the moneys that were paid for the purchase of said property, including the whole consideration thereof, were paid by the plaintiff Leffert L. Buck.

"12. And the plaintiffs further show that not until after the said action at law No. 41,274, which is the suit of said William H. Brainard against James Coleman, had been brought, had the plaintiff Leffert L. Buck any information that the legal title to said premises did not pass to his sister, the said Cornelia A. Brainard, under the will of her said husband, Charles F. Brainard."

The defendants demurred to this amend-

ed bill on the same grounds stated in the demurrer to the original bill, and also on the ground that a new and different cause of action had been set up in the amended bill from the one in the original bill. The demurrer was overruled, and the defendants thereupon answered, in which, among other things, they denied complainants' allegation as to the payments for the premises by Buck, and averred that the purchase money for the premises had been paid out of Charles F. Brainard's own funds in cash or by his notes secured by deed of trust, which notes were subsequently paid by Brainard.

[104] Upon the trial there was a final decree in favor of the complainants, and the defendants were enjoined from prosecuting the action at law, and they were directed to convey, quitclaim, and release the real estate unto the complainant Buck, and in default of their doing so it was adjudged that the decree then given should operate and stand as such conveyance, quitclaim, and release.

Messrs. Leo Simmons and Hugh T. Taggart argued the cause, and, with **Mr. D. W. Baker**, filed a brief for appellants:

The amendments made to sworn bills must be consistent with the original bill.

Marble v. Bonhotel, 35 Ill. 248; 1 Dan. Ch. Pl. & Pr. § 404, note 1; *Ogden v. Moore*, 95 Mich. 293, 54 N. W. 899; *Hill v. Hill*, 53 Vt. 582; *Shields v. Barrow*, 17 How. 120, 15 L. ed. 158.

A party is not allowed to state one case in a bill or answer and to make out a different one by proof.

Boone v. Chiles, 10 Pet. 179, 9 L. ed. 388; *Henry v. Suttle*, 42 Fed. 94.

Even if Buck and Brainard agreed to buy the property together, each to pay equally and each to own one half, and the fact was established that at various times Buck's money had been used to pay all the purchase money, he would not be entitled to have the entire property, but only one half of it, and an accounting, with a lien for the balance due him.

Dickson v. Patterson, 160 U. S. 584, 40 L. ed. 543, 16 Sup. Ct. Rep. 373.

Transactions, although impeachable in equity at the time of inception and for some time afterwards, on the ground of fraud, may become unimpeachable by a subsequent confirmation, by acquiescence, or by mere lapse of time.

Kerr, *Fraud & Mistake*, 296.

The doctrine of acquiescence applies as between trustee and *cestui que trust*, even in cases of express trusts.

Kerr, *Fraud & Mistake*, 303.

All the parties concerned in or having any knowledge of the transactions are dead, save Buck alone. In his effort to enforce alleged obligations of the dead his averments of fact in his pleadings in regard to such obligations should be clear and consistent, and his testimony in support of them should be clear and consistent with them; if not he must take the risk of presumptions against him.

Crosby v. Buchanan, 23 Wall. 420, 23 L. ed. 138.

No fraud in the transaction being shown, the mere fact that Brainard saw fit to buy the property on his own account, and to use a part of the money in making the cash payment, giving his own notes to secure the remainder, is not sufficient to raise a resulting trust.

White v. Carpenter, 2 Paige, 241; *Bibb v. Hunter*, 79 Ala. 352; *McGowan v. McGowan*, 14 Gray, 119, 74 Am. Dec. 668. See also *Bailey v. Hemmaway*, 147 Mass. 326, 17 N. E. 645; *Sayre v. Townsend*, 15 Wend. 651; *Olcott v. Bynum*, 17 Wall. 59, 21 L. ed. 574; *Ducie v. Ford*, 138 U. S. 592, 34 L. ed. 1095, 11 Sup. Ct. Rep. 417; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 281.

Lapse of time and the death of the parties to the deed have always been considered, in a court of chancery, entitled to great weight, and almost controlling circumstances when the controversy grows out of stale transactions.

Jenkins v. Pye, 12 Pet. 254, 9 L. ed. 1075; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418.

If the case, as it appears at the hearing, is liable to the objection of staleness, by reason of the laches of the complainants, the court will, upon that ground, be passive, and refuse relief.

Richards v. Mackall, 124 U. S. 187, 31 L. ed. 399, 8 Sup. Ct. Rep. 437.

Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing.

Smith v. Clay, 3 Bro. Ch. 640, note; *Speidel v. Henrici*, 120 U. S. 387, 30 L. ed. 720, 7 Sup. Ct. Rep. 610; *Brown v. Bucna Vista County*, 95 U. S. 157, 24 L. ed. 422.

Mr. E. V. Brookshire argued the cause, and, with **Mr. Nelson L. Robinson**, filed a brief for appellees:

If an agent invests his principal's money in land, and takes a deed in his own name, with or without the principal's consent, a trust will arise.

Witts v. Horney, 59 Md. 584; *Keller v. Keller*, 45 Md. 270; *Crocker v. Crocker*, 31 N. Y. 507, 88 Am. Dec. 291; *Moffatt v. Shepard*, 2 Pinney (Wis.) 66; *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723; *Hall v. Sprigg*, 7 Mart. (La.) 243, 12 Am. Dec. 506; *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554; *Burden v. Sheridan*, 36 Iowa, 125, 14 Am. Rep. 505; 2 Pom. Eq. Jur. § 1037; *Philips v. Crammond*, 2 Wash. C. C. 441, Fed. Cas. No. 11,092; 2 Story, Eq. Jur. 13th ed. §§ 1201, 1211a, 1265.

Where a trustee or other person standing in a fiduciary capacity makes a profit out of any transaction within the scope of his agency or authority, that profit will belong to the *cestui que trust*. In cases of this sort the *cestui que trust* is not bound at all by the act of the other party. He has, therefore, an option to insist upon taking the property, or he may disclaim title thereto and proceed upon any other remedies to which he is entitled, either *in rem* or *in personam*.

Story, Eq. Jur. 13th ed. §§ 1261, 1262; *Day v. Roth*, 18 N. Y. 448.

It is not necessary to an equitable estoppel that there should be a design to mislead.

Manufacturers' & T. Bank v. Hazard, 30 N. Y. 226; *Blair v. Wait*, 69 N. Y. 113.

A party need not have acted affirmatively upon a declaration, to claim an estoppel, if he has been led thereby to refrain from using means to retrieve his position.

Continental Nat. Bank v. National Bank, 50 N. Y. 575; *Voorhis v. Olmstead*, 66 N. Y. 113.

An owner of an equitable title in possession is not obliged to take steps to establish his title until his possession is disturbed or his title attacked.

18 Am. & Eng. Enc. Law, 2d ed. title *Laches*, subdiv. VII. § 7, p. 125; *Townsend v. Vanderwerker*, 160 U. S. 176, 40 L. ed. 385, 16 Sup. Ct. Rep. 258; *Ruckman v. Cory*, 129 U. S. 387, 32 L. ed. 728, 9 Sup. Ct. Rep. 316.

Moreover, Mr. Buck, a nonresident, is not chargeable with notice of the law of the District of Columbia, now obsolete, that a will did not then pass after-acquired realty.

Stedman v. Davis, 93 N. Y. 32.

Mr. James Coleman filed a brief for appellee Leffert L. Buck:

If the original and amended bills stated different causes of action, the appellants' remedy was, not by demurrer, but to strike the amended bill from the files.

Jones v. Van Doren, 130 U. S. 684, 32 L. ed. 1077, 9 Sup. Ct. Rep. 685.

It was a proper exercise of discretion on the part of the court below to permit the plaintiffs to amend their bill.

Story, Eq. Pl. § 834; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; *Jones v. Van Doren*, 130 U. S. 684, 32 L. ed. 1077, 9 Sup. Ct. Rep. 685.

The demurrer to the amended bill having been overruled, it follows that if the court shall find that the evidence sustains the bill the decree of the court below should be affirmed, unless the court should also find that the court below erred in permitting the plaintiffs to amend their bill. This, we submit, was not error.

Story, Eq. Pl. 884; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771.

If the property in question was paid for by the plaintiff Buck, or with money in the hands of Charles F. Brainard belonging to said Buck, an implied or constructive trust is created by operation of law, by which the property became vested in him.

Anderson, Law Diet. title *Trusts*; Perry, Tr. § 168; Pom. Eq. Jur. p. 1049; 1 Story, Eq. Jur. p. 187; Adams, Eq. p. 36; *Michigan Air Line R. Co. v. Mellen*, 44 Mich. 321, 6 N. W. 845; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Watson v. Thompson*, 12 R. I. 466; *McMurry v. Mobley*, 39 Ark. 309; *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641; *Conant v. Riseborough*, 139 Ill. 383, 28 N. E. 789; *Smith v. Profitt*, 82 Va. 832, 1 S. E. 67; *Balloch v. Hooper*, 6 Mackey, 421; *Ferguson v. Williamson*, 20 Ark. 272; *McDonald v. McDon-*
184 U. S. U. S., Book 46.

ald, 24 Ind. 68; *Hidden v. Jordan*, 21 Cal. 92; *Follansbe v. Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691; *Brown v. Dwelley*, 45 Me. 52; *Chastain v. Smith*, 30 Ga. 96; *Smith v. Boquet*, 27 Tex. 507.

The plaintiff Buck is not chargeable with laches in not asserting his title to the premises.

Ruckman v. Cory, 129 U. S. 387, 32 L. ed. 728, 9 Sup. Ct. Rep. 316.

The defendant William H. Brainard is not entitled to relief, neither should he be permitted to prosecute his suit at law by reason of his laches.

Richards v. Mackall, 124 U. S. 187, 31 L. ed. 399, 8 Sup. Ct. Rep. 437; *Speidel v. Henrieli*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422; *Crutehfield v. Hewitt*, 2 App. D. C. 373; *Cammack v. Carpenter*, 3 App. D. C. 219; *Baker v. Cummings*, 4 App. D. C. 273; *Levis v. Kengla*, 8 App. D. C. 230.

*Mr. Justice Peckham, after stating the [104] above facts, delivered the opinion of the court:

The appellants insist that the supreme court of the District had no power to authorize the amendment which was made by the appellees to their original bill in this suit, because, as they assert, the cause of action set forth in the amendment is new, different, and distinct from that set forth in the original bill, and that therefore the demurrer to the amended bill should have been sustained.

We fully agree with the courts below in holding that the allowance of the amendment was within the discretion of the court, and that the demurrer on the grounds stated was properly overruled. The case comes within the principle of *Jones v. Van Doren*, 130 U. S. 684, 32 L. ed. 1077, 9 Sup. Ct. Rep. 685. The purpose in both bills was the same,—to establish a resulting trust in favor of the complainant Buck on account of the transactions set forth in the bills; and while the reasons are stated more fully in the amended bill, and in some respects differently from those in the original bill, yet the purpose is the same, arising from the same transactions and based upon the same general rule of law applicable to resulting trusts.

Upon the merits of the case, the two courts below have come *to the same conclu- [105] sion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been repeated and affirmed in the court of appeals, and we are now asked to review and reverse those findings upon the testimony contained in the record. It ought not to be done in this case. It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous. *The Carib Prince*, 170 U. S. 655, 658, sub nom. *Wuppermann v. The Carib Prince*, 42 L. ed. 1181, 1185, 18 Sup. Ct. Rep. 753.

and cases there cited. After examining the evidence in the case, we are not convinced that the findings of the court below were erroneous, but, on the contrary, it seems to us that they are justified by the evidence.

In regard to the evidence on the part of the complainants given on the trial, defendants assert it to be different from and inconsistent with the statements of fact contained in the amended bill, but a careful perusal of the whole evidence fails to convince us that there exists any such real and material inconsistency, but, on the contrary, the evidence substantially corroborates and justifies the averments of the amended bill.

The account book of the deceased Brainard was put in evidence, and some criticism has been made by counsel for the defendants in regard to the manner in which the deceased kept his accounts, as evidenced in that book, and some faint claim seems to have been made that the book showed that moneys had been sent by Brainard to Buck instead of the reverse, as claimed by Buck. This criticism arises on account of the position of the words "Dr." and "Cr." with regard to the statement of the account between the two people. However, a perusal of the accounts in the book, taken in connection with the statement of the account between the parties made by Brainard in his lifetime and in his handwriting and given to complainant Buck, shows beyond any controversy that the moneys were advanced by Buck to Brainard, and not the reverse. There is really no contradiction of the evidence on the part of the complainants that it was the money of Buck, and his alone, which paid for the property in question.

[106] From the evidence which was taken upon the trial, and upon *which the trial court gave judgment in favor of the complainants, the court of appeals itself found the facts similar to the averments in the amended bill, and stated them as follows:

"Leffert L. Buck was a civil engineer and a bachelor. His residence was in the city of New York; but his professional engagements called him to different parts of the world. He testified that he went to Peru in 1875, and before leaving sent about \$200 to Brainard for investment. He continued to send sums of money from time to time from 1877 to 1880, and during the latter year. Brainard invested from time to time in bonds which he sold for reinvestment.

"Brainard kept an account book, which has been preserved, and the entries therein of money received from Buck correspond with a statement rendered to the latter and produced by him in evidence.

"Buck testified that he suggested the joint purchase of the house and lot in controversy, which Brainard wrote him could be had for \$6,350. Brainard made the purchase at that price on July 18, 1879, making a cash payment thereon of \$2,550 with Buck's money, as the account book shows. The remainder was raised by mortgage. The account book, under the same date, shows the charge of the cost of recording the deed,

454

and of insurance against Buck. The deed was made to Brainard.

"Buck testified that early in 1880 he learned that the deed was in the name of Brainard alone, and suggested to the latter to convey to him and he would pay the balance, and Brainard and wife could occupy the house as a home. Brainard was then in bad health. He did not wish to make the transfer then, saying that when he recovered he would be able to go on and pay the balance on the property, and would also be able to pay for Buck's half, and he thought that better than to go to the expense of making two transfers. He said that, in any event, the property would go to his wife with everything that he had in case of his death. He was sick and nervous, and Buck did not press the matter. Brainard died of Bright's disease, and was suffering therefrom at the time, though it was not then known.

*"On March 12, 1880, he paid \$1,266.66 on [107] the mortgage with Buck's money in his hands.

"Some time after that Brainard made a statement in writing of the cost of the property, showing the payments made with Buck's money, and stating therein that he proposed to convey to Buck a half interest in the property, and to give him his note for the excess paid over one half. He expected to be able to pay back to Buck this excess, and also to finish paying for the property.

"Buck testified that he did not agree to this, but let matters run on because of Brainard's nervous condition, and because he expected the will of Brainard would invest the legal title in his sister. Brainard died without completing the payment for the property.

"Mrs. Brainard remained in possession, claiming under the will, but conveyed the title to Buck, who paid the last mortgage, amounting to nearly \$2,000. Mrs. Brainard made her home there until she died on March 31, 1892. Buck was frequently there, and contributed to her support. When she died he leased the property and has since collected the rents, kept the property in repair, and paid all the taxes.

"Without going into further details, it is sufficient to say that the evidence on behalf of Buck, corroborated on all material points by the entries in the book of Brainard, shows clearly that the purchase of the property was made with his money in the hands of Brainard for investment; and that Brainard was his agent and trustee, and not his debtor for money lent for the purpose. From these facts it is clear that a trust resulted in favor of Buck, which entitled him to a conveyance of the legal title. 2 Pom. Eq. § 1037." [16 App. D. C. 595.]

We think the law in this respect was correctly stated by the court below.

The defendants also rely upon the defense of laches on the part of the complainants, in that they permitted so long a time to elapse after they knew that the title was in the name of Brainard.

We also agree with the court below that

this defense is not sustained. When the [108] knowledge came to the complainant *Buck that the title was in Brainard, Buck asked him to transfer it to the complainant, and stated that he (Buck) would pay the balance of the purchase money unpaid on the premises. This Brainard disliked to do, and wanted Buck to wait and see if he (Brainard) could not make payments, and thus keep the house for himself. During this time Brainard was ill, and, as it subsequently appeared, was then suffering from Bright's disease, although he did not then know the cause of his illness, and the complainant says that he acquiesced because he did not wish to worry Brainard, and so the matter ran on for a little while, and was terminated by the sudden death of Brainard without anything having been done.

This did not amount to any settlement, nor did it in any way bar the rights otherwise existing in favor of the complainant Buck. It was a mere hope expressed on the part of Brainard that he might thereafter be able to pay for the house and a passive acquiescence on the part of the complainant that such effort might be made. As is said, nothing was ever in fact done, and no real alteration was ever made in the position of the two parties.

We have, then, the conditions of the title taken to the property in the name of Brainard, unknown to the complainant at the time, and the money furnished by Buck to Brainard as his agent, and put into the purchase of the house and lot. Subsequently, and a short time before the death of Brainard, Buck discovers the fact, and Brainard and his wife are then living on the premises. He knows that Brainard has made a will in favor of his wife, for he has been told by Brainard that upon his death everything was to go to her, and wants his sister to have a home, and is entirely satisfied in that way. He believed that the property would pass to the wife by the will in case of the death of Brainard. After Brainard's death, his widow (complainant's sister) remains in the house, and Buck contributes to her support while living there. She conveys the premises to him by deed, and he supposed that he thereby acquired full title to the premises, and paid the balance of the purchase money. After the death of his sister he takes possession of the property, and has continued in possession ever since,

[109] and it *was not until after the commencement of the action of ejectment that the complainant Buck had any knowledge that the legal title to the premises did not pass to his sister under the will of her husband, because it was acquired subsequently to that will. That action of ejectment was commenced in 1897, and this bill was filed April 15, 1898. These facts, we think, are sufficient to excuse all the delay that has been shown to exist in this case. It is covered by the principles laid down in *Ruckman v. Cory*, 129 U. S. 387, 389, 32 L. ed. 729, 9 Sup. Ct. Rep. 316, and *Townsend v. Vanderwerker*, 160 U. S. 171, 185, 186, 40 L. ed. 383, 388, 16 Sup. Ct. Rep. 258.

184 U. S.

Upon this subject we fully agree with what was said by Mr. Justice Shepard, in delivering the opinion in this case in the court of appeals, as follows:

"Buck entertained affection for, and had perfect confidence in, Brainard. He was anxious to secure a comfortable home for his sister. Brainard became seriously ill, and his condition was such that Buck would not aggravate it by importunity. Besides, he was assured that Brainard would devise the property to his sister. In fact, Brainard had made, and executed with due formality, a will leaving everything to his wife. This will was then, and until the institution of the action of ejectment, supposed to operate a conveyance of the property in question. Buck, so believing, took a conveyance from his sister, who was childless, and paid off the last encumbrance. He suffered her to occupy the house until her death. In the meantime, none of the heirs-at-law of Brainard made any claim to the property. Their apparent acquiescence tended to confirm Buck, who was in actual possession all of the time, in the belief that his title was perfect. There was nothing, therefore, to suggest the necessity or importance of resorting to a court of equity for the confirmation of that title, until the institution of the action of ejectment. When aroused to action, he was diligent in taking it. This long, undisturbed possession, under a title supposed to be perfect, presents a stronger excuse for delay, also, than that held sufficient in *Ruckman v. Cory*, 129 U. S. 387, 389, 32 L. ed. 729, 9 Sup. Ct. Rep. 316, 317, wherein it was said: 'Nor has the plaintiff been guilty of any such laches as would close the doors of a court of equity against him. He was in the peaceful occupancy of the premises for some years prior to *any assertion of title [110] upon the part of the defendant under the deed of 1872. If he had not been all the time in the possession of the premises, controlling them as if he were the absolute owner, the question of laches might be a more serious one than it is. The bringing of the action of ejectment was, so far as the record shows, the first notice he had of the necessity of legal proceedings for his protection against the legal title held by the defendant. As proceedings to that end were not unreasonably delayed, we do not perceive that laches can be imputed to him. Laches are rather imputed to the defendant, who, although claiming to have been the absolute owner of the lands since 1862, took no action against the plaintiff until the ejectment suit was instituted.'"

The last objection made by the appellants consists in an assertion that in no possible view of the evidence, even upon a proper bill, could Buck be properly held to be entitled as a matter of equitable right to more than a decree for an accounting, wherein he should be credited with advances of money made by him to Brainard in the latter's lifetime and invested by the latter in the property, and further credited with the sum paid by him after Brainard's

death in the settlement of Brainard's debt to the building association secured by the deed of trust (thus subrogating him to the rights of the association), and charged with rents and other proper offsets and with an equitable lien on the property for the balance thus found to be due, if any.

Taking the facts as found by the courts below, this claim is not well founded. The moneys of the complainant Buck were used by his agent Brainard in the purchase of the premises, and at the time of the death of the agent the whole purchase price had not been paid. After his death that balance was paid by Buck, who thus paid every dollar that has gone into the purchase price of the premises, and the substance of the whole evidence tends directly to show that while the funds were used by the agent with the assent of his principal, Buck, the taking of the title in Brainard's name was unknown to his principal. Buck's money, and Buck's money alone, has been paid for the whole premises, and there is neither [111] equity nor justice in refusing*him the legal title to the property purchased with his own money.

The judgment should be affirmed.

CLEVELAND TRUST COMPANY, *Plff. in Err.,*
v.

M. A. LANDER, Treasurer of Cuyahoga County, Ohio.

(See S. C. Reporter's ed. 111-115.)

Tax on shares of trust company—distinguished from tax on property of company—exemption of investments in United States bonds.

A tax on the shares of stock in a trust company under the Ohio statutes is not equivalent to a tax on the property of the corporation, and therefore the shareholders are not entitled, under U. S. Rev. Stat. § 3701, to have a deduction, from the value of the shares, of the amount of the capital stock of the company which is invested in United States bonds.

[No. 88.]

Argued January 10, 1902. Decided February 24, 1902.

IN ERROR to the Supreme Court of the State of Ohio to review a decision affirming a judgment dismissing on demurrer a suit for an injunction against the collection of a tax on shares of stock in a trust company. *Affirmed.*

See same case below, 62 Ohio St. 266, 56 N. E. 1036.

Statement by Mr. Justice McKenna:

This, a writ of error, to review the judgment of the supreme court of the state of Ohio, which sustained the ruling of the court of common pleas of Cuyahoga county, dis-

missing upon the demurrer of the defendant in error the petition of the plaintiff in error praying for an order and decree restraining the collection of taxes levied upon the shares of the stockholders of plaintiff in error. 62 Ohio St. 266, 56 N. E. 1036.

The plaintiff (plaintiff in error was plaintiff in the court below) is a banking corporation with a capital stock of \$500,000, divided into 5,000 shares of \$100 each, all of which are paid up, and for which certificates are outstanding and owned by a large number of persons, most of whom reside in Ohio.

The plaintiff made in due time return of its resources and liabilities, in accordance with § 2765 of the Revised Statutes of Ohio, to the auditor of the county, together with a full statement of the names and residences of the stockholders of the company, and with the number of shares held by each and the par value thereof, as required by the statute. The return included its real estate and 174 bonds*of the United States of the denom-[112] ination of \$1,000 each, "then and for a long time prior thereto owned by the plaintiff and in which the plaintiff had invested its capital stock." The plaintiff valued these bonds at the sum of \$213,274.81, and in its return deducted that sum from the \$500,000 par value of paid-in capital stock included among the liabilities of the plaintiff, leaving a balance of \$286,725.19.

The county auditor refused to allow the deduction of the government bonds, and fixed the value of the shares of the capital stock at \$333,700, exclusive of the assessed value of the real estate. No notice of this action was given plaintiff or its stockholders, nor did plaintiff or its stockholders know until the 11th of November, 1898, that said bonds had been included in fixing the valuation of the shares of the bank.

It is alleged in the petition that it is the custom of banks and banking institutions throughout the state of Ohio to deduct the value of government bonds from the paid-in capital stock returned, "although not so apparent upon the face of their returns to the several county auditors; that said bonds were by the banks and banking associations of this state so deducted in the returns for 1897; that similar deductions of the United States government bonds are likewise made by unincorporated banks in the state of Ohio under and by virtue of the Revised Statutes of state of Ohio, § 2759; that the auditor of Cuyahoga county and the county auditors elsewhere throughout the state, as this plaintiff is informed and believes, did not include United States government bonds so owned in fixing the total value for 1898 of the shares of the several incorporated banks of Ohio, as directed by § 2766 of the Revised Statutes of Ohio."

The county auditor entered the valuation of the property of plaintiff, including said government bonds, upon the tax duplicate of the county, and assessed taxes against the same at the rate of .02955 cents on each dollar's valuation of the shares, making an excess of taxation of \$4,283.71, and that that sum stands against said shareholders upon

the tax duplicate in the hands of the defendant, "together with the remaining amount of taxes lawfully assessed against them upon the valuation so fixed by the county auditor."

[113] *The plaintiff tendered the sum which it regarded as legally due, and alleged the grounds upon which it claimed equitable relief.

The error in the judgment of the supreme court of the state is assigned as follows:

"First. The court erred in affirming the judgment of the circuit court in sustaining the judgment of the court of common pleas on the demurrer of the defendant to the petition of the plaintiff.

"Second. The court erred in holding and deciding that the Cleveland Trust Company was not entitled, in making its statement to the auditor of Cuyahoga county, Ohio, under § 2765 of the Revised Statutes of Ohio, to deduct, for the purpose of taxation, from its capital and surplus, the amount of the United States government bonds owned by it under and by virtue of § 3701 of the Revised Statutes of the United States, as claimed in the original petition of the plaintiff."

Mr. James R. Garfield argued the cause, and, with Messrs. Harry A. Garfield and Frederic C. Howe, filed a brief for plaintiff in error:

The Constitution of the state of Ohio specifically requires that the property of corporations, and especially of banking institutions, shall be taxed.

Exchange Bank v. Hines, 3 Ohio St. 1.

The supreme court of Ohio has construed the various tax laws of the state as various methods provided by the legislature to carry into effect the plain mandate of the Constitution that all property of banks shall be taxed.

Ibid.; *Fayette County Treasurer v. People's & Drivers' Bank*, 47 Ohio St. 503, 10 L. R. A. 196, 25 N. E. 697; *Chapman v. First Nat. Bank*, 56 Ohio St. 310, 47 N. E. 54.

A tax upon the shares of stock of a corporation in the hands of the owner is a tax upon a kind of property separate and distinct from the property of the corporation itself, and such a tax is not equivalent to a tax upon the property of the corporation.

Van Allen v. The Assessors, 3 Wall. 573, sub nom. *Churchill v. Utica*, 18 L. ed. 229; *New York v. New York City & County Tax & A. Comrs.* 4 Wall. 244, 18 L. ed. 344; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

If it be held that the tax provided for under §§ 2762 and 2769 is an equivalent of a tax upon the property of the corporation, then it must follow that all bonds of the United States owned by the bank may be deducted in fixing the value of the shares.

Bank Tax Case, 2 Wall. 200, 17 L. ed. 793; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701.

Unless incorporated banks and trust com-

panies organized under the laws of Ohio are permitted to deduct government bonds from their resources for the purpose of taxation, there is a gross discrimination in favor of unincorporated banks and bankers.

Exchange Bank v. Hines, 3 Ohio St. 10.

The property of an Ohio corporation being subject to tax, the shares of stock of such corporation in the hands of the owner are exempted from taxation.

Jones v. Davis, 35 Ohio St. 474; *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829.

The right to tax the shares of national banks does not rest upon the distinction between shares and property, but upon the direct permission granted by Congress.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *State, Fox, Prosecutor, v. Haight*, 31 N. J. L. 399; *State, Mutual Life & Casualty Ins. Co., Prosecutors, v. Haight*, 34 N. J. L. 128; *Van Allen v. The Assessors*, 3 Wall. 573, sub nom. *Churchill v. Utica*, 18 L. ed. 229; *City Nat. Bank v. Paducah*, 2 Flipp. 75, Fed. Cas. No. 2743; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863.

Apart from the statutory permission granted by Congress, there is no power in the states to tax the shares of corporations, unless, in estimating the value of such shares, the government bonds owned by the corporation are deducted.

Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; *New York ex rel. Bank of Commerce v. New York City & County Tax Comrs.* 2 Black, 620, 17 L. ed. 451; *Bank Tax Case*, 2 Wall. 200, 17 L. ed. 793; *State, Mutual Life & Casualty Ins. Co., Prosecutors, v. Haight*, 34 N. J. L. 128; *State, North Ward Nat. Bank, Prosecutor, v. Newark*, 39 N. J. L. 380.

The deduction by state banks of their holdings in government bonds will not affect the power of the state of Ohio to tax the shares of national banks.

Van Slyke v. State, 23 Wis. 655, Affirmed in 154 U. S. 581, and 20 L. ed. 240, 14 Sup. Ct. Rep. 1168; *Frazer v. Siebern*, 16 Ohio St. 615.

The term "moneyed capital" as used in the provision of the national banking act that "taxation of national bank shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," is taxable moneyed capital.

Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; *Exchange Nat. Bank v. Miller*, 19 Fed. 373.

Mr. P. H. Kaiser argued the cause, and, with Messrs. O. L. Neff and W. W. Boynton, filed a brief for defendant in error:

A state may tax the shares of stock in an incorporated bank at their full value, notwithstanding the capital of the bank is partially or wholly invested in nontaxable United States bonds.

Van Allen v. The Assessors, 3 Wall. 573, sub nom. *Churchill v. Utica*, 18 L. ed. 229; *New York v. New York City & County Tax & A. Comrs.* 4 Wall. 244, 18 L. ed. 344; *Frazer v. Siebern*, 16 Ohio St. 614.

The scheme of taxation contained in 64 Ohio Laws, 204, is essentially the same as that found in Ohio Rev. Stat. §§ 2762-2769, and was evidently the result of a decision of a United States court regarding the taxation of shares of national banks.

The Supreme Court of the United States had held that the imposing of a tax upon the property owned by a state bank was not the legal equivalent of a tax imposed upon the shares of stock in a national bank.

Van Allen v. The Assessors, 3 Wall. 573, *sub nom. Churchill v. Utica*, 18 L. ed. 229.

No inference that it is the corporation's property, and not the shares of stock, that is being taxed, can be drawn from the provision of Ohio Rev. Stat. § 2762, requiring shares of stock in an incorporated Ohio bank to be listed and taxed where the bank is located, on the theory that the situs of the shares of stock is at the place of residence of the owners of those shares, as the Ohio supreme court has held that the situs of intangible property is a matter wholly within the control of the legislature.

Hubbard v. Brush, 61 Ohio St. 252, 55 N. E. 829.

The national bank tax decisions, and the law of Congress on which they rest, make it impossible for Ohio to tax shares of stock in national banks if Ohio taxes the taxable corporate property of her state banks. But shares of stock in national banks may be taxed in Ohio.

Chapman v. First Nat. Bank, 56 Ohio St. 310, 47 N. E. 54; *Niles v. Shaw*, 50 Ohio St. 370, 34 N. E. 162; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. ed. 669, 19 Sup. Ct. Rep. 407.

These decisions, therefore, are conclusive to the effect that Ohio does tax shares of stock in state banks, and not merely the taxable property owned by those banks.

[113] *Mr. Justice McKenna delivered the opinion of the court:

The argument of the plaintiff in error claims a greater immunity from taxation for the shares of the trust company than § 5219 of the Revised Statutes of the United States gives to shares in national banks. That section permits the states to assess and tax the shares of shareholders in national banks, with the limitations only "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state;" and that the shares of nonresidents "shall be taxed in the city or town where the bank is located, and not elsewhere." The

[114] prayer of the petition* is also opposed by decisions of this court. In *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom. Churchill v. Utica*, 18 L. ed. 229, the provision contained in § 5219—then a part of the act of Congress of June 3, 1864—came up for consideration. There was a dispute as to the meaning of the statute, and its validity was also assailed. The court asserted a distinction between the property of the bank and corporation as such, and the property of the shareholders as such, and held that the tax

authorized by the statute was a tax on the shares, the property of the shareholder, not a tax on the capital of a bank, the property of the corporation. The validity of the statute was sustained, and interpreting it the court said that it authorized the taxation of such shares, and shares were defined to be the whole interest of the holder without diminution on account of the kind of property which constituted the capital stock of the bank. Of the provisions of the act expressing this purpose and the right of the state to tax, the court said nothing "could be made plainer or more direct and comprehensive." The case was subsequently affirmed. 4 Wall. 244, 259, 18 L. ed. 344, 350; 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826.

The plaintiff concedes the distinction between the property of the corporation represented by its capital stock and the property of the shareholders represented by their shares, and bases an argument upon that distinction, and yet excludes from consideration, as immaterial to the questions at issue, the laws of Congress governing the taxation of the shares. The reasoning advanced is that under the laws and Constitution of the state of Ohio the property of the trust company "must be and is subject to taxation;" and "that the sections of the statutes of the state of Ohio which provide the method for determining this tax value, so far as they apply to such trust company, simply prescribe a convenient method for arriving at the true value in money of the property of the corporation." And the deduction is made "that, in determining the value of such property for taxation, the trust company is entitled to deduct from its capital and surplus the value of the United States government bonds then owned by it." In other words, the contention is that the tax on the shares being equivalent to a tax on the property of the trust company, there must be deducted from the value of the shares that portion of the capital of the company invested in United States bonds. [115]

The answer to the contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§ 5219) by another (§ 3701), between which there is no want of harmony. And what the Constitution of the state of Ohio requires, or what the statutes of the state require as to taxation, must be left to be decided by the supreme court of the state, and whether that court has decided, logically or illogically, that a tax authorized by the laws of the United States on the shares of the company satisfies the Constitution of the state as a tax on the corporation, is not open to our review or objection. The manner of taxation being legal under the statutes of the United States, its effect cannot be complained of in the Federal tribunals. We do not mean to be understood as implying that the plaintiff's view of the Constitution of the state, or of the laws of the state, is

correct. The inquiry is not necessary. Accepting such view as correct, plaintiff shows no right, under the Constitution or laws of the United States, which has been violated. *Judgment affirmed.*

Mr. Justice **Harlan** did not hear the argument, and took no part in the decision.

EDWARD W. VOIGT, *Plff. in Err.*,
v.

CITY OF DETROIT and Thomas M. Lucking, Receiver of Taxes of Said City of Detroit.

(See S. C. Reporter's ed. 115-123.)

Constitutional law—due process of law—assessments for benefits—sufficiency of notice.

1. Failure to provide for any notice or opportunity to be heard on the question, what lands shall be included in an assessment district, or what shall be the maximum aggregate amount to be assessed upon the district, does not make Mich. Comp. Laws 1897, § 3406, unconstitutional on the ground that a person compelled to pay an assessment on his property is denied due process of law, since his constitutional rights in this respect are fully protected by the opportunity which the statute gives him to be heard on the question of the amount of the assessment apportioned to his property, and this the statute limits to the amount of benefits which the property receives from the improvement.
2. A rule or standard of assessment sufficient to satisfy the constitutional guaranty of due process of law is furnished by Mich. Comp. Laws 1897, § 3406, which, as interpreted by the supreme court of the state, provides that a municipal council may assess the whole, or such part as it may deem just, of the cost of a local improvement, upon such lands in the vicinity thereof as are benefited thereby, and limits the amount of the assessment upon each lot to the amount of benefits.

[No. 83.]

Argued December 6, 1901. Decided February 24, 1902.

IN ERROR to the Supreme Court of the State of Michigan to review a decision of

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption* (Ind.) 2 L. R. A. 657; *Chauvin v. Valiton* (Mont.) 3 L. R. A. 194, and *Ulman v. Baltimore* (Md.) 11 L. R. A. 225.

As to the necessity of special benefit to sustain assessments for local improvements—see *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755, and note.

184 U. S.

that court affirming a judgment sustaining a demurrer to a bill in equity for an injunction against the sale of lands for an assessment for a city improvement. *Affirmed.*

See same case below, 123 Mich. 547, 82 N. W. 253.

Statement by Mr. Justice **McKenna**:

*This is a bill in equity brought by plaintiff in error in the circuit court for Wayne county, Michigan, to restrain the sale of his lands for an assessment levied by the city of Detroit for city improvements, on the ground that the law under which the assessment was imposed is repugnant to the 14th Amendment of the Constitution of the United States, and that the assessment, therefore, puts a cloud upon plaintiff's title. A demurrer was filed to the bill by defendants, which was sustained, and the bill dismissed. That action was affirmed by the supreme court of the state. 123 Mich. 547, 82 N. W. 253. A writ of error was then allowed by the chief justice of the state, and the case brought here.

The bill alleged that plaintiff was the owner of certain lots (describing them), which were a part of the subdivision of the "Voigt Park Farm," a plat of which had been made and recorded by plaintiff. Upon the plat was designated a street called "Second avenue," and to extend that street proceedings were instituted, which resulted in a verdict opening the same as a public necessity. Damages were awarded for the property taken to the amount of \$73,732.68.

The verdict was confirmed by the court, and the judgment of confirmation was transmitted to the common council of the city, and was referred to the committee on street openings. The committee reported, recommending that \$49,155.12 of the award be assessed on a local assessment district and the balance be paid by the city. A resolution was then adopted by the common council fixing and determining the assessment district, and including therein the property of plaintiff. The resolution recited "that it is hereby determined that the sum of \$49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement which should be paid by the owners" of the property included in said assessment district; and it was further resolved that said amount be assessed and levied upon the several parcels of said property by the board of assessors of the city. It was also alleged that *plaintiff in error "had no notice of the intention of said common council to impose and have assessed upon a local assessment district a part of the damages awarded by the jury in said condemnation proceedings, and no notice to appear before said council or any committee thereof in relation to the matter of determining the limits of such district and the amount to be assessed thereon, and that he was given no opportunity to appear and be heard before said common council or any committee thereof with reference thereto."

An assessment roll was subsequently pre-

pared, "being street assessment roll No. 111," and confirmed by the common council. By the assessment roll the sums assessed against the property of plaintiff aggregated the sum of \$9,957. The roll was placed in the hands of the defendant, Thomas M. Lueking, receiver of taxes of the city, for collection, and plaintiff notified of the assessment against his property, and payment of the amount assessed was demanded. And it is alleged that the receiver will, unless restrained, advertise and sell plaintiff's property for the amount assessed thereon.

The condemnation proceedings were instituted and conducted under the provisions of § 3406 of the Compiled Laws of the state of Michigan, and it is alleged those provisions violate the 14th Amendment of the Constitution of the United States, in that they deprive plaintiff of his property without due process of law, for the following reasons:

"1. Because said law does not provide for giving to the property owners interested any notice of the proceedings of the common council for the determination of the limits of the local assessment district, and the amount or proportion of the award of the jury to be assessed thereon, and does not provide for the giving to the property owners interested notice of any hearing by such common council as to the amount of land to be included in such assessment district and as to the amount or proportion of such award to be assessed thereon.

"2. Because said law does not fix the basis upon which or the standard by which the common council are to determine what is the just proportion of the compensation awarded by the jury to be assessed upon the assessment district.

[118] "3. Because the said law does not require that the amount of the award of the jury which the common council may order to be assessed upon such assessment district shall not exceed the total amount of the benefits derived by the lands in said district from the improvement to pay the expense of which such award was made.

"That the proceedings of said common council, hereinbefore set forth, in determining said assessment district and the amount to be assessed upon it, are invalid for the reasons aforesaid, and for the further reason that it does not appear by the resolution fixing said district and determining the amount to be assessed thereon upon what basis or standard or by what method the council determined the proportion of the award to be assessed upon said district, or that the amount to be assessed did not exceed the total amount of benefits derived by the property to be assessed from the improvement."

Mr. Hinton E. Spalding argued the cause, and, with Mr. Hoyt Post, filed a brief for plaintiff in error:

Parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage of the proceedings before the tax shall become an

established charge against them or their property.

Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535.

The decision in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, was based on the violation of the principle of assessing without a hearing.

While in questions of general taxation the legislature has absolute discretion in fixing the amount of revenue and the sources from which it is to be derived, yet, before a tax can become an established charge against an individual, he has a constitutional right to be heard on all matters by which he is peculiarly affected,—for example, the valuation of his property.

Cooley, Taxn. 361-363.

And it is for this reason that the distinction is taken on the right of hearing between specific taxes and those based on valuation.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 709, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

Where the legislature delegates to a board or officer a duty involving discretion and affecting individual rights, notice is required, though the legislature itself might have acted without.

Re Curren, 25 Misc. 432, 54 N. Y. Supp. 917; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; 2 Dill. Mun. Corp. § 802a; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

Due process of law "must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought."

Hagar v. Reclamation Dist. No. 108, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

Hearing is equally needful for protection, whether private rights are to be affected by the decision of a common council, or by that of a purely administrative board or officer.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

Special benefit is the constitutional limit of special assessment.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

Mr. C. D. Joslyn argued the cause and filed a brief for defendants in error:

The fixing of an assessment district and the determination of the gross amount of the tax to be spread upon that district are public questions, in the consideration of which the individual taxpayer has no right to take part or be heard.

Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

The statute under which the assessment was made gives the taxpayer an opportunity

ty to be heard on all questions which concern him individually.

Beccher v. Detroit, 92 Mich. 268, 52 N. W. 731.

The fact that the same court had already affirmed the doctrine "that parties whose property is to be taken under summary tax proceedings are entitled of right to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property" adds force to this conclusion.

Thomas v. Gain, 35 Mich. 164, 24 Am. Rep. 535.

Mr. Timothy E. Tarsney also argued the cause and filed a brief for defendants in error:

A property owner is not entitled to notice of the fixing of the assessment district and of the amount to be apportioned upon such district, and what portion of the award shall be apportioned to such district, and what portion to the city at large.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Williams v. Eggleston*, 170 U. S. 305, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

[118] *Mr. Justice McKenna, after stating the case, delivered the opinion of the court:

The proceedings in the case were had under the provisions of an act of the state of Michigan entitled "An Act to Authorize Cities and Villages to Take Private Property for the Use or Benefit of the Public, and to Repeal Act No. 26, Public Acts of 1882." This act is reproduced in the Compiled Laws of Michigan of 1897 as §§ 3392-3415.

The particular provisions attacked are contained in § 3406 (§ 15 of the original act), and are as follows:

"When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal has expired, or, if an appeal is taken, on the filing in the

[119] court below *of a certified copy of the order of the supreme court affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, board of trustees, or board of supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment, if any, of affirmance; and thereupon, the proper and necessary proceedings, in due course, shall be taken for the collection of the sum or sums awarded by the jury. If the common council, or board of trustees, or board of supervisors believe that a portion of the city, village, or county in the vicinity of the proposed improvement will be benefited by
184 U. S.

such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city [or] village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may [be], to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying, and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided shall be assessed, levied, and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village, *or county. At [120] any sale which takes place of the assessed premises, or any portion thereof, delinquent for nonpayment of the amount assessed and levied thereon, the city [or] village or county may become a purchaser at the sale."

Plaintiff in error makes two objections to the law:

"First. That it does not afford to the property owner notice and opportunity of hearing upon the questions of what lands, if any, are specially benefited by the improvement, and therefore to be included in the assessment district, and what is the amount of the special benefit, and therefore the maximum amount to be paid by the district.

"Second. That it does not require the amount imposed upon the district to be limited to the amount of special benefit."

The common council proceeded as required by the ordinance. They determined that a portion of the city was benefited by the improvement, created a district of the property benefited, determined also that \$49,155.12 was a just proportion of the compensation awarded by the jury to be assessed upon the property owners of the district created, and directed the board of assessors to make the assessment. The assessment roll was subsequently made out and was ratified and confirmed by the council. The assessment against the property of plaintiff in error was nearly \$10,000.

Passing on the ordinance the supreme court said: "No provision is made for a notice to property owners of a time and place of hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon." But the court observed that such notices were not necessary to vindicate the statute from the charge of being unconstitutional, because "the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement, and the proper notice of this hearing was given." And further:

"When the proceeding has reached that stage where it becomes necessary to decide what proportion of the cost of the proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the owner of the land to be heard upon that question.

[121] *"There is no claim in the bill that complainant's property is not benefited by the proposed improvement, in excess of the amount assessed; nor is there any claim that he was not allowed to be heard in relation to the amount which should be assessed against his property, thus avoiding the difficulties found in the cases cited by the counsel for complainant. We do not think it can be said that complainant's property is taken without due process of law. This statute has been construed in *Beecher v. Detroit*, 92 Mich. 268, 52 N. W. 731, and *Smith v. Detroit*, 120 Mich. 572, 79 N. W. 808, and the action taken by the common council thereunder upheld."

It was urged by plaintiff in error in the supreme court of the state, as it is now urged here, that—

"The act is bad because it does not fix any rule or standard by which the council are to determine the just proportion of the award of the jury to be assessed upon the district, nor limit the total assessment of the district to the amount of its benefits.

"The constitutional limit of the amount to be imposed upon the district is the total benefit to the district. The law might therefore permit the council, when, in their judgment, a portion of the city in the vicinity of the improvement is benefited thereby, to determine the amount of such benefit and to require a just proportion of the compensation awarded by the jury, not exceeding the total benefit, to be assessed upon such local district. This act contains no such limitation. The council are empowered, when they believe that a local district is benefited, to assess what in their judgment is a just proportion of the whole award upon the district, without requiring that proportion to be limited by the amount of benefit."

To the contention the supreme court of the state replied:

"We do not think this is a fair construction of the language of the statute. Before the council can create the district at all they must believe that a portion of the city in

the vicinity of the proposed improvement will be benefited by such improvement, and then provide for an apportionment of the compensation awarded by the jury upon the property deemed to be benefited. 'The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate *in proportion, as [122] nearly as may [be], to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement.' We think this language makes it clear that the amount of tax which may be assessed upon the district or upon any given parcel of land cannot exceed the benefit. Provision is then made for the assessment, levy, and collection of the tax."

The law, then, as we understand the decision of the supreme court of the state, provides for the formation of a district in the vicinity of the proposed improvement, the limits of the district to be determined by the benefits derived from that improvement, and further provides that the common council shall determine what proportion of the cost of the improvement ("compensation awarded by the jury") shall be assessed upon the owners of the real estate benefited. The language of the statute is: "The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may [be], to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement."

It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law. And such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. The supreme court of the state decided, as we have seen, "that the amount of the taxes which may be assessed upon the district or upon any given parcel of land cannot exceed the benefits." On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be, and the showing will take his land out of the district and relieve it from the tax.

The contentions of plaintiff in error seem to be based on the assumption that a property owner must have notice of every step of the proceedings. Such assumption is untenable. *Weyerhaeuser v. *Minnesota*, 176 [123] U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485, and cases cited; *King v. Portland*, 184 U. S. 61, ante, 431, 22 Sup. Ct. Rep. 290.

Judgment affirmed.

Mr. Justice Harlan did not hear the argument and took no part in the decision.

UNITED STATES, *Appt.*,

v.

BYRON BARLOW, James E. Blackwell,
and James M. Dougan, Partners as Byron
Barlow & Co.

BYRON BARLOW, James E. Blackwell,
and James M. Dougan, Partners as Byron
Barlow & Co., *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 123-140.)

*Contracts—public works—conclusiveness of
decision as to quality by engineer in
charge—extra work.*

1. Approval, by the engineer in charge of the work of constructing a dry dock for the United States, of the quarry from which the sandstone for the ashlar was to be taken, is not made final by the contract provision that such stone must be "of quality approved by the engineer," so as to forestall the latter's judgment of the stone actually furnished, or the judgment of any "other competent officer or person or persons" who, under the contract, might be designated by the Navy Department, with power to inspect or reject any material deemed unsuitable for the purpose intended; but the decision of such engineer as to quality is only final as to stone actually cut and delivered.
2. The Secretary of the Navy may direct or consent to a change in a contract for the construction of a dry dock for the United States, which he was authorized by law to construct, although such contract provides that changes can only be made upon written order of the Bureau of Yards and Docks, as, under U. S. Rev. Stat. § 420, the duties of the bureaus of the Navy Department are performed under his control, and their orders are considered as emanating from him, and have "full force and effect as such."
3. An order of the Secretary of the Navy directing contractors, against their protest, to sink by the "water-jet system" the piles required in the construction of a dry dock for the United States, is not a "change or modification" within the meaning of the contract, which will preclude the contractors from recovering the expense incurred in the unsuccessful experiment with such system because not agreed upon in writing by the parties.
4. The expense caused to contractors engaged in the construction of a dry dock for the United States, by the suspension of regular work, due to an unsuccessful experiment with the "water-jet system" in driving piles, undertaken against their protest, in obedience to an improper order of the Secretary of the Navy, is properly allowed as for extra work, as well as the expenditure in the experiment.
5. The additional cost to contractors engaged in the construction of a dry dock for the United States, of additions required by the Navy Department to be made in correcting a mistake in the performance of the contract, which had no relation to such mistake, but would have been required irrespective thereof, is properly allowed as for extra work.
6. A claim as for extra work, of the additional cost to contractors engaged in a public work,

of replacing defective work at the command of the engineer in charge, which has been approved and accepted by his predecessor, will be disallowed, where the contract provides that all labor and materials shall be of the best kind and quality, and subject, not only to the approval of the engineer at a particular time, but to the approval of any engineer subsequently appointed, with full power to reject any material or work which he may deem unsuitable for the purpose intended, and to cause any inferior work to be taken down and satisfactorily replaced at the contractors' expense.

[Nos. 127 and 128.]

Argued January 23, 1902. Decided February 24, 1902.

CROSS APPEALS from the Court of Claims to review a judgment for petitioners for extra work done and extra materials furnished under a contract with the United States. *Reduced and affirmed.*

See same case below, 35 Ct. Cl. 514.

Statement by Mr. Justice McKenna:

These are cross appeals. The appellees in No. 127, appellants in No. 128, filed three separate petitions against the United States in the court of claims for extra work done and extra materials furnished under a contract with the United States. The petitions were consolidated and tried as one case. On some of the claims the decision was in favor of petitioners, and on others in favor of the United States.

*The claimants entered into a contract [124] with the United States for the construction of a dry dock at Puget sound, in the state of Washington. The contract was in writing, and was very full. There are only a few of its provisions in controversy, and those only need to be quoted:

"First. The constructors will . . . construct and complete, ready to receive vessels, a dry dock, to be located at the place shown on a plan accompanying this contract, at the naval station, Puget sound, Washington; and will, at their own risk and expense, furnish and provide all labor, materials, tools, implements, and appliances of every description—all of which shall be of the best kind and quality adapted for the work as described in the specifications—necessary or requisite in and about the construction of said dry dock and the caisson, pumping machinery, pump house, culverts, and all other accessories and appurtenances, in accordance with the aforesaid plans and specifications, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part; it being further mutually stipulated and agreed that the officer or officers, person or persons, thus designated shall and may, from time to time during the progress of the work, inspect all material furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the

NOTE.—On extra work—see notes to Gibson County v. Cincinnati Steam Heating Co. (Ind.) 12 L. R. A. 502, and Ingle v. Jones, 17 L. ed. U. S. 762.

purpose or purposes intended, or not strict conformity with spirit and intent of this contract and with the aforesaid plans and specifications, and to cause any inferior or unsafe work to be taken down, by and at the expense of the contractors; and that all such rejected material shall be at once removed from the station and replaced by material satisfactory to such inspector, and that all such inferior or unsafe work shall be replaced by satisfactory work, by and at the expense of the contractors. Such inspectors shall at all times during the progress of the work have full access thereto, and the contractors shall furnish them with full facilities for the inspection and superintendence of the same.

[125] "Seventh. The construction of the said dry dock and its accessories *and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractors, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change or modification in the aforesaid plans and specifications, such change or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractors shall receive, if any: Provided, That whenever the said changes increase or decrease the cost by a sum exceeding five hundred dollars (\$500) the actual cost thereof shall be determined by a board of naval officers appointed for the purpose, and the contractors shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation they shall be entitled to receive in consequence of such change or changes: And provided also, That no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part: And pro-

vided further, That no change herein provided for shall in any manner affect the validity of this contract.

*"Eighth. The aforesaid dry dock and its [126] accessories and the appurtenances and each and every part thereof, shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning, and spirit of the contract, plans, and specifications, to the satisfaction of the party of the second part.

"Fourteenth. It is expressly understood, covenanted, and agreed by and between the parties to the contract, that if any doubts or disputes as to the meaning or requirements of anything in the contract, or if any discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and decision of the chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interest of the respective parties to this contract shall require, and the parties of the first part hereby bind themselves and their heirs and assigns, and their personal and legal representatives, to abide by his, the said Secretary's, decision in the premises."

The specifications referred to in the contract contain the following provision:

"The ashlar must be of granite or sandstone, of quality approved by the engineer. All stones must be hard, clean, and free from seams and imperfections, and of good bed and build. They must be laid true on their natural beds, and without pinning."

The largest item in the contentions of the parties arises on that provision of the specifications.

The court found that a bid based on the use of sandstone was accepted, and that shortly after the inception of the work the claimants tendered to U. S. G. White, civil engineer in charge of the work, a sample of the sandstone which was proposed to be used in the ashlar of the dock, and offered at the *same time to exhibit to him the [127] quarry from which the stone was taken. Early in the spring of 1893 the engineer visited the quarry, satisfied himself by certain inspections (which are detailed in the findings) of the quality of the stone, observed its satisfactory use elsewhere, and made numerous examinations with a glass magnifying six or eight diameters, looking to the detection of any mica or other substances in its composition, and found none, the texture appearing uniform and good under the glass, and he subsequently made a test to determine the percentage of absorption. As the result of this examination he

approved the sandstone from the Tenino quarry, and informed the claimants that the same would be accepted for all work under the contract.

On May 4, 1893, the claimants (appellees), relying on the assurance of the engineer, entered into a contract "with the owners of the quarry to furnish them from said quarry all of the sandstone required for the work." By the contract (which is set out in full in the findings) the Tenino Stone Quarry Company covenanted to furnish and deliver "all of the sandstone required for the stone entrance of the United States dry dock, Puget sound, Washington, according to drawings and schedules of courses, numbers, and sizes furnished by the parties of the second part, and which form a part of this contract, for the sum of forty (40) cents per cubic foot, and all of the stone for the boiler and pump house trimmings for the sum of fifty-five (55) cents per cubic foot." And it was covenanted "that the stone shall be Tenino bluestone of good, even, regular texture, of quality approved and acceptable to the civil engineer United States Navy, in charge of construction." Also that "payments of 90 per cent to be made monthly for all stone delivered the previous month upon acceptance, approval, and estimate of the civil engineer. United States Navy, in charge of construction, and as soon as payment is received therefor from the government by the parties of the second part, and the remaining 10 per cent upon completion of the setting of the stonework and upon the approval and acceptance of the stone by the said civil engineer, United States Navy."

[128] Afterwards the claimants entered into a contract with Albert* and Lewis Beaudette, stonecutters, to cut the stone. Subsequently 2,377 cubic feet of stone arrived at the site of the dock, which amounted to \$1,545.05 at 65 cents per foot, and was included in the vouchers rendered by claimants in the month of June, 1893, to which the following certificates, signed by the engineer officially, were annexed:

"Having fully examined the labor and materials above charged, I certify that they are of good quality and in all respects in conformity with the written contract of date October 29, 1892."

"Received the above labor and materials in good order at Puget Sound Naval Station this 1st day of July, 1893."

The amount rendered by the claimants, which included the said sum \$1,545.05, was approved by the commandant, John C. Morong, July 8, 1893. The Navy Department struck out the item for \$1,545.05 on account of a communication from the Tacoma Trades Council of the State of Washington, complaining of the quality of the stone. A report on the quality of the stone was called for from the commandant, and the latter in turn called for a report from the engineer in charge. The engineer reported favorably on the quality of the stone, and attached to his report letters from the chief engineer of the Northern Pacific Railroad

184 U. S.

and others. The commandant accepted the report as his own, and forwarded it to the Navy Department.

June 14, 1893, the claimants addressed a letter to the Department describing the qualities of the stone, and stated the protest against it was prompted by a "spirit of boycotting."

On the 21st of August, 1893, the claimants sent a letter to the engineer in charge, including their bill for the sandstone, and reciting the circumstances which led to its selection, and insisted "on immediate payment for said stone and the bureau's decision as to the remaining stone."

On the 31st day of August, 1893, the chief of the Bureau of Yards and Docks announced by letter to the commandant of the Puget Sound Naval Station that the Tenino stone would not be accepted as material for construction, and on the 8th of September, 1893, the engineer in charge notified the claimants of this decision.

*Upon being informed of this decision the [129] claimants protested against the requirement, but offered stone from Sueia island, and also from Dog Fish point, which was accepted and used in the construction of the dock.

Upon their tendering such stone to the civil engineer in charge, he wrote them under date of March 29, 1894:

Messrs. Byron Barlow & Co.

Charleston, Washington,

Gentlemen:—

The receipt of your favor of yesterday is acknowledged, and in reply would say that the stones referred to therein, having been approved by the bureau, will be accepted by me, subject to inspection under such specifications as I may be furnished with by the bureau.

2. The specifications forming a part of your contract being of no effect under existing circumstances, I have asked for such specifications as will doubtless be furnished therewith before any stone will be delivered here.

Very respectfully,

U. S. G. White,

Civil Engineer, U. S. Navy, in Charge of Construction.

Upon receiving the communication in regard to the quality of the Tenino stone the Navy Department, through the Bureau of Yards and Docks, instituted an examination into the qualities of the stone and its fitness, "with the result that said Navy Department, through the chief of the Bureau of Yards and Docks, reached the conclusion that said Tenino sandstone was not fit and suitable for the purposes to which it was proposed to use said stone; that said stone did not fulfil the requirements of the contract and specifications as above recited; that it was not a hard stone, nor a clean stone, nor free from imperfections; that its absorbent qualities were too high; that its crushing strength was too low, and that it was in many essential particulars totally unfit and unsuitable and undesirable for the

use in the ashlar of this dry dock; and thereupon, to wit, on the 29th day of August, 1894, the contractors were notified of this decision of the Bureau of Yards and Docks, and were required to furnish other and better sandstone. From this decision of the chief of the Bureau of Yards and Docks the *claimants appealed to the Secretary of the Navy, who concurred in the opinion of the said chief of the Bureau of Yards and Docks, and concurred in his order requiring a different and better sandstone. The tests and analyses of said Tenino sandstone were made from samples furnished to the Bureau of Yards and Docks by the contractors and by the commandant of the Puget Sound Station. The delay in arriving at the ultimate determination to require a better quality of sandstone, which was reached on the 24th of August, 1894, was partly caused by the fact that the claimants were in correspondence with the Secretary of the Navy in an endeavor to persuade him to accept said Tenino sandstone. The tests and analyses of said stone, as above recited, were made promptly."

And it was found by the court:

"The amount of Tenino sandstone quarried, cut, and delivered was 2,349 cubic feet, amounting, at 65 cents a cubic foot, to \$1,526.85.

"The claimants had also, before receiving notice of the rejection of the Tenino sandstone by the Bureau of Yards and Docks, caused to be quarried and cut, but not transported, 7,280 cubic feet, amounting, at 65 cents a foot, less the cost of transportation, 10½ cents a foot, 54½ cents a foot, to \$3,967.60, making a total for stone actually quarried and cut, and part of which was delivered, of \$5,494.45. That sum, however, has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against the said claimants for said sum of money.

"The total amount expended by the claimants for furnishing, delivering, and cutting the stone which actually went into the construction of said dry dock from Sucia island and Dog Fish point, as aforesaid, was \$23,556.23.

"If they had been allowed to furnish Tenino stone they could have done so at a cost of \$17,948.80. The additional cost, therefore, to the claimants of furnishing the stone which they did furnish, over and above what it would have cost them to furnish the Tenino stone, is the difference between the two sums last named, amounting to \$15,607.43." [35 Ct. Cl. 514.]

In the execution of the contract claimants made a mistake in *the cutting off of certain piling, which mistake could be corrected in two ways. One of the ways was accepted by the Navy Department and executed by the claimants as required, but claimants were also required to make some additions which "had no relation to the error which had been made in the original construction of the sheet piling, but would have been required irrespectively of any

such error having been made. The additional cost to the contractors amounted to \$59.30." (Finding IX.)

It was discovered during the progress of the work that the soil at the bottom of the dock was of a very tenacious and unyielding character, so as to be difficult of penetration for piles driven by the ordinary drop-hammer process, and was so reported by the contractors.

It was stated, on the 15th of February, 1894, that penetration was from 8 to 10 feet, and while the Bureau of Yards and Docks thought this might be satisfactory, yet the bureau also thought that the piles should be driven, if possible, 15 feet below the bottom of the excavation. There was no claim made by the contractors at that time that they could not reach a greater depth than theretofore reported. After some correspondence the bureau telegraphed definite instructions to accept no piles driven to a less depth than 15 feet. The contractors made no attempt to show that this could not be done, but employed experts to give an opinion, after tests upon the piles driven, that the bureau was wrong. "In view of these facts, the Secretary of the Navy, on the 21st day of May, 1894, and upon the occasion of a visit to said dock by that official, verbally authorized and directed the contractors to sink the piles by a method known as the water-jet system; that is to say, by forcing water into the ground by means of a sink pipe operated by the hydraulic system, thus forming a hole into which the pile is set. The contractors objected to and protested against this method of driving the piles upon the ground that it destroyed and weakened the bottom of the pit, and subsequently a board of naval experts was convened for the purpose of reporting upon the advisability of sinking the piles by this system. The board reported adversely to this system, and recommended that *the piles be driven in accordance with [132] the provisions of the contract and by the ordinary drop-hammer process. the piles to be driven to a minimum of 6 feet. The remaining 696 piles, which were driven after this report by the drop-hammer process, reached an average depth of 10 feet 4 inches."

The same board of naval experts, under the direction of the Secretary of the Navy, passed upon the expense caused the contractors by the use of the water-jet system, and recommended an allowance of \$1,156.76. The allowance was approved by the Secretary and a voucher drawn therefor; "but when the same came before the Auditor for the Navy Department for audit and before the Comptroller of the Treasury for payment, it was refused, upon the ground that the services required were not extra and additional, but that they were such as the contract contemplated, and upon the further ground that the Secretary of the Navy, under the specific requirements of § 7 of the original contract, had no power or authority to authorize or direct the incurring of this expense unless the cost of the

same was first ascertained by a board of officers provided for that purpose before the expense was incurred, and reduced to writing, as required by the 7th clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, § 1063." (Finding XI.)

The reasonable value of the work set forth and described in the finding is \$1,156.-76.

The foregoing statement of facts is applicable to the appeal of the United States. The findings applicable to the appeal of claimants (No. 128) are given in the opinion.

Mr. George A. King argued the cause, and, with **Mr. Rufus H. Thayer**, filed a brief for Barlow & Co.:

The decision of the engineer as to quality was final.

United States v. Shrewsbury, 23 Wall. 508, 23 L. ed. 78; *Kihlberg v. United States*, 97 U. S. 398, 24 L. ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344; *Kennedy v. United States*, 24 Ct. Cl. 122; *Ogden v. United States*, 9 C. C. A. 251, 13 U. S. App. 615, 60 Fed. 725; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; *Elliott v. Missouri, K. & T. R. Co.* 21 C. C. A. 3, 40 U. S. App. 61, 74 Fed. 707.

The subcontractors could not, by bringing actions or recovering judgments against the principal contractors, claimants in this case, either enlarge or restrict the liability of the United States.

Masterton v. Brooklyn, 7 Hill, 61, 43 Am. Dec. 38; *Chandler v. United States*, 17 Ct. Cl. 1; *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; *Price v. Forrest*, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434.

Doubtful expressions should be construed most strongly against the government, by which the contract and specifications were drawn.

Simpson v. United States, 31 Ct. Cl. 217, Affirmed in 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 222.

The Secretary of the Navy had authority by oral direction to vary the terms of a written contract wherein was provided a formal method of varying such contract.

Ford v. United States, 17 Ct. Cl. 60.

A parol contract has been sustained which was made by a mere subordinate with a party with whom the government had no written contract whatever, after the contract had been executed and the government had received the benefit of the services rendered or the supplies furnished.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518.

Expense due to delay in experimentation with water jet was properly allowed.

United States v. Smith, 94 U. S. 214, 24 184 U. S.

L. ed. 115; *United States v. Mueller*, 113 U. S. 153, 28 L. ed. 946, 5 Sup. Ct. Rep. 380.

Mr. George A. King filed a separate brief in reply for Barlow & Co.:

Upon all matters arising under the contract, which the engineer had power to decide, there could be no disagreement. His decision upon these subjects was absolutely final and conclusive upon the parties.

Hasbrouck v. Milwaukee, 17 Wis. 266. See also *Pashby v. Birmingham*, 18 C. B. 2; *Mason v. Bridge*, 14 Me. 468, 31 Am. Dec. 66.

The submission of a question arising in the progress of the work, to the responsible officer of the government, has been deemed to be the very thing which fixed and determined the liability of the government.

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607.

Mr. George Hines Gorman argued the cause, and, with **Assistant Attorney General Pradt**, filed a brief for the United States:

The United States can only be required to make compensation to the contractor for damages which he has actually sustained by its default in the execution of its undertakings to him; but this is the extent of its liability in the court of claims. More than compensation for damages actually sustained can never be awarded against the United States.

United States v. Smith, 94 U. S. 214, 24 L. ed. 115.

If it be contended that the government is given the advantage by the contract, the complete answer is, such is the contract.

Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 19 L. ed. 349; *Sun Printing & Pub. Co. v. Moore*, 183 U. S. 642, ante, 366, 22 Sup. Ct. Rep. 240.

An express contract and an implied contract cannot exist concerning the same transaction at the same time.

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607.

The provision of U. S. Rev. Stat. § 3744, requiring the Secretary of the Navy to cause all contracts made by his Department to be reduced to writing and signed by the contracting parties with their names at the end thereof, has been held to be a statute of frauds as clearly as that of 29 Car. II., and contracts not made in conformity with its provisions are absolutely void.

Clark v. United States, 95 U. S. 541, 24 L. ed. 519; *South Boston Iron Co. v. United States*, 118 U. S. 37, 30 L. ed. 69, 6 Sup. Ct. Rep. 928; *Calvary Cathedral v. United States*, 29 Ct. Cl. 269.

A public officer is limited in the exercise of his capacity as an agent of the government by the positive commands of statute law, and can bind the government only when he has express authority to do the very identical thing and to make the very identical promise which he does or makes.

Whiteside v. United States, 93 U. S. 256, 23 L. ed. 884; *Story, Agency*, 6th ed. 307a; *Lee v. Munroe*, 7 Cranch, 367, 3 L. ed. 373; *Baltimore v. Eschbach*, 18 Md. 282; *State ex rel. Blakeman v. Hays*, 52 Mo. 578; *Dela-*

field v. Illinois, 26 Wend. 228; *Baltimore v. Reynolds*, 20 Md. 10, 83 Am. Dec. 535.

The promise of a Cabinet officer, or any other agent of the government, to pay money or to obligate the government for the payment of money, if made without authority of law, is absolutely void.

Stansbury v. United States, 8 Wall. 33, 19 L. ed. 315; *United States v. Garlinger*, 169 U. S. 316, 42 L. ed. 762, 18 Sup. Ct. Rep. 364.

The government does not guarantee the capacity, fidelity, or integrity of its officers or agents, and all persons dealing with them must know at their peril the extent to which they have authority to bind the government, and their ignorance on this subject cannot increase the government's risk.

United States v. Beebe, 180 U. S. 343, 45 L. ed. 563, 21 Sup. Ct. Rep. 371; *Dox v. Postmaster General*, 1 Pet. 318, 7 L. ed. 160; *McElrath v. United States*, 12 Ct. Cl. 201, Affirmed in 102 U. S. 426, 26 L. ed. 189; *Wisconsin C. R. Co. v. United States*, 164 U. S. 207, 41 L. ed. 405, 17 Sup. Ct. Rep. 45; *Hume v. United States*, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. Rep. 134; *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; *Steele v. United States*, 113 U. S. 129, 28 L. ed. 952, 5 Sup. Ct. Rep. 396; *United States v. Barlow*, 132 U. S. 271, 33 L. ed. 346, 10 Sup. Ct. Rep. 77.

Delays incident to the experimentation with the water-jet system do not entitle the claimants to additional or further compensation, but merely entitle them to additional time for the completion of the structure.

United States v. Garlinger, 169 U. S. 316, 42 L. ed. 762, 18 Sup. Ct. Rep. 364.

If the contract as written did not express the intention of the parties, it was the claimants' folly to have signed it.

Brawley v. United States, 96 U. S. 173, 24 L. ed. 624; *Simpson v. United States*, 172 U. S. 379, 43 L. ed. 484, 19 Sup. Ct. Rep. 222.

[132] *Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The principal claim of appellees and the [133] largest item in the judgment awarded them grows out of the rejection of the Tenino sandstone. That item was based upon the provision in the specifications which required it to be "of quality approved by the engineer." But that provision, it is contended by the United States, must be read and construed with those covenants of the contract which require, (1) that all materials used in the dry dock shall be of the best kind, "subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part," which officer or persons may, "from time to time during the progress of the work, inspect all material furnished, . . . with full power to reject any material, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intention of this contract, and the aforesaid plan and specifica-

tions." And the United States also relies upon the covenants contained in the 14th subdivision of the contract set out in the statement of facts.

And we think these provisions are harmonious and determine the rights of the parties. We think, indeed, that the engineer in charge of the work was the appointee of the parties, and that his decision upon the quality of sandstone was final when properly exercised, but it could not be exercised in advance of the work and forestall his judgment of stone furnished or about to be used, or the judgment of any "other competent officer or person or persons" who might be designated by the Navy Department. To so hold would destroy the power reserved by the United States to appoint any competent person to inspect the work and material. The engineer was given power to judge, not a type of stone, but particular stones. It was such stones which were to be "hard, clean, and free from seams and imperfections, and of good bed and build." Such was the power of the engineer in charge, but who should be the "engineer in charge" depended upon the appointment of the Navy Department; and the power of appointment was reserved to be exercised at any time. A useless right if one appointee could anticipate and control the judgment of his successor.

The influence which these considerations have in the interpretation of the contract is [134] not destroyed by answering that every stone from the Tenino quarry might have satisfied every requirement and have been approved by every and any person designated to inspect the work. This, indeed, might be so; but, on the other hand, not one stone might have passed the test. Besides, claimants are not in a position to urge that consideration. Every stone which might be tendered for inspection was subject to be rejected, but claimants seek to recover as for an acceptance. They rely, not upon approval of stones, but upon the approval of the quarry, and they rest the quality of the quarry upon the general inspection of the engineer and certain instances of satisfactory use. In opposition stand the covenants of the contract already mentioned, and the test the Bureau of Yards and Docks made of samples of Tenino stone furnished by claimants. And there is no pretense that the test was unfairly made. It, at least, convinced the bureau that the Tenino stone was not a hard stone, nor a clean stone, nor free from imperfections.

The court of claims did not pass upon the issue raised as to the quality of the stone. It accepted the decision of the engineer as being final as a matter of law. We cannot concur to the full extent of the decision, and must limit, therefore, the recovery of claimants to the price of stone inspected and approved. On this the finding is that "the amount of Tenino sandstone quarried, cut, and delivered was 2,349 cubic feet, amounting, at 65 cents a cubic foot, to \$1,526.85."

These views render it unnecessary to consider that provision of the contract which

makes the decision of the chief of the Bureau of Yards and Docks final, only subject to appeal to the Secretary of the Navy, of "any doubts or disputes as to the meaning or requirement of anything" in the contract.

2. The next item of importance is the expense to which the claimants were subjected in experimenting with the water-jet system. The court found that the experiment was ordered by the Secretary of the Navy against the protest of the claimants, and the board of inspectors found that the cost of the experiment to the claimants was \$1,156.76, and recommended the payment of that sum. This action was approved by the

[135] Secretary, *and vouchers drawn accordingly. It was refused when it came for audit and payment, because "under the specific requirements of § 7 of the original contract, [he] had no power or authority to authorize or direct the incurring of this expense unless the cost of the same was first ascertained by a board of officers provided for that purpose before the expense was incurred, and reduced to writing, as required by the 7th clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, § 1063."

There was certainly nothing in the contract or in the specifications which required the contractors to experiment with the water-jet system. There was nothing in the contract which required them to experiment with ineffectual or detrimental methods. Their obligation was to drive the piles in the construction of the dock to a sufficient depth, and it is not found that the depth attained, when the Secretary of the Navy interfered, was not sufficient. The Bureau of Yards and Docks conceived a greater depth to be necessary, and that it could be attained. Some controversy arose, and there were reports to and correspondence with the Bureau of Yards and Docks, and finally the bureau "telegraphed definite instructions" "to accept no piles driven to a less depth than 15 feet." In view of the facts the Secretary of the Navy, on the occasion of a visit to the dock, "verbally authorized and directed the contractors to sink the piles" by the water-jet system. The contractors protested and predicted failure. Failure occurred and the system was abandoned upon an adverse opinion of its utility given by a board of naval experts.

It is contended by the United States that the direction of the Secretary of the Navy was a change or modification of the contract within the meaning of the 7th subdivision of the contract, and that the Secretary had no power to direct or consent to such change more than the "humblest laborer employed upon the work," and besides, that no such change could be made except by an agreement in writing.

We have no doubt of the power of the Secretary of the Navy. His power is manifest from the contract, and is given by law.

[136] *The duties of the bureaus of the Navy Department

are performed under the control of the Secretary of the Navy. Their orders are considered as emanating from him and have "full force and effect as such." Rev. Stat. § 420. And the act of 1891, which provided for the construction of the dry dock, authorized the Secretary of the Navy to have it constructed by contract. He especially stood for the United States in such contract, and was invested with its power, and was charged with the duty of seeing that the dock was adequately constructed.

It is further contended by the government that the experiment with the water-jet system was a "change or modification" of the contract, and because not agreed to in writing by the parties that the expense incurred by the contractors in making the experiment cannot be recovered.

If both contracting parties were individuals, it would easily be seen that subdivision 7 was inserted in the contract for their benefit, to be insisted upon or waived as to them might seem best. What precluded that freedom and useful power to the government? If not precluded it certainly could have been exercised, and, as we have seen, through the Secretary of the Navy. If the power to insert the provision in the contract or to omit it was given, the power to dispense with it was also given, unless it was necessary to be inserted, and could not be dispensed with, on account of some injunction of the law. Such injunction, as we understand counsel, is claimed by virtue of § 3744 of the Revised Statutes, which requires the Secretary of the Navy to cause all contracts made by his department to be reduced to writing and signed by the contracting parties with their names at the end thereof. It is certainly disputable if the requirement of the section applies to alterations, which may become necessary in the progress of work regularly conducted under contract. And this court has held that the requirements of the section did not preclude a recovery for property or services "as upon an implied contract for a *quantum meruit*." *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518. But we are not required to decide on this record the question suggested. We do not think that the order of the Secretary of *the Navy directing the experiment with the water-jet system was a "change or modification" of the contract within the sense of subdivision 7. It was an exercise of superintendence and unwarrantable superintendence. The experiment was forced upon the contractors. They were powerless to do anything but protest and yield. The interference with the work of driving the piles by the drop-hammer process was an improper interference, and brings the claim of the contractors within the rule in *Clark's Case*, 6 Wall. 546, 18 L. ed. 917; *Smoot's Case*, 15 Wall. 47, 21 L. ed. 110; the case of the *Amoskeag Company*, 17 Wall. 592, 21 L. ed. 715, and within the ruling of *United States v. Smith*, 94 U. S. 214, 24 L. ed. 115, where the other cases are cited and approved. By denomi-

nating the order of the Secretary as an improper interference, we mean in a legal sense. The facts show that he considered the order as a proper exercise of his authority, and beneficial to the United States. Nor did he intend to be oppressive to the contractors. He subsequently recognized their right to reimbursement for the expenses which they had incurred.

The measure of damages adopted by the court of claims, we think, was correct. The expense caused to the claimants by the suspension of the regular work was as definite and as directly assignable to the action of the Secretary as the expenditure in the experiment.

There was no error in allowing the sum of \$59.30 for the extra work set forth in finding IX.

The summary of our views upon the appeal of the United States is that the court of claims erred in allowing the following claims:

Tenino stone quarried and not delivered	\$3,967 60
Difference in cost between Tenino stone and that which was furnished	15,607 43
	<hr/>
	\$19,575 03

The appeal of the claimants is based on the action of the court of claims in denying recovery for the extra work and materials described in findings VIII. and X.

Those findings are as follows:

[138] *"VIII. The plans for the foundations of the boilers and boiler house were submitted to the civil engineer in charge of the work and approved by him, and the work was then done on said foundations in accordance with the directions of said engineer. The foundations for the boiler house were completed and accepted by said engineer and included in his monthly estimate and paid for. The foundations for the boilers were made in accordance with the drawings so submitted to said engineer, and were completely laid at about the time the engineer first in charge of said work was detached therefrom. Subsequently another engineer was placed in charge of the work. In his opinion the foundations were imperfect and insecure because of defective construction on the part of the claimants, and he required that they be relaid. The claimants, protesting that it was not competent to require them to change the foundations after they had laid the same to the acceptance of the engineer in charge at the time of the original construction, relaid the same in accordance with the direction of the engineer thus subsequently in charge. The matter was subsequently referred to the chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract. It does not appear that the claimants appealed to the chief of the bureau before doing the work, or that it was ordered by him.

470

"The total additional cost of said work to the claimants was—

For the extra foundations for the boiler house	\$312 12
And for the extra foundations for the boilers	384 56

Making a total of \$696 68"

"X. In refilling the dirt after the altars were in place no part of the filling was rammed or sluiced except the clay puddling. This was in accordance with the instructions of the engineer in charge of the work. The claimants discussed the matter with him, and he informed them that it was not required to be rammed or sluiced. He embraced the work done in that way in his monthly estimates, and the claimants received payment for a large portion of the work done in that way at *the contract rate of 'filling and grading per cubic yard, 30 cents.' In the latter part of August, 1894, however, there was a change in the office of engineer in charge of the work for the United States. The new engineer then placed in charge required the claimants to ram or sluice all back fillings. The claimants protested, insisting that the contract did not require anything more than depositing the material and evenly grading the surface to correspond with the grade of the station. The new engineer, however, required all the work to be thoroughly sluiced with water, and all but a small part thoroughly rammed, and the claimants did the work in that way under protest.

"The additional cost to the claimants of doing this work, over and above what would have been required had they not been required to ram or sluice the same, would be 10 cents a yard, making, for 37,227 yards, \$3,722.70. The engineer who ordered the work done in the manner stated referred the question of so requiring it, at the request of the claimants, to the chief of the Bureau of Yards and Docks, and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the bureau, that the contract plainly required it."

The claims were rightly disallowed. Some of the observations already made apply to them. The contract is very explicit in that all labor and materials "shall be of the best kind and quality adapted for the work," and subject, not only to the approval of the civil engineer at a particular time, but subject to the approval of any engineer subsequently appointed, "with full power to reject any material or work, in whole or in part, which he or they (some other competent officer or person or persons) may deem unsuitable for the purpose or purposes intended. . . . And to cause any inferior or unsafe work to be taken down by, and at the expense of, the contractors, . . . and replaced by material satisfactory to such inspector . . . by and at the expense of the contractors."

In addition to these views, we quote from

184 U. S.

the opinion of the court of claims as follows:

[140] "As to the causes of action set forth in findings VIII. and X. the court is of the opinion that the claimants should have submitted the requirements of the engineer in charge to the chief of the bureau before proceeding with the work. They were required to do so by the terms of the contract, and authority to compel them to do additional work was thereby reserved to the chief of the bureau."

Judgment is reduced to the sum of \$5,367.96, and for that amount affirmed.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

Justice **Harlan** did not hear the argument, and took no part in the decision.

UNITED STATES, *Appt.*,

v.

WILLIAM T. EWING.

(See S. C. Reporter's ed. 140-151.)

Postmaster's salary — readjustment.

A readjustment of the salary of a postmaster under the acts of Congress of March 3, 1883, chap. 119 (22 Stat. at L. 487) and August 4, 1886 (24 Stat. at L. 256, 307, chap. 903, § 8), when the quarterly returns for a period of two years show that his salary is 10 per cent less than his commissions would have been for that period under the act of June 22, 1854 (10 Stat. at L. 298, chap. 61), must be made to begin with the next succeeding quarter, and cannot apply to the biennial period for which the returns have been made.

[No. 225.]

Argued November 12, 13, 1901. Decided February 24, 1902.

A PPEAL from a judgment of the Court of Claims readjusting the salary of a postmaster. *Reversed.*

Statement by Mr. Justice Peckham:

The government appeals from a judgment of the court of claims awarding to the petitioner the sum of \$1,264.83 upon a readjustment of salary for his services as postmaster at Gadsden, in the state of Alabama, between July 1, 1866, and June 30, 1874. The original petition was filed in October, 1888, in consequence of the passage of the act of March 3, 1883, chap. 119 (22 Stat. at L. 487), which reads as follows:

"That the Postmaster General be, and he is hereby, authorized and directed to readjust the salaries of all postmasters and late postmasters of the third, fourth, and fifth

[141] classes, under the classification provided for in the act of July 1, 1864, whose salaries have not heretofore been readjusted under 184 U. S.

the terms of § 8 of the act of June 12, 1866, who made sworn returns of receipts and business for readjustment of salary to the Postmaster General, the First Assistant Postmaster General, or the Third Assistant Postmaster General, or who made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was 10 per centum less than it would have been upon the basis of commissions under the act of 1854; such readjustments to be made in accordance with the mode presented in § 8 of the act of June 12, 1866, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business, or quarterly returns were made: *Provided*, That every readjustment of salary under this act shall be upon a written application signed by the postmaster or late postmaster or legal representative entitled to said readjustment; and that each payment made shall be by warrant or check on the Treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the postoffice within whose delivery he resides, and which address shall be set forth in the application above provided for."

The petitioner claimed that by a readjustment of his salary under that act he was entitled to be paid a difference of \$1,264.83 between the salary actually paid him and the amount to which he was entitled by reason of such act.

By the act of June 22, 1854 (10 Stat. at L. 298, chap. 61), Congress provided for the compensation of postmasters by allowing them commissions on the postage collected at their respective offices in each quarter of the year, and in due proportion for any period less than a quarter. The compensation awarded was as follows:

On any sum not exceeding \$100, 60 per cent;

On any sum over and above \$100, and not exceeding \$400, 50 per cent;

On any sum over and above \$400, and not exceeding \$2,400, 40 per cent;

*On all sums over \$2,400, 15 per cent. [142]

This method of compensation was changed by Congress by the passage of the act of July 1, 1864. 13 Stat. at L. 335, chap. 197. By that act it was provided that the annual compensation of postmasters should be at a fixed salary in lieu of commissions, the postmasters to be divided into five classes, with compensation respectively as follows:

First class to receive not more than \$4,000, nor less than \$3,000;

Second class to receive less than \$3,000, and not less than \$2,000;

Third class to receive less than \$2,000, and not less than \$1,000;

Fourth class to receive less than \$1,000, and not less than \$100;

Fifth class to receive less than \$100.

The 1st section of the act then proceeds as follows:

"Whenever the compensation of postmas-

ters of the several offices (except the office of New York) for the two consecutive years next preceeding the 1st day of July, 1864, shall have amounted to an average annual sum not less than \$3,000, such offices shall be assigned to the first class; whenever it shall have amounted to less than \$3,000, but not less than \$2,000, such offices shall be assigned to the second class; whenever it shall have amounted to less than \$2,000, but not less than \$1,000, such offices shall be assigned to the third class; whenever it shall have amounted to less than \$1,000, but not less than \$100, such offices shall be assigned to the fourth class; and whenever it shall have amounted to less than \$100, such offices shall be assigned to the fifth class. To offices of the first, second, and third classes shall be severally assigned salaries, in even hundreds of dollars, as nearly as practicable in amount the same as, but not exceeding, the average compensation of the postmasters thereof for the two years next preceeding; and to offices of the fourth class shall be assigned severally salaries, in even tens of dollars, as nearly as practicable in amount the same as, but not exceeding, such average compensation for the two years next preceeding; and to offices of the fifth class shall be severally assigned *salaries, in even dollars, as nearly as practicable in amount the same as, but not exceeding, such average compensation for the two years next preceeding. Wherever returns showing the average of annual compensation of postmasters for the two years next preceeding the 1st day of July, 1864, shall not have been received at the Post Office Department at the time of adjustment, the same may be estimated by the Postmaster General for the purpose of adjusting the salaries of postmasters herein provided for. And it shall be the duty of the Auditor of the Treasury for the Post Office Department to obtain from postmasters their quarterly accounts with the vouchers necessary to a correct adjustment thereof, and to report to the Postmaster General all failures of postmasters to render such returns within a proper period after the close of each quarter.

"See. 2. And be it further enacted, That the Postmaster General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, on the basis of the preceeding section, the salary assigned by him to any office; but any change made in such salary shall not take effect until the first day of the quarter next following such order, and all orders made assigning or changing salaries shall be made in writing and recorded in his journal, and notified to the Auditor for the Post Office Department."

Subsequently by § 8 of the act of June 12, 1866 (14 Stat. at L. 59, 60, chap. 114), § 2 of the act of 1864 was amended by adding the following:

"Provided, That when the quarterly returns of any postmaster of the third, fourth, or the fifth class show that the sala-

ry allowed is 10 per centum less than it would be on the basis of commissions under the act of 1854, fixing compensation, then the Postmaster General shall review and readjust under the provisions of said section."

The court of claims finds that the petitioner was, as postmaster of Gadsden, Alabama, paid:

"For his services between July 1, 1866, and June 30, 1868, \$73 per year, or for two years.....	\$146 00	
*For his services between July 1, 1868, and June 30, 1870, at \$220 per year, or for two years.....	440 00	[144]
For his services between July 1, 1870, and June 30, 1872, at \$460 per year, or for two years.....	920 00	
For his services between July 1, 1872, and June 30, 1874, at \$540 per year, or for two years.....	1,080 00	
In addition thereto since said service for the two years between July 1, 1868, and June 30, 1870, \$45.95 per year, amounting for the two years to.....	91 90	
And for the two years between July 1, 1870, and June 30, 1872, \$47.50 per year, amounting for the two years to.....	95 00	

Amounting in all to..... \$2,772 90

"During his first biennial term his adjusted salary was less than \$100.

"During his second, third, and fourth biennial terms his adjusted salary was more than \$100 and less than \$1,000 per annum.

"III. He made application in writing to the Postmaster General for readjustment and payment of salary (under chapter 119 of the Laws of 1883) for service as postmaster, in accordance with chapter 61 of the Laws of 1854 and § 8 of chapter 114 of the Laws of 1866. This he did prior to January 1, 1887. The Postmaster General thereupon stated plaintiff's account, as shown later in these findings. This statement shows that (if plaintiff be correct in his contention as to the law) his salary for the four biennial terms between July 1, 1866, and June 30, 1874, should have been \$4,037.73, whereas he has been paid in all for said terms but \$2,772.90; so (if he be correct) there is still due him as readjusted salary \$1,264.83."

The court also sets out certain correspondence between its clerk (under its direction) and the Postmaster General in regard *to papers in the Post Office Department, showing or tending to show what action, if any, had been taken by the department on request of petitioner for readjustment of salary under the act of 1883. It does not clearly appear therefrom that Postmaster General Wanamaker, to whom the clerk addressed his communication, had readjusted the salary, but subsequently to the correspondence the court of claims finds, in its 5th finding, that on November 19, 1897, Postmaster General Gary certified and returned to the court of claims a readjust-

ment of the petitioner's salary and documents relating to the action of the Post Office Department in this and similar cases, and the court in such 5th finding concludes thus:

"If the foregoing readjustment of Postmaster General Wanamaker is the readjustment prescribed and intended by the statutes therein referred to, there is no balance of salary remaining due the plaintiff. If the readjustment hereinafter set forth of Postmaster General Gary is the readjustment prescribed and intended by the said statutes, there remains due to the plaintiff the sum of \$1,264.83."

But the court, by its conclusion of law, finds that no legal readjustment of salary was made by Postmaster General Wanamaker, and that the readjustment made by Postmaster General Gary was valid under the statute, and therefore ordered judgment for \$1,264.83.

Assistant Attorney General Pradt argued the cause and filed a brief for appellant.

Mr. Harvey Spalding argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

[145] **Mr. Justice Peckham*, after stating the above facts, delivered the opinion of the court:

The question at issue between the parties is as to the proper construction of the act of Congress approved March 3, 1883, and which is set forth in the foregoing statement of facts. It is contended, on the part of the petitioner, that when application is made to the Postmaster General for a readjustment of salary between the period from [146] 1864 to 1874 that it is his duty, *under the statute of 1883, to compare the salary which the petitioner received in each biennial period with what he would have received in commissions on the receipts of his office, as shown by the sworn returns of the receipts and business of such office, under the statute of 1854 during the same term, and if on such comparison it should appear that the salary thus allowed was 10 per cent, or more, less than such commissions, then to readjust the salary for the biennial term by allowing the petitioner the difference between the salary and the commission for that particular term. This has been done by the court of claims in its judgment in this case.

The government, on the other hand, contends that to do so would be a plain violation of the statute, which provides that the readjustments shall be made in accordance with the mode prescribed in § 8 of the act of June 12, 1866, and that they shall date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made. In other words, the petitioner claims that upon a comparison of the actual salary paid him in a two-year period, with what he would have received for the same period upon the basis of commissions on

the sum of the quarterly returns for that period, if the salary paid him were 10 per cent less than the commissions, he was entitled to be paid the difference for that particular biennial term, whereas the government contends that by virtue of the statute the readjustment is to date from the immediately succeeding quarter.

Going back to the statute of 1854, providing for compensation by commission, we find the act authorized the Postmaster General to allow the commissions to postmasters at the rates named therein and to be based on the postage collected at their respective offices in each quarter of the year. Then came the act of July 1, 1864, providing for payment to postmasters by salary, and classifying them according to the salary received. There were five classes thus made, and they were arranged at the commencement by reference to the compensation paid to the office for the two years next preceding July 1, 1864. The 2d section of the act provides for a review by the Postmaster General once in two years, and a readjustment of the salaries *on the basis [147] of the preceding section, but any change made in the salary, the statute provided, should not take effect until the first of the quarter next following such order. In special cases, upon satisfactory representation, the Postmaster General might also review and readjust the salary assigned to any office as much oftener than once in two years as he might deem expedient.

Prior to this act of 1864 it will be seen that postmasters received their compensation by commission based upon each quarterly return of the amount of sales made at the particular office, but under the act of 1864, instead of compensation by commission, postmasters were to be paid under that act salaries for two years based upon the average amount of the receipts at their offices, as shown by their quarterly returns for the two years preceding the 1st day of July, 1864, as provided for in the act of June 22, 1854, and this salary was to be reviewed every two years.

Thus, at the end of a biennial period the amount of receipts, as shown by the quarterly returns for the past two years, was taken, and upon that amount the salary for the coming two years was fixed, so that, assuming from 1864 to 1866 the amount of the quarterly receipts made a total of \$2,000, that sum would be fixed upon as the salary for the two years from 1866 to 1868. It was obviously an effort to make the compensation by salary equivalent to the compensation by commissions, and this was the way in which it was to be done. It is equally obvious that a failure to attain this result would frequently occur in the practical operation of the act. The amount of the compensation by salary from 1866 to 1868, for instance, fixed by a resort to the quarterly returns for the two years preceding, would, in rapidly growing communities, fail to reach the amount of compensation which the postmasters would have received

had it been fixed by commissions for those years, 1866 to 1868.

[148] The amount of the sales of stamps might have quadrupled in those years over the amount of such sales for the period from 1864 to 1866, and yet, as the compensation for the years from 1866 to 1868 was measured by the sales from 1864 to 1866, there was no relief to be had, and the postmaster in such case *would have received less salary than the amount of the compensation he would have received had he been paid by commissions on sales of stamps as under the act of 1854. Such being the obvious result of the act of 1864, the 2d section was amended in 1866, which amendment provided that when the salary allowed as fixed, pursuant to the provisions of the act of 1864, proved to be 10 per cent less than it would have been on the basis of commissions, under the act of 1854, fixing the compensation, then in that event the Postmaster General was directed to review and readjust the salaries under the provisions of that act. And even then the readjustment would not take effect until the first day of the quarter next following the order for the same, as that is the condition of the act of 1864, which is not altered in that respect by the act of 1866. It has been held that under this statute of 1866 no action could be maintained in the court of claims until there had been a readjustment of the salary of the petitioner for the period for which he claimed to recover. *United States v. McLean*, 95 U. S. 750, 24 L. ed. 579.

The quarterly returns mentioned in the act of 1866 do not refer to any one quarterly return during the biennial term. The question arose in *United States ex rel. McLean v. Vilas*, 124 U. S. 86, 31 L. ed. 329, 8 Sup. Ct. Rep. 422, when, referring to the amendment of 1866 to the act of 1864, the court, through Mr. Justice Miller, said: "What quarterly returns are here meant, as showing that the salary is 10 per cent less than the commissions under the act of 1854? The argument of counsel is, that when any one quarterly return shall show this condition of affairs, the Postmaster General, on the request of the postmaster, must make a readjustment; but such is not the language of the statute. The expression used is 'when the quarterly returns' shall show this, and inasmuch as the law had already established that readjustments must be made on the basis of the quarterly returns for two years, it is reasonable to suppose that that was the meaning of Congress in this proviso."

Under such a construction, the readjustment could not be had until eight quarterly returns of the biennial period had been made, so that it would appear therefrom that the salary allowed during that term [149] was at least 10 per cent less than *it would have been if fixed on the basis of commissions under the act of 1854, in which case the Postmaster General was directed to review and readjust salaries under the provisions of said section, but the change was

not to take effect until the first day of the quarter next following such order of the Postmaster General. Then comes the act of 1883, which also provides for a case for readjustment of salary where sworn returns of receipts and business have been made, or where quarterly returns, in conformity to the then existing regulations, have been made, showing that the salary allowed was 10 per cent less than it would have been upon the basis of commissions under the act of 1854. In such case the Postmaster General was authorized and directed to readjust those salaries in accordance with the mode prescribed in § 8 of the act of June 12, 1866, already referred to.

The sworn quarterly returns referred to in the act of 1883 are those contained in the biennial period, and the act does not refer to one return alone, any more than did the act of 1866. Having stated the circumstances in which a readjustment could be had, the act of 1883 proceeded to state from what period such readjustment should take effect, and it stated that it was "to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made." This language is plain and unambiguous, and the court is bound by its terms. The readjustment cannot take effect in the same term for which the sworn returns were reviewed. It is postponed to the beginning of the next quarter.

It is said that as thus construed the statute leads in many cases to great injustice, and hence such construction should not be adopted. The difficulty is that any other construction violates the clear directions of the law, and although the result may be to withhold its benefits from some who might be regarded as otherwise entitled to it, yet we cannot for that reason alter its terms so as to include them, and thus ourselves enact instead of construing the law.

In *United States v. Verdier*, 164 U. S. 213, 219, 41 L. ed. 407, 17 Sup. Ct. Rep. 42, it was held that the act of 1883 created an indebtedness voluntarily assumed *by the [150] government in regard to those who claimed under its provisions. It rested entirely with Congress to say who should have its benefits and how the same should be arrived at, and from what date the readjustment should take effect, and as Congress has plainly stated the date there is nothing for the court to do but follow the clear direction of the statute. If Congress had intended to provide for the readjustment taking effect at the commencement of a biennial term subsequent to that in which the quarterly returns were made upon which the compensation was fixed, we are at a loss to think of what language it could use which would more certainly and specifically prove that intention than does the language actually used in this statute.

The method of reviewing and readjusting the salaries of postmasters under the act of 1883 with reference to the acts of 1864 and 1866, pursued by the Post Office Department, by which the readjustments based up-

on the quarterly returns have been made prospectively for the next biennial term thereafter, was approved by Congress as a correct administration of the act of March 3, 1883, and the readjustments which had been made under that act and in that method by the department, were ratified as a correct disposition of the claims which had been considered and disposed of, and Congress enacted that in considering all claims not yet readjusted the same method thus approved by it should be pursued, and it directed that any and every different method of readjustment of salaries during the period between 1864 and 1874 should be prohibited. 24 Stat. at L. 256, 307, chap. 903, § 8, act approved August 4, 1886. When this act was passed the salary of the petitioner had not been readjusted.

While the declaration of Congress in the act of 1886, approving the construction which had been put upon the act of 1883 by the Post Office Department, and ratifying its method of reviewing and readjusting salaries under that act, could have no binding force upon the courts as to the proper construction of that act in cases of salaries already readjusted, yet its direction, "that in considering all claims not yet readjusted, the same method shall be pursued which is hereby approved; and any and every different method of readjustment [151] of salaries of *such postmasters and late postmasters during the period between July 1, 1864, and July 1, 1874, than is herein approved, is hereby prohibited," is a valid legislative enactment, and must be followed by the courts. The readjustment of the salary of petitioner has not been according to this direction.

Construing the acts of 1883 and 1886 as we think their terms require, the judgment of the court of claims is erroneous, and must be reversed and the case remanded to that court with instructions to enter a judgment in conformity to the directions of those statutes and the opinion of this court.

We feel called upon to say that the charges of misconduct, maladministration, and fraud against the officers of the Post Office Department, so freely scattered through the pages of the briefs of counsel for appellee, are entirely unwarranted by anything contained in the record before us, and ought not to have been made.

Reversed.

Mr. Justice **McKenna** did not sit in this case, and took no part in its decision.

FIRST NATIONAL BANK OF LAKE BENTON, MINNESOTA, *Plff. in Err.*,

v.

JOHN W. WATT.

(See S. C. Reporter's ed. 151-155.)

Usury by national banks—action to recover back usurious interest—measure of recovery.

NOTE.—On usury by national banks—see note to *Farmers' & M. Nat. Bank v. Dearing*, 23 L. ed. U. S. 196.

184 U. S.

Twice the amount of the entire interest paid, and not twice the sum by which the interest received exceeded the lawful rate, is the measure of recovery from a national bank for collecting usurious interest, under U. S. Rev. Stat. § 5198, providing for a forfeiture of the entire interest whenever taken, received, reserved, or charged at a usurious rate, and for the recovery, "in case the greater interest has been paid," of twice the amount of the interest thus paid.

[No. 103.]

Submitted January 15, 1902. Decided February 24, 1902.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the trial court in favor of plaintiff in an action to recover back usurious interest. *Affirmed.*

See same case below, 79 Minn. 266, 82 N. W. 1118.

Statement by Mr. Justice **White**:

By this action, which was commenced in a court of the state of Minnesota, recovery was sought from the First National Bank of *Lake Benton, Minnesota, plaintiff in error here, of twice the amount of the entire interest which it was alleged had been paid to that bank by Watt, plaintiff below, who is the defendant in error on this record. The right to the relief was based on the averment that the bank had, in violation of the law of the United States, received from Watt usurious interest. The cause was tried to a jury and a verdict returned in favor of Watt. From an order denying a motion for a new trial an appeal was taken to the supreme court of the state of Minnesota, and that court affirmed the judgment. 76 Minn. 458, 79 N. W. 509. Upon the return of the record to the trial court, judgment was entered on the verdict of the jury. Another appeal was then taken and the judgment was affirmed. 79 Minn. 266, 82 N. W. 1118. The case was then brought to this court by writ of error.

Messrs. Frank B. Kellogg and C. A. Severance submitted the cause for plaintiff in error:

In the absence of statutory regulation, the debtor's claim to relief went only to the usurious excess, and not to the entire interest.

Jones v. Barkley, 2 Dougl. 697; *Fitzroy v. Gwillam*, 1 T. R. 153; *Dey v. Dunham*, 2 Johns. Ch. 191; *Fanning v. Dunham*, 5 Johns. Ch. 123, 9 Am. Dec. 283; *Palmer v. Lord*, 6 Johns. Ch. 95; *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395; *Clarkson v. Garland*, 1 Leigh, 147; *Dole v. Northrop*, 19 Wis. 249; *Baum v. Thoms*, 150 Ind. 378, 50 N. E. 357.

A practice which has prevailed so long should be given the benefit of any possible doubt.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196.

The statute under consideration is penal in its nature, and should therefore be strictly construed.

Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; *Nash v. White's Bank*, 37 Hun, 57; *Monson v. Chester*, 22 Pick. 385. See also *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580.

That statutes prescribing a penalty for the taking of usurious interest are to be strictly construed, see—

Tiffany v. National Bank, 18 Wall. 409, 21 L. ed. 862; *United States v. Kansas P. R. Co.* 4 Cent. L. J. 174, Fed. Cas. No. 15,506; *Pardoe v. Iowa State Nat. Bank*, 106 Iowa, 345, 76 N. W. 800.

General words of a penal statute are to be restrained for the benefit of him against whom the penalty is inflicted.

The Industry, 1 Gall. 114, Fed. Cas. No. 7,028.

This court in its strict construction of the statute under consideration has gone so far as to hold that the remedy provided for therein is exclusive in this sense,—that the action to recover back must be a separate and independent one, and that the remedy cannot be availed of by way of counterclaim.

Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212.

The question has been judicially determined in accordance with the contention of plaintiff in error.

Hintermister v. First Nat. Bank, 64 N. Y. 212; *Bobo v. People's Nat. Bank*, 92 Tenn. 444, 21 S. W. 888; *Hardin v. Trimmier*, 30 S. C. 391, 9 S. E. 342; *National Bank v. Johnson*, 104 U. S. 271, 26 L. ed. 742; *Nash v. White's Bank*, 37 Hun, 57; *First Nat. Bank v. Denson*, 115 Ala. 650, 22 So. 518.

The act of usury is never regarded as consummated until actual payment is not only exacted, but is made under such contract.

Wycoff v. Longhead, 2 Dall. 92, 1 L. ed. 303; *Musgrove v. Gibbs*, 1 Dall. 216, 1 L. ed. 107; *Turner v. Calvert*, 12 Serg. & R. 46.

The borrower does not become entitled to his action of recovery back under § 5198, until something beyond principal and legal interest has been paid by him on the alleged usurious contract.

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 396; *National Bank v. Ragland*, 181 U. S. 45, 45 L. ed. 738, 21 Sup. Ct. Rep. 536; *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852.

In the cases cited it was held that the two-year limitation upon the action to recover back did not begin to run until the usurious excess was actually paid. This has also been held in the state courts.

First Nat. Bank v. Denson, 115 Ala. 650, 22 So. 518.

The law clearly omits to provide for the case where the borrower under a usurious contract pays merely the principal and legal interest, thereby enforcing the theory of the existence of a *locus penitentiæ*.

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 396.

Mr. F. L. Janes submitted the cause for defendant in error:

Where illegal interest has been knowingly

stipulated for, but not paid, only the sum lent, without interest, can be recovered.

Lucas v. Government Nat. Bank, 78 Pa. 231; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65; *Guthrie v. Reid*, 3 Thompson, Nat. Bank Cas. 753; *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 396.

Where a national bank takes, receives, or charges more than the legal rate of interest on the discount of the note, the interest-bearing power of the note is destroyed. It is a dead note thereafter so far as interest is concerned. Not only is the usurious interest forfeited, but the interest accruing by law thereafter is forfeited, and the bank cannot recover more than the face of the note.

Alves v. Henderson, 3 Thompson, Nat. Bank Cas. 452; *Petersborough Nat. Bank v. Childs*, 3 Thompson, Nat. Bank Cas. 469.

Where the greater rate of interest has been paid, then twice the amount of the entire interest so paid can be recovered in a penal action of debt, or suit in the nature of such action, against the offending bank, brought by the person paying the same, or his legal representative.

Hill v. National Bank, 21 Blatchf. 258, 15 Fed. 433; *Crocker v. First Nat. Bank*, 4 Dill. 358, Fed. Cas. No. 3,397; *National Bank v. Davis*, 8 Biss. 100, Fed. Cas. No. 10,038; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65, 3 Thompson, Nat. Bank Cas. 746; *Schuyler Nat. Bank v. Bullong*, 24 Neb. 825, 40 N. W. 413, 3 Thompson, Nat. Bank Cas. 561; *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492, 10 Am. Rep. 751; *Monongahela Nat. Bank v. Overholt*, 96 Pa. 329; *National Bank v. Trimble*, 40 Ohio St. 629; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143, 102 Fed. 442; *National Exch. Bank v. Moore*, 2 Bond, 174, Fed. Cas. No. 10,041; *First Nat. Bank v. McInturff*, 3 Kan. App. 536, 43 Pac. 839; *First Nat. Bank v. Turner*, 3 Kan. App. 352, 42 Pac. 936; *Boerner v. Traders' Nat. Bank*, 90 Tex. 443, 39 S. W. 285; *Colgin v. City Nat. Bank*, 16 Tex. Civ. App. 346, 40 S. W. 634; *Marion Nat. Bank v. Thompson*, 101 Ky. 277, 40 S. W. 903; *First Nat. Bank v. Denson*, 115 Ala. 650, 22 So. 518.

The foregoing construction has been substantially followed in this court.

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390. See also *National Bank v. Ragland*, 181 U. S. 45, 45 L. ed. 738, 21 Sup. Ct. Rep. 536.

The statute in question is remedial as well as penal, and is to be liberally construed to effect the object Congress had in view in enacting it.

Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196. See also *Gray v. Bennett*, 3 Met. 522.

***Mr. Justice White**, after making the foregoing statement, delivered the opinion of the court:

The contention of the plaintiff in error is that the state court erroneously condemned it to pay twice the amount of the entire interest which it had collected because it had taken a usurious rate, whilst under the law

of the United States, it is insisted, the recovery should have been, not twice the amount of the entire interest, but only twice the sum by which the interest received exceeded the lawful rate. To dispose of this contention involves ascertaining the meaning of §§ 5197 and 5198 of the Revised Statutes of the United States, which are as follows:

[153] "Sec. 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where by the laws of *any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, or territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale, of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"Sec. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided, such action is commenced within two years from the time the usurious transaction occurred. (That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.)"

The argument that the recovery should have been limited to twice the amount by which the usurious interest exceeded the legal rate is predicated on what is assumed to be the correct construction of the second sentence of § 5198 above quoted. The sentence relied on is as follows:

[154] "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice *the amount of the interest thus paid from the association taking

or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

It is urged that the statute is penal in its character and must be strictly construed, therefore the sentence relied upon must be interpreted as relating solely to the usurious portion of the interest paid, and not to so much of the rate of interest as was lawful. Although it be conceded that the statute is penal in character, we do not consider, even under the strictest rule of construction, it is possible to give to it the meaning contended for without departing from its unambiguous letter, and thereby frustrating its obvious intent. The first sentence of the section provides that "the taking, receiving, reserving, or charging a rate of interest greater than is allowed, . . . when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." This, without the slightest ambiguity, provides for the forfeiture, not of the amount by which the usurious has exceeded the lawful rate, but of the entire interest. When the statute then proceeds, in the very next sentence, to say, "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back . . . twice the amount of the interest thus paid," it cannot in reason be held that the words, "the interest thus paid," refer to any other sum than the entire interest as provided in the previous sentence. To hold otherwise would be to decide that the statute forfeited the entire amount of interest whenever a usurious rate had been taken, received, reserved, or charged, and yet limited the debtor's right to recover back only to twice the amount of the excess of the usurious over the legal rate. This would be to interpret the law as in one sentence imposing a forfeiture of the entire interest, whilst in the next sentence it rendered such forfeiture, in many cases, absolutely nugatory. That such would be the result becomes apparent when it is considered that whilst it is conceded that in case usurious interest is received the entire amount is forfeited, it is yet argued that in case suit is brought *to[155] recover the forfeited usurious interest, the entire interest received cannot be awarded. The contention otherwise stated is this: The entire interest, in the event usurious interest is received, is forfeited at the election of the creditor, such election on his part, by which the forfeiture is escaped, being manifested by his insisting on retaining the money taken by him in violation of the statute. This, however, involves, not only the conflict pointed out by the considerations just mentioned, but the further contradiction that the greater the violation of the statute the lesser the penalty which it imposes. The disregard of the text and the confusion as to the purpose of the law, which the argument involves, disappears if the statute be harmoniously enforced according to its letter and spirit. By both it

is apparent that the statute, on the one hand, causes a forfeiture of the entire interest to result from the taking, receiving, reserving, or charging a rate greater than is allowed by law, and, on the other, subjects the creditor to pay twice the amount of the entire interest illegally exacted if by persistence in wrongdoing he subjects the debtor to the necessity of suing to recover.

Whilst the question here presented has not been heretofore passed upon by this court, the circuit courts of the United States have had occasion frequently to consider it, and have uniformly construed the statute in accordance with its plain import as we have just expounded it. *National Bank v. Davis*, 8 Biss. 100, Fed. Cas. No. 10,038; *National Exch. Bank v. Moore*, 2 Bond, 174, Fed. Cas. No. 10,041; *Crocker v. First Nat. Bank*, 4 Dill. 358, Fed. Cas. No. 3,397; *Hill v. National Bank*, 21 Blatchf. 258, 15 Fed. 433; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143, 149, 102 Fed. 442. The state courts of last resort have also, as a general rule, upheld the same construction. *Boerner v. Traders' Nat. Bank*, 90 Tex. 443, 39 S. W. 285, and authorities there cited. True it is that in a few cases some state courts have hesitatingly taken an opposite view; but we think, for the reasons which we have given, the letter of the statute is too plain and its intention too manifest to justify such an interpretation.

Affirmed.

[156] *J. C. LEAGUE, *Plff. in Err.*,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 156-162.)

Constitutional law—change of remedy—due process of law.

1. A state may adopt new remedies for the collection of taxes, and apply those remedies to taxes already delinquent, without any violation of the Federal Constitution.
2. A claimant of land sold to the state by administrative sale for the nonpayment of taxes is not deprived of his property without due process of law by judicial proceedings to collect such delinquent taxes, under a statute enacted subsequent to such sale, although the ordinary expenses attending such proceedings are chargeable as costs, which were not provided for by the prior statute in reference to sales for unpaid taxes, since the state may waive the rights obtained by such

NOTE.—On *retrospective statutes*—see notes to *Otoe County v. Baldwin*, 28 L. ed. U. S. 331; *People v. O'Brien* (N. Y.) 2 L. R. A. 255; *Ex parte Medley*, 33 L. ed. U. S. 835; and *Baruitz v. Beverly*, 41 L. ed. U. S. 94.

As to *what constitutes due process of law*—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

478

sale, and may prescribe the terms on which such waiver will be made.

3. A state may provide that taxes which have already become delinquent shall bear interest from the time the delinquency commenced, without conflicting with any provisions of the Federal Constitution.

[No. 137.]

Argued and Submitted January 29, 1902.
Decided February 24, 1902.

IN ERROR to the Supreme Court of the State of Texas to review a judgment affirming a decree of the Court of Civil Appeals which modified a judgment of the District Court of San Augustine County in favor of the state in an action to recover unpaid taxes. *Affirmed.*

See same case below, 93 Tex. 553, 57 S. W. 34.

Statement by Mr. Justice **Brewer**:

On August 6, 1898, the state of Texas filed a petition in the district court of San Augustine county, Texas, averring that the defendant was justly indebted to the state of Texas and the county of San Augustine in the sum of \$1,305.87, on account of taxes, interest, penalties, and costs due on certain described lands for the years 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1894, 1895, and 1896. The prayer was for a recovery of the taxes, interest, etc., and for a decree establishing and enforcing a lien upon the several tracts for the amounts found due upon each. An answer was filed and a trial had, which resulted, on September 9, 1889, in a finding that there was due the state the amount claimed for taxes, etc., a decree that the state recover the amount thereof from the defendant, and adjudging a lien upon the several tracts therefor, and directing a foreclosure and sale. On appeal to the court of civil appeals the decree was modified by striking out the taxes of 1884, all penalties and the personal judgment against the defendant, leaving the decree to stand as a finding of the amount due for taxes subsequent to the year 1884, interest and costs, and a foreclosure of a lien therefor upon the several tracts. This modification reduced the amount of the recovery to \$1,232.77, with interest at 6 per cent from September 9, 1899, the date of the decree in the district court. On error to the supreme court of the state the decree of the court of civil appeals was affirmed (93 Tex. 553, 57 S. W. 34), whereupon this writ of error was sued out. [157]

Mr. **F. Charles Hume** submitted the cause for plaintiff in error:

Prior to the enactment of Tex. Gen. Laws 1897, chap. 103, the collector of taxes was empowered by law to levy upon and sell, after the 1st day in January in each year, the lands assessed for taxes for the preceding year.

McFadden v. Longham, 58 Tex. 519.

Any right of a purchaser at a tax sale to review or continue the lien for taxes must

184 U. S.

depend on some statutory law of the state in force and effect when the sales were made.

Desty, Taxn. 1011, 1020; *Robson v. Osborn*, 13 Tex. 307.

The act of the legislature of Texas (Laws 1897, chap. 103) is a violation of the constitutional guaranty of due process, in so far as its provisions are intended to avoid the legal effect of a prior sale for taxes, by directing a second foreclosure proceeding for collection of the same taxes.

Yenda v. Wheeler, 9 Tex. 408; *Clegg v. State*, 42 Tex. 605; *Meredith v. Coker*, 65 Tex. 31; *Cooley*, Taxn. 527; *Blackwell*, Tax Titles, 3d ed. 527.

The title passed by a tax sale in Texas is derivative, and the lien is fixed by the assessment.

Yenda v. Wheeler, 9 Tex. 408; *Clegg v. State*, 42 Tex. 605; *Meredith v. Coker*, 65 Tex. 31; *Tex. Const.* art. 8, § 15.

Plaintiff in error was deprived of his property without due process of law by the foreclosure, in this suit, of the alleged lien and the sale of his property to enforce collection of charges or burdens retroactively imposed by act of the legislature of the state of Texas (Gen. Laws 1897, chap. 103) under the guise of interest, fees and costs, and added to the delinquent taxes that had accrued prior to the passage of said act.

Cooley, *Const. Lim.* *353, *369; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Ryan v. State ex rel. Eller*, 5 Neb. 276; *Camp v. Rogers*, 44 Conn. 291; *State, Dixon, Prosecutor, v. Jersey City*, 37 N. J. L. 39; *Redwood County v. Winona & St. P. Land Co.* 40 Minn. 515, 41 N. W. 465, 42 N. W. 477.

Interest is not an incident of a tax, and not authorized without statutory authority.

Edmonson v. Galveston, 53 Tex. 157; *Western U. Teleg. Co. v. State*, 55 Tex. 317; *Anderson County v. Kennedy*, 58 Tex. 622; *Heller v. Alvarado*, 1 Tex. Civ. App. 411, 20 S. W. 1003; *Cave v. Houston*, 65 Tex. 619.

The constitutional guaranty of due process operates with equal force upon the legislative, judicial, and executive departments of government, and upon all agencies by which state law is made and enforced.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Burton v. Plattner*, 4 C. C. A. 95, 10 U. S. App. 657, 53 Fed. 901.

The purchaser at a void tax sale cannot recover even the taxes assessed upon the land and paid by his purchase.

McCormick v. Edwards, 69 Tex. 106, 6 S. W. 32.

Mr. D. E. Simmons argued the cause, and, with **Mr. C. K. Bell**, filed a brief for defendant in error:

The state has an election of remedies in
184 U. S.

the collection of taxes. It may proceed under the summary power of seizure and sale given an administrative officer, or it may provide for collection by means of a suit and foreclosure of the tax lien. The right to redeem after two years from date of sale, not being a vested right, may be changed by the legislature. After forfeiture by sale to the state, the resulting rights of the state may be waived, there being no other parties interested therein.

Tex. Const. 1876, art. 8, §§ 3, 13, 15; *Tex. Rev. Stat.* 1895, arts. 5176-5189; *Acts* 25th Legis. chap. 103; *Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 619.

It is within the power of the legislature to provide whatever procedure seems best adapted for collecting taxes, and for foreclosure of the lien which is given by the Constitution and the laws; such law being one which affects the remedy, and not depriving delinquents of any substantial rights.

State ex rel. Garnes v. McCann, 21 Ohio St. 210; *State Tax on Foreign-held Bonds*, 15 Wall. 300, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. ed. 80; *Cave v. Houston*, 65 Tex. 619; *Lufkin v. Galveston*, 73 Tex. 343, 11 S. W. 340; *Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 619; *San Antonio v. Berry*, 92 Tex. 319, 48 S. W. 496; *Clarke v. Strickland*, 2 Curt. C. C. 439, Fed. Cas. No. 2,864; *Hodgdon v. Burleigh*, 4 Fed. 111; *Masterson v. State*, 17 Tex. Civ. App. 91, 42 S. W. 1003; *Conklin v. El Paso* (Tex. Civ. App.) 44 S. W. 883; *Traylor v. State*, 19 Tex. Civ. App. 86, 46 S. W. 81; *Fristoe v. Blum*, 92 Tex. 80, 45 S. W. 998.

The legislature has the power to waive any rights which may have accrued to the state by reason of a sale to the state of property delinquent for taxes. The courts, in the trial of a case, are limited to the issues made by the pleadings of parties to the suit. It is necessary to prove only those issues which are in dispute.

Sansom v. Mercer, 68 Tex. 488, 5 S. W. 62; *Ogden v. Bosse*, 86 Tex. 344, 24 S. W. 798.

***Mr. Justice Brewer** delivered the opinion [157] of the court:

In 1897 the legislature of Texas passed an act for the collection by judicial proceedings of delinquent taxes upon real estate. *Texas Gen. Laws* 1897, chap. 103, p. 132. The contention of the defendant, now plaintiff in error, is that prior thereto the collection of taxes was enforced by an administrative sale made by the collector of taxes after January 1 of the succeeding year; that the state's lien for taxes was merged in the estate passed or vested by that sale; that the status of the rights of the state or other purchaser was fixed by the sale, and must depend upon the legality of the title acquired under the collector's deeds, and that any right of a purchaser at such sale, whether state or private individual, to revive or continue any lien for taxes, must

depend upon some statute existing at the time of the sale; and that, hence, this act of the legislature providing for the collection of delinquent taxes by judicial proceedings was a violation of the constitutional guaranty of due process in so far as it avoided the legal effect of the prior administrative sale and directed a further and judicial sale with the rights attending thereon.

[158] *There is no pretense that the taxes levied for these several years were invalid, or that the proceedings up to and including the collector's sale were irregular. On the contrary, the delinquent tax record in evidence, duly certified and filed, which by § 3 of the act is made prima facie evidence of the regularity of all prior proceedings and also that the amount of the tax against any real estate is a true and correct charge, showed taxes due as found by the court. It does not appear that the lands were assessed to the defendant, or that he was the owner of them at the time of the early assessments. Indeed, he alleges in his answer that he acquired title about the year 1889, but does not allege that this title was from the state. Apparently he had purchased from some individual who claimed title. His argument assumes that the taxes had not been paid, and that the lands had been sold by the collector to the state. The case, therefore, presented is one of a party, admitting that valid taxes have been duly levied on his property and have not been paid, who is contesting the manner in which the state shall collect them, and insisting that the only method which it can adopt for such collection is one which has hitherto proved ineffectual.

That a state may adopt new remedies for the collection of taxes, and apply those remedies to taxes already delinquent, without any violation of the Federal Constitution, is not a matter of doubt. A delinquent taxpayer has no vested right in an existing mode of collecting taxes. There is no contract between him and the state that the latter will not vary the mode of collection. Indeed, generally speaking, a party has no vested right in a mere matter of remedy; that is subject to legislative change. And a new remedy may be resorted to unless in some of its special provisions a constitutional right of the debtor or obligor is infringed. "There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection." *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 570, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445, 450. That in the new remedy in the case at bar, as well as in the change from the old to the new, there was no violation of the Constitution of the state of Texas, is

[159] for *us settled by the decisions of its highest court. *West River Bridge Co. v. Dix*. 6 How. 507, 12 L. ed. 535; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed.

683, 17 Sup. Ct. Rep. 305; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

Defendant further contends that interest, expenses, and costs are included in the new remedy by judicial proceedings which were not provided for by the prior statutes in reference to collector's sales. The court of civil appeals and the supreme court of the state dealt with this question in these ways. The latter, in its opinion, quoted the following averment from the sworn answer of the defendant:

"And for answer in this behalf, defendant denies all and singular the allegations of plaintiff's petition; and further answering, defendant shows that he purchased the lands described in plaintiff's petition and exhibits about the year 1889; that said lands have been sold by the collector of taxes of San Augustine county for 1884 taxes and for the taxes of subsequent years, and they have, in every instance, been bid in by the collector of taxes for the state of Texas, in obedience to the laws of the said state."

Upon this it observed that it had granted the writ of error upon a question of the validity of the charge for interest, and added:

"However, upon the point on which the writ was granted, we will say that the answer of the defendant sets up the sale of the lands for taxes and the purchase of them by the state, insisting that the state is bound by its purchase. No attack is made upon the sale, nor upon any of the proceedings leading up to it, and it stands before the court, under the defendant's allegations, as a valid sale by which the title passed to the state. The state, having acquired the title, had the power to waive its right, and, in order to perfect the claim beyond all dispute, to foreclose its lien on the land as against the then claimant, and in doing so had the authority to prescribe such terms as it deemed proper and just. The claimant of the lands, being a party defendant, could have disclaimed any interest in them, and might thus have escaped any cost for proceedings had after such disclaimer. The defendant chose not to pursue this course, and he has no cause of complaint as the case stands before this court, because, by his own showing, he had no title to be affected by it, and depended solely upon the grace of the state for whatever he might get out of the land."

The court of appeals said:

"The lands were forfeited to the state by the sale for the taxes of 1884, the forfeiture to become absolute in two years. The offer of the state is to waive this forfeiture and restore the land to the owner if he will only pay the taxes accruing since then and 6 per cent interest thereon, together with the costs which had been incurred in making the sale, and in making up the delinquent lists, and of the suit. The state has waived its right of forfeiture on condition that the taxes, with interest and costs, shall be enforced against the land. This it might do." 56 S. W. 264.

Whichever be the true view of the effect of the answer (and, of course, so far as the two courts differ, we must accept the view expressed by the highest court of the state as controlling), the same result will follow. Whether the title which passed by the sale was conditional or absolute, the state may waive the rights obtained by such sale and prescribe the terms upon which it will waive them. In the one view it waives the right to a forfeiture; in the other, the title acquired by the sale; and in either case the state may fix the conditions of its waiver.

The costs referred to are simply the ordinary expenses which attend proceedings of the character prescribed, to wit, compensation to the collector for preparing the delinquent list and certifying it to the commissioners; to the county attorney for conducting the suit; to the sheriff for selling the land, and to the district clerk for making the court records. There is no pretense that any separate charge is exorbitant or unreasonable. And if the state is compelled to resort to such proceedings for the collection of its taxes it may provide reasonable compensation for the officials charged with any duty in connection therewith, and incorporate the charges therefor as costs in the case. Liability for these costs and expenses can be avoided by payment of taxes; and a delinquent taxpayer—one who fails to discharge his obligations to the state, compelling it to go into court to enforce payment of the taxes due upon his [161] land—*has no ground of complaint because he is charged with the ordinary fees and expenses of a law suit.

While the matter of interest stands upon a little different basis, yet, so far as the Federal Constitution is concerned, there is nothing to prevent its collection. The statute may be retroactive, but a statute of a state is not brought into conflict with the Federal Constitution by the mere fact that it is retroactive in its operation. In *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395, 401, 13 L. ed. 469, 472, it was said:

"That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the Federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. Thus, in the case of *Watson v. Mercer*, 8 Pet. 110, 8 L. ed. 884, the court says: 'It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. Now, it has been solemnly settled by this court that the phrase *ex post facto* is not applicable to [164] U. S.

civil laws, but to penal and criminal laws.' For this position is cited the case of *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; already mentioned; of *Fletcher v. Peck*, 6 Cranch, 138, 3 L. ed. 178; *Ogden v. Saunders*, 12 Wheat. 266, 6 L. ed. 624, and *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458."

This decision, it is true, was before the 14th Amendment, and the restrictions placed by that amendment upon state action apply to retrospective, as well as prospective, legislation. But it contains no prohibition of retrospective legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution.

As the state may, in the first instance, enact that taxes shall bear interest from the time they become due, so, without conflicting *with any provision of the Federal Consti- [162] tution, it may in like manner provide that taxes which have already become delinquent shall bear interest from the time the delinquency commenced. This is adding no novel or extraordinary penalty, for interest is the ordinary incident to the nonpayment of obligations.

We see nothing else in the record calling for notice, and, finding no error, *the judgment of the Supreme Court of Texas is affirmed.*

S. D. HATFIELD and Nancy C. Rutherford,
Appts.,
v.

HENRY C. KING.

(See S. C. Reporter's ed. 162-168.)

Appeal—appearance.

A decree entered against persons not served with process, but for whom an unauthorized appearance has been entered by an attorney, will be reversed.

[No. 221.]

Submitted January 7, 1901. Submission Set Aside January 21, 1901. Submitted on Motion for Rule November 11, 1901. Decided February 24, 1902.

A PPEAL from a decree of the Circuit Court of the United States for the District of West Virginia quieting title to lands. *Reversed.*

Statement by Mr. Justice **Brewer**:

On October 8, 1898, the appellee commenced this suit in the circuit court of the United States for the district of West *Vir- [163] ginia to quiet his title to certain lands. In the bill he alleged that he was the owner in fee and in the actual possession of a large tract, known as the "Robert Morris 500,000,-

NOTE.—As to the effect of a judgment obtained upon an unauthorized appearance by attorney—see note to *Williams v. Johnson* (N. C.) 21 L. R. A. 848.

Acre Grant," which was granted by Virginia in 1795 to Robert Morris, of Philadelphia, and is situated partly in West Virginia, and partly in Kentucky and Virginia. He followed this general allegation with a detailed statement of his chain of title and of certain tax proceedings. After these averments tending to show his own rights and title, he charged that Aly and Joseph Hatfield, father and son, had at different times obtained pretended titles to certain small tracts within the limits of his grant, stating how these titles were obtained and wherein he claimed they were invalid. He further averred that both the Hatfields were dead; that their only heirs were the two defendants, now appellants, the widow and daughter of Joseph Hatfield, who wrongfully claimed the tracts last mentioned and thereby cast a cloud upon the plaintiff's title. No process was issued, but on June 8, 1899, a demurrer was filed on behalf of the defendants, signed by one appearing as their attorney. This demurrer was overruled on May 16, 1900, and leave given to file answer. Thereupon, as the record states, the defendants declined to answer but elected to stand upon their demurrer, and on June 2, 1900, a decree was entered in favor of plaintiff, quieting his title to the lands claimed by the defendants. From this decree an appeal was prayed and allowed to this court, and the appeal papers were filed here on January 3, 1901.

The bill was so framed as to invite a consideration, in some aspects, of the question of forfeiture for nonpayment of taxes, presented to this court in *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925.

At the beginning of this term one of the appellants, Nancy C. Browning (erroneously, as she states, called Nancy C. Rutherford in the record) moved for a rule against the attorney who had appeared for her, to show by what authority he had assumed to so appear and why he should not be attached and his name stricken from the roll of attorneys for falsely assuming to act as her attorney and imposing upon the circuit and this court a false, fictitious, and manufactured case for the purpose of obtaining an opinion and judgment on a false state-

[164]ment *of facts, to her injury and the injury of others similarly situated but not parties to the suit or appeal. She also asked that the alleged final decree of the circuit court be declared null and void, and that this appeal and the cause be dismissed. At the same time other parties, claiming to be interested in the Robert Morris tract, appeared and represented that the entire proceedings had in this case were feigned and fictitious; that the litigation on both sides was controlled by the counsel for the plaintiff King, and asked an examination as to the truth of the charge so made. A substantially similar motion was made on behalf of the state of West Virginia. The counsel named in the record have answered, denying these charges and asserting the fullest integrity in the matter. Quite a

number of affidavits have been filed, and also some documentary evidence presented.

Mr. Henry C. Fleisher submitted the cause for appellants on the first submission.

Mr. Maynard F. Stiles submitted the cause for appellee on the first submission.

Mr. Edgar P. Rucker submitted the cause for the State of West Virginia on motion for rule, etc.:

By a long line of decisions, this court has held that upon a motion it will intervene and dismiss an appeal when it clearly appears that the suit is fictitious and that there is no real issue between the parties.

East Tennessee, V. & G. R. Co. v. Southern Teleg. Co. 125 U. S. 695, 31 L. ed. 853, 8 Sup. Ct. Rep. 1391; *South Spring Hill Gold Min. Co. v. Amador Medcan Gold Min. Co.* 145 U. S. 302, 36 L. ed. 713, 12 Sup. Ct. Rep. 921; *American Woodpaper Co. v. Hest*, 8 Wall. 333, 19 L. ed. 378; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; *California v. San Pablo & T. R. Co.* 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876.

'It is highly reprehensible and a contempt of court for an individual to carry on both sides of a suit for the purpose of obtaining a decision to advance his personal interests.

Cleveland v. Chamberlain, 1 Black, 419, 17 L. ed. 93; *Lord v. Veazie*, 8 How. 254, 12 L. ed. 1069.

Defendants are at liberty to show that the appearance for them was unauthorized. If they show this, they are not bound by the proceedings of the court, whose judgment as to them is a nullity.

Shelton v. Tiffin, 6 How. 163, 12 L. ed. 387.

The power to disbar an attorney "is possessed by all courts who have authority to admit attorneys to practice."

Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205.

It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them.

Randall v. Brigham, 7 Wall. 523, 19 L. ed. 285.

In order to make any acts or conduct ground for striking the name of an attorney from the rolls, it is not essential that they be such as would subject him to indictment or to any civil liability; any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relation of attorney and client and the practice of law before the courts, or showing such a lack of personal honesty or of good moral character as to render him unworthy of public confidence, constitutes a ground for his disbarment.

3 Am. & Eng. Enc. Law, 2d ed. p. 302.

The confidence which attorneys receive, and the responsibility which they are obliged to assume, demand, not only ability of high order, but the strictest integrity.

Randall v. Brigham, 7 Wall. 523, 19 L. ed. 285.

Messrs. Holmes Conrad and Edward C. Lyon submitted the cause for petitioners on such motion:

Judgment rendered on an appearance by an agent has been held to be a nullity because "it does not appear that he had authority to waive process and defend the suit."

Shelton v. Tiffin, 6 How. 186, 12 L. ed. 397.

Mr. W. P. Hubbard submitted the cause for interveners on such motion. **Messrs. C. W. Campbell and John H. Holt** were with him on the brief:

Where a collusive or fictitious suit is shown, or where it appears that the plaintiff or defendant was in the beginning or became the *dominus litis* on both sides, the court will, according to the circumstances of the particular case, either simply dismiss the appeal, or dismiss the appeal and remand the cause, or reverse the judgment of the court below and remand the cause.

Lord v. Veazie, 8 How. 251, 12 L. ed. 1067; *Cleveland v. Chamberlain*, 1 Black, 419, 17 L. ed. 93; *American Woodpaper Co. v. Heft*, 8 Wall. 333, 19 L. ed. 378; *Little v. Bowers*, 134 U. S. 557, 33 L. ed. 1020, 10 Sup. Ct. Rep. 620; *South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.* 145 U. S. 300, 36 L. ed. 712, 12 Sup. Ct. Rep. 921.

Mr. Maynard F. Stiles submitted the cause in opposition to such motion:

An appearance by authorized counsel is as effectual to give jurisdiction of a party as the personal appearance of such party, and the appearance of either cures defects in or want of process.

Hill v. Mendenhall, 21 Wall. 453, 22 L. ed. 616; *Pollard v. Dwight*, 4 Cranch, 421, 2 L. ed. 666; *Creighton v. Kerr*, 20 Wall. 8, 22 L. ed. 309.

There would be no safety to opposing parties if reliance could not be put upon the presumed authority of counsel.

Osborn v. Bank of United States, 9 Wheat. 739, 6 L. ed. 204.

The jurisdiction of the court over the parties is always one of the first subjects of inquiry, and must be presumed to have been examined into by the court; and where it depends upon the authority of counsel the court must be presumed to have satisfied itself upon the matter before proceeding further, and to have judicially settled the question.

Preston v. Kindrick, 94 Va. 760, 27 S. E. 588; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733. See also *Hills v. Ross*, 3 Dall. 331, 1 L. ed. 623.

[164] ***Mr. Justice Brewer** delivered the opinion of the court:

It is contended by the appellants that the decree in the circuit court against them ought to be set aside because they have not had the hearing in that court to which they were entitled by law; that they were not served with process; that counsel unauthorized by them entered their appearance, and

after having wrongfully entered their appearance failed to take the proper steps for the protection of their rights.

It is also contended (though by other parties than the appellants) that there was no real controversy between the parties *nominally opposed to each other, and that the litigation was in fact carried on under the direction and control of the plaintiff. It is well settled that questions of this kind may be examined, upon motion, supported by affidavits, and that it is the duty of a court to make such inquiry, in order that it may not be imposed on by an apparent controversy to which there are really no adverse parties. *Shelton v. Tiffin*, 6 How. 163, 186, 12 L. ed. 387, 397; *Lord v. Veazie*, 8 How. 251, 12 L. ed. 1067; *Cleveland v. Chamberlain*, 1 Black, 419, 426, 17 L. ed. 93, 94; *American Wood-Paper Co. v. Heft*, 8 Wall. 333, 19 L. ed. 378; *East Tennessee, V. & G. R. Co. v. Southern Tcleg. Co.* 125 U. S. 695, 31 L. ed. 853, 8 Sup. Ct. Rep. 1391; *South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.* 145 U. S. 300, 36 L. ed. 712, 12 Sup. Ct. Rep. 921; *California v. San Pablo & T. R. Co.* 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876.

In *Cleveland v. Chamberlain* it was said, quoting from *Lord v. Veazie*: "Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court."

In *Shelton v. Tiffin* the question was as to the validity of a judicial sale, and it appeared that one of the defendants in the proceedings had not been served with process; that an attorney had entered an appearance for him but had done so inadvertently and without authority, and it was said: "An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property."

If it be true, as claimed by some of the moving parties, that this is a collusive suit, that there is no real controversy between the plaintiff and defendants, that the plaintiff has been controlling the litigation on both sides with a view of obtaining an opinion on a matter of law in which he is interested, the transaction is one which as stated courts of justice have always *reprehended, and should be treated as a punishable contempt, and no decree entered under those circumstances should be permitted to stand.

So far as respects permitting the decree to stand, the same result would follow, even

though there were no collusion, if the appearance of counsel was, in fact, not authorized or ratified by the defendants; and to that matter alone shall we direct our attention.

Before any proceedings could rightfully be taken against the defendants it was essential that either they be brought into court by service of process, or that a lawful appearance be made in their behalf. Confessedly they were not served with process, and they now deny the right of counsel to have entered an appearance for them. The evidence upon this, as well as kindred questions, is principally in *ex parte* affidavits. The appellants were respectively the widow and daughter of Joseph Hatfield, and claimed title to the various tracts by inheritance from him. It appears that in 1895 an action of ejectment was brought by King against several parties, these appellants among the number. Mrs. Hatfield was led to employ in that case the same counsel who entered her appearance in this. We do not stop to inquire into the circumstances which it is alleged attended that employment. She swears that it was simply for that action and a suit ancillary thereto brought to enjoin the cutting of timber; that she never employed him in any other matter, and knew nothing of the pendency of this suit until after the decree against her and the appeal to this court. She also swears that she never attempted to act for her daughter in preparing for the defense of any suit or action, or in making any arrangements for her. Mrs. Browning testifies that at the time of the ejectment suit she was the widow of John Rutherford; that on December 25, 1895, she married her present husband, Albert Browning; that she had no notice or knowledge of the present suit, and never directly or indirectly employed or authorized anyone to appear for her therein, or in any other controversy or matter pertaining to said lands; and further, never authorized any person to employ said counsel or any other attorney to appear and represent her in this suit.

[167] *On the other hand, the counsel's affidavit is that he was employed by Mrs. Hatfield in the prior action, and supposed he was authorized by the scope of that employment to appear for her in this suit; that he had the title papers of both the appellants in his possession, and had no suggestion of any revocation of his authority. He introduced a copy of a letter from Mrs. Hatfield, which supported his claim of employment, at least in the ejectment case. While he testifies to having met and conversed with Mrs. Hatfield, he does not state that he ever met Mrs. Browning or had any conversation or correspondence with her, although he does state in a general way that she sanctioned and ratified the action of her mother in employing him.

We do not deem it necessary to mention all the matters of evidence, but it seems to us quite clear that, whatever may have been his understanding of the matter, the counsel was not authorized to appear for Mrs.

Browning. She had in fact never employed him in any litigation in respect to these lands or otherwise, nor had she authorized anyone to employ him, and she had no notice of the pendency of this suit. As to Mrs. Hatfield, while she did at one time employ him in other litigation, she knew nothing of the pendency of this suit until after the decree and the appeal, and if the employment in the ejectment action was sufficiently broad to cover all future litigation of any kind in respect to the land, it would seem to have been so only in consequence of a contract which she says was made, and which, if made, would stamp the whole transaction with wrong.

We do not stop to inquire whether the course pursued by counsel was under the circumstances the best that could have been taken for the protection of the appellants' rights. They were entitled to notice of the pendency of the suit to select such counsel as they chose, and to be guided by his advice and judgment, even though that advice and judgment should prove to be erroneous.

We have refrained from spreading upon our records a detailed statement of the charges and countercharges made in the various motions and affidavits that have been filed, and have only referred to so much as seemed necessary for the *present disposition [168] of the case. But our reticence in this respect must not be taken as expressive of a purpose to ignore them. The charges are serious ones, affecting the integrity of counsel commended, by the fact of admission to the bar of the circuit court, to the confidence of the community. They involve the due administration of justice in that court, and cannot be passed without notice and action. It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach be kept clean. We refrain from extended comment because, as, heretofore stated, the testimony is mainly by *ex parte* affidavits, which are often, this case being no exception, quite unsatisfactory, and it is only through the sifting process of cross-examination that the real facts can be disclosed. When the truth is ascertained, if there be wrongs as charged, the language of judicial condemnation should be clear and emphatic, and a punishment inflicted such as the wrongs deserve; and if no wrong has been done the conduct of counsel will be cleared from suspicion. It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence.

The order therefore is that this case be remanded to the Circuit Court, with instructions to set aside the decree as well as the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the

various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require.

Mr. Justice **Harlan** was not present at the argument of this case, and took no part in its decision.

[169] *W. C. LYKINS and E. W. W. Lykins, *Plffs.*
in *Err.*,
v.

MRS. R. McGRATH.

(See S. C. Reporter's ed. 169-173.)

Public lands—restriction on alienation by Indian patentee—retroactive effect of consent by Secretary of Interior.

Consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibited alienation by him or his heirs without such consent may be given after the death of the Indian grantor, and when so given is retroactive in its effect, and relates back to the date of the conveyance, so as to cut off any claim of the heirs of such grantor to the land.

[No. 90.]

Argued and Submitted January 13, 1902.
Decided February 24, 1902.

IN ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment for defendant in an action of ejectment. *Affirmed.*

Statement by Mr. Justice **Brewer**:

Under and by virtue of the provisions of a treaty between the United States of America and the Kas-kas-kia, Peoria, and other confederated tribes of Indians, concluded on the 30th day of May, 1854, proclaimed August 10, 1854 (10 Stat. at L. 1083). and an act of Congress approved March 3, 1859 (11 Stat. at L. 431, chap. 82), the southeast quarter of section No. fifteen (15), in township No. seventeen (17), south of range No. twenty-three (23) east, in the territory, now state, of Kansas, and other lands, were on November 1, 1859, conveyed by the United States of America by letters patent to Ma-cha-co-meyah, or David Lykins, a member of the said Peoria tribe of Indians, being "Peoria Reserve No. 14." The patent contained the following provision: "That said tracts shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being." On June 3, 1864, the patentee, David Lykins, conveyed the land to one Baptiste Peoria, by deed of that date, which deed was on March 10, 1865, presented to the Secretary of the Interior, and by him approved. Intermediate the making of the deed and the approval of the Secretary of the Interior, to wit, on August 14, 1864, the patentee died, leaving the two plaintiffs in error (plaintiffs below) as his sole

heirs. *This action in ejectment was commenced by them on March 18, 1899, in the circuit court of the United States for the district of Kansas against the defendant, in possession and claiming title under the deed to Baptiste Peoria. A demurrer to an amended petition was sustained, and judgment entered in favor of the defendant, whereupon this writ of error was sued out.

Mr. **W. M. Springer** argued the cause, and, with *Messrs. Robinson, Bowling, & McCluer*, filed a brief for plaintiffs in error:

Making and sending a deed to the Secretary for his approval was not as strong as giving him a power of attorney to sell; and that would have been revoked by death.

Hunt v. Rousmanier, 8 Wheat. 175, 5 L. ed. 590.

A deed by an attorney in fact, executed before, but delivered after, the death of the principal, is inoperative.

Kent v. Cecil (Tex. Civ. App.) 25 S. W. 715.

This decision was rendered in a state where it is held that, if the attorney has power to convey, the conveyance is binding on the principal, and conveys his title, though made without reference to him.

Trinity County Lumber Co. v. Pinecard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015.

A conveyance in the name of a person who was dead at the time would be a manifest absurdity.

Hunt v. Rousmanier, 8 Wheat. 202, 5 L. ed. 596.

The decisions hold that the retroactive efficacy of the ratification is subject to the qualification that the intervening rights of third persons cannot be defeated by the ratification.

Pickering v. Lomax, 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860; *Murray v. Wooden*, 17 Wend. 531; *Clark v. Akers*, 16 Kan. 166. See also *McGannon v. Straightledge*, 37 Kan. 87, 14 Pac. 452; *Pennock v. Monroe*, 5 Kan. 578; *Miami County v. Wanzoppc-che*, 3 Kan. 364; *Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket v. Johnson*, 18 L. ed. 667; *Stevens v. Smith*, 2 Kan. 243, 10 Wall. 321, 19 L. ed. 933.

The doctrine of relation is a fiction of law, and cannot be operative upon a void agreement.

Doc ex dem. DePeyster v. Howland, 8 Cow. 277, 18 Am. Dec. 445; *Kansas City v. O'Connor*, 82 Mo. App. 655.

Messrs. W. C. Perry and Daniel B. Holmes submitted the cause for defendant in error. Mr. *Frank M. Sheridan* was with them on their brief:

The controversy does not involve a Federal question.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

The allottee, having sold and conveyed the

land, having performed every act in his power to divest the title, the consent of the Secretary could be given at any time, and, when given, it related back to the date of the deed.

Pickering v. Lomax, 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860; *Godfrey v. Beardsley*, 2 McLean, 412, Fed. Cas. No. 5,497; *Jackson ex dem. Gillet v. Hill*, 5 Wend. 532; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534.

[170] *Mr. Justice **Brewer** delivered the opinion of the court:

It is contended by the plaintiffs that the deed from David Lykins, not having been approved before his death, became thereby an absolute nullity; that title immediately vested in them, free from any claim of the grantee in the deed; that they never asked for the approval of the Secretary of the Interior; never consented that it should be given; never in any way ratified or assented to the deed of their ancestor, and that the Secretary was without any authority after the death of the patentee to approve the latter's deed.

The 11th section of the act of 1859, superseding in this respect the treaty of 1854, contained a general provision in reference to restricted patents to Indians in Kansas, that the Secretary of the Interior should cause them to be issued "upon such conditions and limitations, and under such guards or restrictions, as may be prescribed by said Secretary," and in pursuance of this section the restriction referred to was placed in this patent. That the consent of the Secretary was effective, though given after the execution of the deed, was determined in *Pickering v. Lomax*, 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860. In that case the patent to the Indian contained a stipulation, authorized by treaty, that the land should not be conveyed "to any person whatever, without the permission of the

[171] President of the United States." A *deed was made by the Indian holder of the title on August 3, 1858, which was approved by the President on January 21, 1871, nearly thirteen years thereafter, and it was held that the approval related back to the time of the execution of the deed, and made it valid as of that date. In other words, the antecedent approval of the President was not a condition of the validity of the deed. It was enough that he approved what had been done. It is true that it does not appear that the Indian grantor had died intermediate the making of the deed and the approval of the President (and in this respect that case differs from the present), but the grantee from the Indian had died during such interval, and only by way of relation could the action of the President be considered as making effective an otherwise void deed to a dead man. That case came before this court a second time (*Lomax v. Pickering*, 173 U. S. 26, 27, 43 L. ed. 601, 602, 19 Sup. Ct. Rep. 416, 417), and in the opinion then filed the scope of the prior decision was thus stated: "The case was re-

versed by this court upon the ground that the approval subsequently given by the President to the conveyance was retroactive, and was equivalent to permission before execution and delivery."

It must therefore be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance.

But the applicability of the doctrine of relation is denied on the ground that the interests of new parties, to wit, the plaintiffs, have sprung into being intermediate the execution of the conveyance and the approval of the Secretary. But one of the purposes of the doctrine of relation is to cut off such interests, and to prevent a just and equitable title from being interrupted by claims which have no foundation in equity. The doctrine of relation may be only a legal fiction, but it is resorted to with the view of accomplishing justice. What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same as any holder of a fee-simple title. The restriction was placed upon *his alienation in order [172] that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein. When the Secretary approved the conveyance it was a determination that the purposes for which the restriction was imposed had been fully satisfied: that the consideration was ample; that the Indian grantor had received it, and that there were no unreasonable stipulations attending the transaction. All this being accomplished, justice requires that the conveyance should be upheld, and to that end the doctrine of relation attaches the approval to the conveyance and makes it operative as of the date of the latter.

Counsel for plaintiffs in error would liken this deed to a power of attorney,—a mere authority to convey, which loses its vitality at the death of the grantor of the power. It seems to us more like a deed fully executed and placed in escrow, to be finally delivered on the performance of a condition. While ordinarily in case of an escrow title passes at the date of the second delivery, yet often, for the prevention of injustice, the deed will relate back to the first delivery so as to pass title at that time. "If the grantor being a *feme sole* should marry, or whether a *feme sole* or not should die or be attainted after the first and before the second delivery, and so become incapable of making a deed at the time of second delivery, the deed will be considered as taking effect from the first delivery, in order to

accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity." *Prutsmen v. Baker*, 30 Wis. 644, 649, 11 Am. Rep. 592, 596; *Vorheis v. Kitch*, 8 Phila. 554; *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369; *Black v. Hoyt*, 33 Ohio St. 203.

The plaintiffs have no equities superior to those of the purchaser. They are the heirs of the Indian grantor, and as such may rightfully claim to inherit and be secured in the possession of all that property to which he had at his death the full equitable title; but when, as is shown by the approval of the Secretary, he had received full payment of a stipulated price, and that [173] price *was ample, and he had been subjected to no imposition or wrong in making the conveyance, then their claims as heirs cannot be compared in equity with those of the one who had thus bought and paid full value. They certainly do not stand in the attitude of bona fide purchasers. "A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term bona fide purchaser. To enable the grantee to claim protection as a bona fide purchaser he must have parted with something possessing an actual value, capable of being estimated in money, or he must on the faith of the purchase have changed, to his detriment, some legal position that he before had occupied." *Devlin, Deeds*, § 813.

As, therefore, it has been settled by *Pickering v. Lomax*, 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860, that approval by the Secretary may be retroactive and take effect by way of relation as of the date of the deed, and as it appears from the fact of the approval by the Secretary that the Indian grantor received full payment for his land and was in no manner imposed upon in the conveyance, and as these plaintiffs have no equitable rights superior to those of the grantee in that deed, it follows that the title conveyed by it must be upheld. *The judgment of the Circuit Court is affirmed.*

LOUIS AUGUSTE MARANDE *et al.*, Plffs.
in Err.,
v.

TEXAS & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 173-198.)

*Trial—negligence—loss of cotton by fire—
inadequate watchmen and fire apparatus
—deviation of shipment to port for export.*

1. The question whether cotton was set on

NOTE.—On functions of court and jury in negligence cases—see notes to *Emry v. Raleigh & G. R. Co.* (N. C.) 15 L. R. A. 332, and *Roux v. Blodgett & D. Lumber Co.* (Mich.) 13 L. R. A. 728.

As to liability of railroad company for fires
184 U. S.

fire by sparks from a locomotive is for the jury, where the cotton was stored in and along the side of open sheds in close proximity to railroad tracks on each side, although the only locomotive near the cotton on the day that the fire was discovered did not go near the shed where the fire started, and is not shown to have been throwing out any sparks, while, if there had been any, the wind would have carried them in the opposite directions, since one possibility is that the fire was set by other locomotives on a preceding day, and smouldered until the day it was discovered.

2. Whether a lack of sufficient watchmen contributed to the loss of cotton by fire is a question for the jury, notwithstanding the contention that the watchmen actually present discovered the fire as soon as it started, where it is possible for the jury to infer that the fire might have been smouldering for a considerable period before its discovery, and a sufficient force of watchmen, if present, might have materially aided in extinguishing the fire.

3. Whether the negligence of a railroad company in failing to provide proper facilities for extinguishing fire in cotton sheds contributed to a loss of the cotton by fire is a question for the jury, where the cotton was piled up high around the platforms on which hose was kept, and when an attempt was made to use the hose the water would not come, either because the hose had become tangled, or otherwise, and the valve was found already open when one of the men tried to open it, although the railroad company contends, but without any positive proof of the fact, that one of the employees had opened the valve and tangled the hose after the alarm of fire,—especially when there had been no systematic inspection thereof, and no fire drill had, and no instructions given as to the use of the apparatus.

4. No deviation from the route of a shipment of cotton from Texas to the port of New Orleans for export is made by the carrier's delivery of the cotton at its terminal wharf at Westwego, a few miles above, and on the opposite side of the river from, New Orleans, but outside of the limits of the municipality or of the port, as defined by statute.

[No. 86.]

Argued January 8, 9, 1902. Decided February 24, 1902.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a decision affirming a judgment of the Circuit Court in favor of defendant in an action to recover for cotton destroyed by fire. *Reversed.*

See same case below, 42 C. C. A. 317, 102 Fed. 246.

Statement by Mr. Justice **White**:

*This action was commenced to recover [174] from the Texas & Pacific Railway Company the value of 65 bales of cotton destroyed by fire on the night of the 12th of November, 1894, whilst the cotton was in the cars of

set by it along its line—see note to *Grand Trunk R. Co. v. Richardson*, 23 L. ed. U. S. 357.

As to when a verdict may be directed by the court—see note to *Grand Chute v. Winegar*, 21 L. ed. U. S. 174.

the railway company standing on its tracks in the rear of or in close proximity to a terminal wharf of the corporation situated opposite the upper portion of the city of New Orleans, on the west bank of the Mississippi river, at a point called Westwego. The cotton formed part of 100 bales shipped from Greenville, Texas, on the 29th of October, 1894. An export bill of lading was given by the Sherman, Shreveport, & Southern Railway Company, that Company purporting to act, not only on its own, but also on behalf of the Texas & Pacific Railway, and of the Elder Dempster & Co. steamship lines. The bill of lading provided for the carriage of the cotton from the point of shipment "to the port of New Orleans," and thence by the steamship line to Havre, France, and contained numerous conditions and exceptions, one of which exempted the carrier from all loss occasioned by fire. Responsibility of the railway company for the value of the cotton destroyed by fire, although at the time of its destruction it was in the possession of the railway under the bill of lading, was based on the assumption, first, that the fire was due to the negligence of the corporation; and, second, that the carriage of the cotton to the terminal wharf at Westwego, for transshipment there to the steamship line, was a deviation, and hence the railway company was not entitled to avail itself of the exception against loss by fire.

[175] Upon issue joined, a trial was had in the circuit court. After the plaintiffs had introduced their testimony and rested their case, the defendant requested the court to take the case from the jury by giving a peremptory instruction in its favor. This was asked on the ground that there was no proof sufficient to go to the jury, either as to the alleged negligence, or the asserted deviation. The court granted the request, and exceptions were "duly saved by the plaintiffs. From the judgment entered on the verdict the plaintiffs prosecuted error to the circuit court of appeals for the second circuit, and in that court the judgment was affirmed.

The case being one depending not solely on diverse citizenship, the defendant corporation being chartered by an act of Congress, the plaintiffs prosecuted error to this court.

Mr. Treadwell Cleveland argued the cause, and, with Messrs. Frederick E. Mygatt and George Richards, filed a brief for plaintiffs in error:

It is not in every case where a verdict might be set aside that the court will direct a verdict.

McDonald v. Metropolitan Street R. Co. 167 N. Y. 66, 60 N. E. 282.

Defendant, by omitting to introduce evidence, and moving for the direction of a verdict in its favor, admits the truth of plaintiff's testimony, and also the conclusions of fact which the jury may fairly draw from the testimony.

Pleasants v. Fant, 22 Wall. 116, 22 L. ed. 780; *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601.

488

A cause should never be withdrawn from the jury unless the testimony be of such conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict in opposition thereto.

Phoenix Mut. L. Ins. Co. v. Doster, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18.

Or unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can properly be taken of the facts which the evidence tends to establish.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905.

Questions of negligence are peculiarly questions of fact for determination by a jury.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140.

The determination of a question of negligence is for the jury when a given state of facts is such that reasonable men may fairly differ upon the question.

Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105; *Warner v. Baltimore & O. R. Co.* 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

Where the premises are in the exclusive possession and control of the defendant, and the facts are peculiarly within its knowledge, very slight evidence of negligence is sufficient to make out a prima facie case.

J. Russell Mfg. Co. v. New Haven S. B. Co. 50 N. Y. 126.

Taking the cotton-laden cars to a dock already overcrowded with cotton and cars loaded with cotton was negligence.

Thomas v. Wabash, St. L. & P. R. Co. 4 Inters. Com. Rep. 802, 63 Fed. 203; *Thomas v. Lancaster Mills*, 19 C. C. A. 88, 34 U. S. App. 404, 71 Fed. 485.

In regard to fires set by locomotives a slight inference of negligence raised by the plaintiff's case is sufficient to throw the burden of disproving negligence on the defendant. There may be no direct proof of negligence, yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained; and when this is so the defendant must disprove negligence by showing that he exercised due care.

Wharton, Neg. § 871.

This rule is particularly clear where the defendant brings its locomotive into close proximity with inflammable material. Indeed, it is negligence to do so.

Hoffman v. King, 160 N. Y. 618, 46 L. R. A. 672, 55 N. E. 401. See also *Shearn. & Redf. Neg. § 678*; *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 807.

If a fact is to be inferred from the evidence, it must be drawn by a jury, and not by the court.

Belton v. Baxter, 58 N. Y. 411; *Justice v.*
184 U. S.

Lang, 52 N. Y. 323. See also *Hackford v. New York C. & H. R. R. Co.* 53 N. Y. 654; *Bernhard v. Rensselaer & S. R. Co.* 1 Abb. App. Dec. 131.

If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be likely to do under the circumstances proved, this, involving, as it generally must, more or less conjecture, can only be settled by a jury.

Bernhard v. Rensselaer & S. R. Co. 1 Abb. App. Dec. 131.

The court cannot properly instruct the jury as to what inference they may draw from the facts, and can only direct a verdict for the defendant when the evidence given at the trial, with all the inferences which the jury can justifiably draw therefrom, is insufficient to support a verdict for the plaintiffs.

Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125.

There is no rule applicable to the trial of issues of fact in civil actions, which requires a party upon whom the burden of proof rests to establish a case free from reasonable doubt.

Great Western R. Co. v. Braid, 1 Moore, P. C. C. N. S. 101; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622. See also *Quaife v. Chicago & N. W. R. Co.* 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. 658; *Whitney v. Clifford*, 57 Wis. 156, 14 N. W. 927; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75.

A presumption of negligence from the simple occurrence of an accident arises where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.

Scott v. London Dock Co. 3 Hurlst. & C. 596; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160. See also *Hicks v. New York, N. H. & H. R. Co.* 164 Mass. 424, 41 N. E. 721; *Kennedy v. McAllaster*, 31 App. Div. 453, 52 N. Y. Supp. 714; *Griffen v. Manice*, 166 N. Y. 188, 52 L. R. A. 922, 59 N. E. 925.

The taking of the cotton in suit to Westwego, and its detention at that point, for the purpose of these making delivery thereof to the steamship line, constituted a deviation from the regular and usual course of transportation.

Hostetter v. Park, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. Rep. 1; *Lawson, Carr. & Co.* § 139; *Hutchinson, Carr. & Co.* §§ 310 *et seq.*; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *United States Exp. Co. v. Kountze*, 8 Wall. 342, 19 L. ed. 457; *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 514, 6 Am. Rep. 124; *Constable v. National S. S. Co.* 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. Rep. 1062; *Devato v. 823 Barrels of Plumbago*, 20 Fed. 510; *Reiss v. Texas & P. R. Co.* 39 C. C. A. 149, 98 Fed. 533.

The deviation was material, for the cotton was destroyed at Westwego, and would
184 U. S.

not have been destroyed if it had been taken to New Orleans.

Vos v. Robinson, 9 Johns. 192; *Fernandez v. Great Western Ins. Co.* 48 N. Y. 571; *Burgess v. Equitable Marine Ins. Co.* 126 Mass. 70, 30 Am. Rep. 654.

The plaintiffs were at least entitled to go to the jury on the question whether such treatment of the cotton was so well known, through commercial custom of long standing, or so general or so universal, as to be fairly within the constructive knowledge of the shippers.

Devato v. 823 Barrels of Plumbago, 20 Fed. 510; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *The Sultan v. 3,000 Empty Oil Barrels*, 15 Fed. 618. See also 27 Am. & Eng. Enc. Law, pp. 710, 718, 721; *Graff v. Bloomer*, 9 Pa. 114; *Isakson v. Williams*, 26 Fed. 642; *The Innocenta*, 10 Ben. 410, Fed. Cas. No. 7,050; *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. Rep. 1; *Young v. 140,000 Hard Brick*, 78 Fed. 149.

Mr. Rush Taggart argued the cause, and, with *Mr. Arthur H. Masten*, filed a brief for defendant in error:

The words "port of New Orleans," as used in the bill of lading, have no narrow or restricted meaning, but simply describe in general terms the point of transshipment.

Harrower v. Hutchinson, 38 L. J. Q. B. N. S. 185. See also *Sailing-Ship Garston Co. v. Hickie*, L. R. 15 Q. B. Div. 580.

The fact that the general usage of the port may not have been known to the shipper does not affect the question of the defendant's right to make such a delivery.

Hostetter v. Park, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. Rep. 1.

In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Schuylkill & D. Improv. & R. Co. v. Munson, 14 Wall. 442, 20 L. ed. 867; *Laidlaw v. Sage*, 158 N. Y. 76, 44 L. R. A. 216, 52 N. E. 679.

The court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Anderson County v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433.

Railways are not liable for a mistaken exercise of judgment upon the part of their servants, or their failure to act with the utmost possible promptitude, when the circumstances are such as to afford no time for deliberation.

Lewis v. Long Island R. Co. 162 N. Y. 52, 56 N. E. 548; *Wynn v. Central Park, N. & E. R. Co.* 133 N. Y. 575, 30 N. E. 721; *Bitner v. Crosstown Street R. Co.* 153 N. Y. 76, 46 N. E. 1044; *Stabenau v. Atlantic Ave. R. Co.* 155 N. Y. 511, 50 N. E. 277; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619. See also *Banks v. Highland Street R. Co.* 136 Mass. 485; *Bell v. Hannibal & St. J. R. Co.* 72 Mo. 50.

It is not permissible to send a case to the jury to guess out the result.

Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Laidlaw v. Sage*, 158 N. Y. 76, 44 L. R. A. 216, 52 N. E. 679; *Baulee v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325; *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194, 29 N. E. 999; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48, 33 N. E. 472.

Where the facts are as consistent with care and diligence on the part of the defendant and its servants as they are with the negligence and inattention of the defendant, the case must not be submitted to the jury, because it would be a mere conjecture for the jury whether the loss was the result of negligence, or was the result of accident.

Western Transp. Co. v. Downer, 11 Wall. 129, 20 L. ed. 160; *Baulee v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325; *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 94, 47 N. E. 971; *People v. Harris*, 136 N. Y. 429, 33 N. E. 65; *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310; *Laidlaw v. Sage*, 158 N. Y. 76, 44 L. R. A. 216, 52 N. E. 679.

The word "port," as used in bills of lading, must be understood in its commercial sense, and as such it was used in this bill of lading with reference to the universal usage and custom of the railway companies to deliver all export cotton to the steamship lines at New Orleans, at their terminals.

Devato v. 823 Barrels of Plumbago, 20 Fed. 510; *Sailing-Ship Garston Co. v. Hickie*, L. R. 15 Q. B. Div. 580; *Price v. Livingstone*, L. R. 9 Q. B. Div. 679; *Loomis v. Wabash, St. L. & P. R. Co.* 17 Mo. App. 340; *Harrower v. Hutcheson*, 38 L. J. Q. B. N. S. 185; *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. Rep. 1.

[175] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

Questions involving the liability of the defendant for damage occasioned by the loss of other cotton by the fire which destroyed the cotton, the value of which is now sought to be recovered, have been previously decided by this court. *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. ed. 725, 19 Sup. Ct. Rep. 421; *Texas & P. R. Co. v. Reiss*, 183 U. S. 621, ante, 358, 22 Sup. Ct. Rep. 253; and *Texas & P. R. Co. v. Callender*, 183 U. S. 632, ante, 362, 22 Sup. Ct. Rep. 257. Whilst in deciding these cases it was essential to refer to, and in some respects consider, the course of business at the terminal wharf at

Westwego, the controversy which here arises for decision involves different considerations, and causes it to be necessary to more fully refer to the establishment of the wharf at Westwego and the course of business at that place prior to and at the time the fire occurred.

In the circuit court of appeals there were a number of assignments of error; now, however, only four of such assignments are pressed,—the 1st, the 12th, the 13th and the 14th. As the 1st of these only complains generally that the circuit court of appeals erred in affirming the judgment, and the 14th is a mere reiteration of the 1st, the only assignments which we are called upon to consider are the 12th and the 13th. The one asserts that the case should have been allowed to go to the jury on the issue of deviation, *the other that error was moreover [176] committed in not permitting the plaintiff to go to the jury on the general question of the loss of the cotton by the negligence of the defendant railway.

In order to pass upon the issues arising on these assignments, the evidence must be considered. In taking it into view, however, we shall do so only to the extent necessary to enable us to decide the question of law which arises, that is, Was the evidence sufficient on the subject of negligence and deviation to go to the jury?

Approaching the city of New Orleans, on the opposite or right descending bank of the Mississippi river, the track of the Texas & Pacific Railroad terminated prior to 1873 at a point called Gouldsboro. There the company had a railway yard, roundhouse, and other structures. It there also had a terminal wharf with an incline, by means of which its cars could be transferred directly across the river by boat to a depot and yard belonging to the company situated at the foot of Thalia street, at about the center of the river front of the city of New Orleans. At the Thalia street depot freight for New Orleans was delivered, and that intended for further transit by way of export or otherwise was also delivered in carload lots over connecting tracks, or, where this could not be done, was hauled and delivered at the expense of the railway to the steamship or other carrier. Prior to 1873 the proof tended to show, at a point some 6 or 8 miles above Gouldsboro, a spur track left the main track of the Texas & Pacific road, and extended for about $\frac{1}{2}$ mile in length to Westwego, on the bank of the river. Before 1873, however, the proof showed that none of the inbound traffic was carried on at Westwego, though at that point probably some outbound freight, intended for the purposes of the railroad, may have been received at Westwego. Some time in 1873 the company constructed a grain elevator at Westwego, and built a terminal wharf at the same point. The proof gives no description of the elevator wharf, except that it was below the freight wharf and connected with it, but the freight wharf is fully described, there being no material variation in the testimony on the subject.

[177] *The wharf was built on the bank of the river. It was constructed on piles and stood above the water, the piling having placed on it beams and joists upon which planks were nailed, constituting a flooring which had very narrow spaces between the planks, as they were not tongued and grooved. The wharf was about 800 feet, stretching up and down the river front, and was somewhere between 350 to 400 feet in depth, that is, running back from the river front to where it rested against the bank. On this wharf were constructed two freight sheds, the one designated as No. 1 began some short distance above the lower end of the wharf, and extended up for a length of between 250 to 300 feet. At a short distance, above the upper end of this shed, the flooring on the wharf ceased, and there was an open space about 50 feet, extending up the wharf, and which was near about the width of the shed; in this place the piling had been driven and the joists and beams placed, but no flooring was laid. Beyond this open space there was built shed known as No. 2, of the same dimensions as the lower one. Both of these sheds were wooden structures raised on posts placed in the wharf, entirely open at each end and at each side. The roof commenced at about 20 feet above the flooring of the wharf, and was surmounted by a cupola running the entire length of each shed, which was covered with a lattice or wooden work like a wooden shutter. The number of the rows of posts in each shed is not made clear in the proof, but it tended to show that the posts were somewhere between 20 and 30 feet apart. About 8 to 10 feet in front of both of these sheds along the wharf was a railroad track, which entered the wharf from the lower end, and extended to and beyond the extreme upper end of shed No. 2. Between the outer rail of this track and the river front there was a space on the wharf of about 30 feet. Behind the sheds were two railroad tracks running the entire length, and extending above the upper end of No. 2 shed, somewhere between 50 and 100 feet.

Westwego was not within either the municipal limits of the city of New Orleans, or the limits of the port of New Orleans, as defined by statute. It was shown that the season of active cotton receipts in the city [178] of New Orleans commences about *the 1st of September and ends about May of each year, and that the Westwego wharf was completed in time to enable the railway company to avail of its facilities for, if not the whole, at least a portion, of the business of the cotton season of 1893 and 1894. After the construction of the wharf in the season in question the great bulk of cotton handled by the Texas & Pacific Railroad under export bills of lading was deflected from its main track at the Westwego spur track, carried to the terminal wharf, and there unloaded and transhipped. This the proof showed was the course of business also as to all export cotton in the following season of 1894 and 1895, up to the time of the fire, except, perhaps, as to small lots of cotton intended

for export, where the number of bales would not justify the coming of a steamer to the wharf at Westwego, in which case the cotton was carried to Gouldsboro, transferred, and delivered. In arranging to carry export cotton the course of business was this: The Texas Pacific Railway would contract with steamship lines for the carrying of a given quantity of cotton at a stated price, and under these contracts would then, through either itself or through other carriers at various points of original shipment, issue through bills of lading, embracing both railroad and water carriage. The method pursued by the railway to bring about the formal delivery to the steamship lines of the export cotton at the Westwego wharf after its arrival is fully stated in the case of *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. ed. 725, 19 Sup. Ct. Rep. 421. It was shown that under the contracts made by the railway with the steamship companies there was always an understanding that the ships would not be obliged to suffer the expense of moving from their own docks, usually in the city of New Orleans, to the Westwego wharf, for the purpose of loading cotton, unless a sufficient amount, variously stated at from 1,000 to 2,500 bales, was on hand for delivery.

It appears that other railroads possessed terminal wharfs on the river, some of them being outside of the municipal and port limits, and that they were used as a depot for the shipment of through billed export cotton, under methods of business substantially similar to those at Westwego. The export cotton intended for transshipment at the Westwego wharf was *thus handled: On ar-[179] riving in the vicinity, the cars were usually, in the night-time, switched to the tracks running in the rear of the wharf beside the open sheds, and the cotton would then be unloaded and stored in the sheds, whence, when called for, it was delivered to the steamships. The track running the length of the wharf in front of the sheds was principally used for the bringing in of freight intended for shipment by water other than cotton. The cars containing it would be drawn or pushed by a locomotive along the track, and the freight would then be moved from the cars to the vessels.

During the cotton season of 1894 and 1895 (prior to November the 12th, 1894) labor troubles of a serious character occurred at the docks in the city of New Orleans. The disturbances, the proof tends to show, caused delay in the movement from the port of New Orleans of export cotton. Either because of this fact or because of an unusually large cotton crop, or an unexpectedly rapid movement of cotton to the seaboard by the Texas & Pacific lines, large quantities of export cotton accumulated in the sheds on the wharf at Westwego. The cotton, which was all compressed, was stored in the following manner: The bales were piled between 15 and 20 feet high throughout the whole space of the shed, but probably three, and certainly not more than four, narrow gangways being left in each shed, running from front to

rear. There was no possible doubt from the evidence that no gangways were left running lengthwise of the sheds. There was also proof tending to show that these narrow gangways, as the cotton accumulated, were obstructed by bales of cotton standing endwise. The proof also tended to show that the accumulation of cotton became so great that on the river front of the sheds, in the open space towards the railroad track, cotton was also placed, approaching so close to the railroad track, that as an engine moved along carrying or pushing cars containing freight intended for shipment there was not sufficient space between the cotton and the track to enable a person to stand with perfect safety. It appeared that around the open space between the upper end of the No. 1 and the lower end of the No. 2 shed cotton had also been piled. It was shown that most, if not all, of the cotton exposed as [180] stated was *not covered with tarpaulins, and no other means were resorted to to protect it from the danger of fire arising from the operation of the locomotives in the rear and front of the sheds and among the cotton on the wharf.

Westwego was remote from any town or village having a police force or a fire department. The wharf exclusively belonged to the railway company, and was under its control; property on it, therefore, had the benefit of no police protection except that afforded by the company, and in case of fire had nothing to rely upon except the men and appliances which the company furnished. The fire appliances were as follows: There was a tank near the grain elevator standing at such a height as to afford adequate pressure. This tank was supplied by a pump drawing its water from the river. From the tank a pipe ran to the wharf and passed under the floor of each of the sheds. In each shed there were three hydrants or water pipes, in the middle of the shed—about equidistant; they were by the side of the posts, and stood 6 feet above the floor. On each of the six posts by which the hydrants stood and connected to them there was a platform 6 or more feet above the floor, on which was placed 100 feet of coiled hose. A witness testified that some months or more before the fire he had seen hose stretched along the front posts of the shed resting on pieces nailed to such posts, but there was other testimony tending to give rise to the reasonable inference that no such hose was there at the time of the fire. The testimony on this subject, however, had no relation to the hose coiled on the platforms on or around the posts where the hydrants were situated. This is conclusively the case, since the witness who testified as to hose being stretched as above stated spoke only of the front, and said he had not observed the hydrants and their condition, and knew nothing of them. We say this in passing, because in the argument for the defendant in error it is suggested that the testimony of the witness in question related to the hose at the hydrants, and was all the testimony on the subject in the record, over-

looking the clear and cumulative testimony that the hose, at the hydrants, was connected with them and coiled on a platform on or around the posts about 6 feet above the floor. The evidence left it *uncertain exactly [181] where the valve was placed which opened the connection with the water. The proof tended to show that the valve was either under the floor with an opening to reach it, or just above it, at the base of the hydrant pipe. As the three hydrant pipes in each shed stood beside the posts, and the gangways running from front to rear, although very narrow, were shown not to be obstructed by the posts, it was therefore inferable from the proof that the posts where the hydrant pipes stood had cotton piled around them. Indeed, this inference was sustained by direct evidence tending to show that the posts near which the hydrants stood had cotton piled around them from 12 to 15 feet high, and there was also proof tending to show that in some instances the cotton so piled had fallen over on the hose on the platform, and the bale which did so had to be removed.

There was testimony tending to show that along the front and rear of the sheds there were barrels containing water with buckets hanging near. It was shown without contradiction that there were no chemical fire engines, although there was testimony tending to show that what were designated as chemical fire buckets had been bought at about the time the wharf was built, and there was conflict in the testimony as to whether these buckets were on hand for use at the time of the fire. The evidence tended to show that no general directions as to handling or the use of the hose in case of fire had been given, that no fire drill had ever taken place, nor had the men in charge of the wharf been ever instructed in any way as to the use of the apparatus which has just been described.

The wharf in the day time was under the direct authority of an employee designated as chief clerk; in the night-time it was in the charge of one regular employee of the company and three watchmen, who were the members of a special private police force in the city of New Orleans, the railway company contracting with the head of the special police organization for the services of the three men at the wharf, and a like number of men were on watch during the day time. In other words, in the night-time the wharf was in charge of but four men, one a regular employee of the company, and three special policemen *employed as just stated, [182] and their duty extended over the whole surface of the wharf and sheds, as well as under the wharf.

A short while prior to November 12, growing out of supposed danger resulting from fear of election disturbances, the force at the wharf was increased by a few men, whose duty it was to patrol the space under the wharf and prevent persons from entering by boats or otherwise. This force, prior to the fire, had been reduced to the number previously stated.

It was shown that at a wharf in the city of New Orleans belonging to a steamship company where cotton had accumulated, the force of watchmen employed was largely in excess of the number at Westwego, and that at a terminal wharf of another railroad, where there was about half the quantity of cotton which was on the wharf at Westwego at the time of the fire, there were twenty-five watchmen employed instead of four, the number at Westwego; that there were Babcock fire extinguishers, hose placed on reels ready for use, and that this hose was used almost daily for the purpose of washing down the wharves, and to enable the men in control to be familiar with its use in case of emergency.

By about the middle of October, 1894, the accumulation of cotton at the wharf of Westwego had been so great that the proof showed that the railroad officials had become solicitous on the subject, and deemed that they were in great risk of fire. It was also shown that about that date a destructive fire had occurred in a wharf where cotton was stored in the city of New Orleans, presumed to be the result of the labor disturbances, and that at Westwego, during the daytime, within a period not remote from the general conflagration which ensued, subsequently, the longshoremen working there had discovered a fire smouldering in a bale of compressed cotton which was in the tiers, and that it had been extinguished by throwing down the cotton and removing the bale; and that this fact had been reported to the officers of the company. Prior to Monday, the 12th of November, 1894, cars loaded with cotton were being brought in in the night-time in the rear of the sheds, and for days prior to that date vessels had been [183] loading in front of *both of the sheds, some with cotton and some with other products. On the 12th of November two steamers were at the wharf; one about abreast of the lower end of No. 1 shed, and the other opposite the upper or No. 2 shed; that for the purpose of bringing in the cargo taken by these ships, a locomotive was operating among the cotton on the wharf in front of the shed, and was passing back and forth on the track, pushing cars containing the freight to be loaded. Although there was some proof indicating that on that particular day the locomotive which entered from the lower end of the wharf proceeded up the track abreast of No. 2 shed, we assume, for the purposes of this opinion only, that it was shown that the locomotive was pushing so many cars ahead of her that she did not get abreast of the No. 2 shed. There was no proof that the locomotive, in operating along the front of the wharf, was emitting sparks from her smokestack or dropping cinders from her fire-box.

There was evidence as to the direction of the wind on the 12th of November. The parties asserting that opposing inferences were to be deduced therefrom, but, without undertaking to consider this controversy, we assume, only for the purpose of this opinion, that the result of this proof as to the
184 U. S.

direction of the wind tended alone to show that if a spark had been emitted from the locomotive operating on the front of the wharf, as above stated, the wind would have carried it away from the No. 2 shed, where the fire subsequently broke out, as we shall hereafter state.

On Monday, the 12th of November, 1894, the accumulation of cotton was so great that there were stored in the sheds and on the wharf in the manner which we have indicated, about 20,000 bales of compressed cotton, and there were in cars, standing on tracks in the vicinity of the wharf and sheds, about 8,000 bales more, awaiting storage room. The cotton sued for was among the latter. On the evening of the date above mentioned, shortly after the day force had ceased work and the four night watchmen had come on duty, the cotton was discovered to be on fire. The flames spread rapidly, and a disastrous conflagration followed, with the result that most of the *cotton in [184] the sheds and the sheds themselves, as well as cotton in the cars in the vicinity, among which was that sued for, was destroyed. What took place at the time of the discovery of the fire was testified to by only one witness, one of the night watchmen, Robeau, who was one of the three special officers of the private police agency. His statement of what occurred may be thus summarized: His place of duty was at the upper or No. 2 shed, and his business was to pass around and through the shed, and at designated intervals register his presence upon a watchman's clock. After sending a telephone message to indicate his presence at his post, and whilst he was on the river side of shed No. 2, at the lower end, he heard a cry of fire. Running immediately to a gangway, he crossed to the rear or wood side of the shed. Not seeing the fire, he ran up the rear side and across by a gangway to the river front, thence running along the river front of the shed he turned into another gangway and hastened towards the rear of the shed. In going through there he discovered Valle (the one of the four watchmen who was the regular employee of the railroad company) standing on top of the piled cotton, about 15 feet from the floor. Robeau joined Valle, who had the nozzle of a hose in his hand, from which no water was being thrown. From the place where the two stood on the piled cotton they saw a fire burning near the floor in the direction of the upper end of the shed. As they stood upon the pile of cotton they were above the hydrant pipe running up by the post, and about 6 feet above the platform around or upon the post, upon which was coiled the 100 feet of hose connected with the hydrant. From where they stood both the hydrant pipe and the platform with the coiled hose on it were hidden from their view by the piled cotton. Valle, holding the nozzle of the hose in his hand, from which no water was flowing, called upon Robeau to get down between the piles of cotton and open the water valve. Robeau squeezed himself through the space between the cotton piled around

the post to the floor, felt about for the valve, perceived water on the floor, declared the valve to be open, and rejoined Valle. They both dragged at the hose, but no water flowed. The burning cotton flamed up, [185] Valle called upon Robeau *to get down on the platform around the post and uncoil or untangle the hose. He refused on account of the intensity of the fire, and both became alarmed and ran away. The destruction of the property ensued.

As the only witness who testified concerning the outbreak of the fire, the alarm, and the efforts to extinguish it, was Robeau, and as therefore his testimony is of the utmost importance in determining whether the case should have been allowed to go to the jury, we excerpt in the margin† the portions of his testimony which are material.

[186] *Such being the proof, was it sufficient to go to the jury? is the question then for de-

†Q. Now go on and state what occurred. A. After we had done telephoning, and saw everything was all right, we came to the office—I mean to the office of the shed No. 1—to take my lamp, and I went to my beat, and I met the one that was there, and I said “How is it?” He told me “All right.” I took off my coat and put my lamp away. Then I came to make my rounds as usual, to see if everything was right, where my key was. About five or six minutes I was standing there, or seven minutes; I can’t tell exactly. I saw the private watchman pass. In about a minute or two I heard “Fire! Fire!”

By the Court:

Q. You heard the cry of fire? A. The crying of “Fire! Fire!” I run to the woods side to see if I could see anybody, but I could not see anybody, and then I run to the river side, and then I run to the fire and I passed through the shed to go to the woods side and I saw Valle with hose in his hand, and he says, “Go down and open the valve.”

Q. What did you do? A. I went to open the valve. I could only go sideways. I couldn’t hardly stand; and I found the valve wide open. Then I came back and tried to help Mr. Valle with the hose in his hand. Everything was in flames. I couldn’t do anything. I tried all my might to have the water, but we could not have any water. The hose was too heavy; we couldn’t do anything at all; and he says to me, “Robeau, go down and untangle the hose.” I says, “I won’t go down where the flame is.” I kept up; that is the only thing I could do. I went to the other end of my beat, and took my coat and ran away.

Q. Where did you first see the light of the flame that night? A. I was about 70 feet from the light.

Q. When you saw Valle did you first see the light of the flame? A. I saw Valle first.

Q. And when you first saw Valle, where was he? A. On top of the cotton.

Q. Whereabouts? About 12 or 15 feet high on top of the cotton.

By the Court:

Q. Whereabouts on the wharf? A. At the woods side.

By Mr. Cleveland:

Q. You were on the woods side? A. Yes, sir.

Q. Where was Valle? A. He was on the cotton.

Q. Whereabouts, with relation to the center of the shed? A. The fire?

Q. No; where was Valle? A. He was about

cision. In answering this question, as we have said at the outset, we shall be called to pass upon, not *the preponderance of the [187] evidence, but whether it was adequate to go to the jury; and this involves, not a decision as to the facts, but the determination of a proposition of law.

*In *Washington Gaslight Co. v. Lansden*, [188] 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296, the question of the liability of the gas company for certain acts of its general manager, in respect to procuring the publication *of a libel, was presented for deter- [189] mination. In the course of the opinion, after observing that in the case no specific authority was pretended to have been given to the general manager on the subject, the court said, p. 545, L. ed. p. 548, Sup. Ct. Rep. p. 300:

“We are then limited to an inquiry wheth- [190] er the evidence is sufficient upon which a

the center of the shed, but the upper end: because the fire was about 70 or 75 feet below the upper end.

Q. When you first saw Valle what was he doing? A. He had the hose in his hand.

Q. What was he doing with it? A. He couldn’t do nothing. When I went down there he told me to go down and open the valve; and so I went, and it was wide open.

Q. When you were down there trying this faucet, and found that it was wide open, did you see any water coming out? A. No, not a drop. We couldn’t have any water.

Q. You did not see any water when you were opening the valve? A. Yes; saw the pouring.

Q. Leaking, you mean? A. Yes.

Q. When you clambered up with Valle, and he had the hose in his hand, what part of the hose did he have in his hand? A. The pipe.

Q. Was there any water coming out? A. No, sir.

Q. What was he doing when you got up on that pile of cotton? A. Tried to have water, but he could not have none.

Q. Was Valle on the hose? A. Yes, and I was too; but everything was in flames, we couldn’t do nothing at all.

Q. You say he said to you, “Go down and untangle that hose?” A. Yes, sir.

Q. How do you mean go down? Where was the hose? A. The hose was pretty near where the fire was, against the post.

Q. Against the post? A. Yes, sir.

Q. Was it on the platform? A. On the floor.

Q. On the floor of the platform? A. Yes.

Q. On the posts? How high up from the floor of the dock? A. The hose?

Q. Yes. A. The hose was about 6 feet high.

Q. What did you do when you got up with Valle? A. Tried to pull out the hose to have the water to extinguish the fire, but we could not. Everything was in flames.

Q. When did you first see the flames that night? Before you got up to Valle? A. When I got on top I saw the flames.

Q. How many bales of cotton were on fire then, as you recollect it? A. About 3 or 4 bales.

Q. No water came out of the hose? A. No, sir.

Q. How long were you there pulling that hose, trying to untangle it? A. Maybe two or three seconds, because we tried the best we could.

Q. Describe to the jury this fire. Where was it? Was it on the top of the cotton or at

jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide."

The court then reviewed the evidence on this branch of the case, and concluded as follows, p. 548, L. ed. 549, Sup. Ct. Rep. p. 301:

[191] "We are of opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corpo-

ration on the ground that there was an entire lack of evidence upon which to base a verdict against it."

In *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, the following facts appeared: The action was brought by Patton to recover damages for injuries sustained while in the employ of the railway company as a fireman. On a second trial a verdict was directed for the defendant, upon which judgment was rendered, and the court of appeals affirmed such judgment.

Answering the contention of the plaintiff in error that the trial court erred in directing a verdict and in failing to leave the question of negligence to the jury, the court said, p. 659, L. ed. p. 363, Sup. Ct. Rep. p. 276:

"That there are times when it is proper

the bottom? A. At the bottom of the floor.

Q. How near did you come to the flames that night, when you were nearest to them? A. About 15 paces.

Q. In your judgment, if you had had a sufficient stream of water— A. We could easy put it out.

Q. Wait. In your judgment, if the water had come out of the hose that night—a full stream of water—such as the hose was able to carry, could you have extinguished the flames? A. Yes, sir; myself alone.

Cross-examination by Mr. Taggart:

Q. Where were you on the wharf when you first heard this cry of fire? A. I was about 30 feet under the shed, at the lower end.

Q. Towards No. 1 shed? A. Yes.

Q. On the river side? A. On the river side.

Q. That is, out near the tug that was there? A. About 30 or 40 feet. I can't say exactly.

Q. Were you under the shed? A. Under the shed.

Q. Which way did you go when you heard the cry of fire? A. My idea first was to go to the woods side to see if I could see anybody.

Q. Were you at a gangway? A. Yes, sir.

Q. You went through that gangway then to the woods side? A. Yes, sir.

Q. And you saw nothing? A. I saw nothing. Then I run to the river side.

Q. Did you come back through the same gangway? A. No, sir.

Q. You went up along the woods then? A. I went to the upper end of my beat after I heard the noise "Fire! Fire!"

Q. Did you go clear up to the upper end? A. Yes, sir.

Q. And you did not see any fire up there? A. No.

Q. Then where did you go? A. I went to the woods again. I went through the gangway, and I saw Valle.

Q. This hose he had in his hand, you say, did you? A. He had what?

Q. He had the hose pipe in his hand, did he? A. Yes, he had the pipe in his hand.

Q. How far was the hydrant from where he was? A. About 10 feet; but where he was he could not see the hydrant.

Q. He could not see the hydrant? A. He was on top of the cotton. He could not see me when I went down neither.

Q. What did you do when you went there? A. I went there and I saw the valve was wide open.

Q. The what? A. The valve of the pipe.

184 U. S.

Q. And was there water in the hose? A. Kind of water; yes, in the hose.

Q. It had pushed out in the hose, had it? A. Yes, swelled up.

Q. How far had it pushed out and swelled up in the hose? A. I didn't look. As soon as I saw it open I went to Valle to help him.

Q. What did you do to help him? A. We tried to pull the hose free, and we couldn't do anything.

Q. The pressure of water had kinked the hose? A. Yes, the hose was so tangled that we couldn't do anything. At the same time the blaze was going; and Valle says to me, "Go down and have it untaugled." And I said, "No, I won't go, go yourself if you want to."

Q. And you run away then, did you? A. Yes, I did. I tried to save my skin.

Q. This cotton was blazing? A. Yes, very high.

Q. Blazing right up? A. Yes.

Q. Blazing way up? A. Yes.

Q. How high was it blazing when you got there? A. About 6 feet from the floor—about.

Q. How high was the pile of cotton? A. The cotton was piled about 15 feet high.

Q. Was it blazing along the side of that pile of cotton? A. Yes, spread out.

Q. Spread out along the ends of the bales, was it? A. Yes.

Q. Where was this kink in the hose—down below Valle? A. Where the platform was?

Q. Yes. A. About 6 feet under.

Q. You say the valve, when you tried it, was wide open? A. Yes, sir.

Q. How far out in this hose had the water pushed out from the pipe? A. I don't know that.

Q. Did you take hold of the hose to see? A. With all my might, all the strength I had.

Q. And the pressure of water was so heavy that you could not straighten it out? A. We couldn't budge it.

Q. Do you know who opened that valve? A. I don't know.

Q. Do you know how high the fire was when that valve was opened? A. Yes.

Q. How high was it when the valve was opened—when it was first opened?

The Court: He found it open.

The Witness: I found it open when I got there.

Q. You don't know who opened it? A. No, I don't know who opened it.

Q. How long were you there with Valle when you discovered this fire? A. I never took my watch for that. I did the best I could.

Q. About how long were you there? A. Maybe two or three seconds; I don't know.

for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 32, 27 L. ed. 65, 66, 1 Sup. Ct. Rep. 18; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 482, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Anderson County v. Beal*. 113 U. S. 227, 241, 28 L. ed. 966, 971, 5 Sup. Ct. Rep. 433; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 618, 29 L. ed. 224, 225, 5 Sup. Ct. Rep. 1125; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472, 35 L. ed. 213, 214, 11 Sup. Ct. Rep. 569. See also *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85.'

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions

of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748."

We come, then, to an analysis of the evidence for the purpose of ascertaining whether it was correctly decided that it afforded no reasonable ground upon which a jury, in the exercise of its *functions, could have in-[192]ferred that the destruction of the cotton by fire was occasioned by the negligence of the defendant. In doing so we shall, of course, be mindful, as was said in *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, that as both courts below have held that the evidence had not the tendency stated, their decision is entitled to great respect—a respect, however, which cannot relieve us from the duty of securing the plaintiffs in the enjoyment of their constitutional right to trial by jury if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as a matter of law by the court.

All the reasonable tendencies of the proof, if any, to show negligence, must arise from

Q. And then where did you go? A. I went up stairs to help him.

Q. You went up on the cotton? A. On the cotton.

Q. How long were you there with him? A. Maybe one or two seconds.

Q. Then where did you go? A. I said I tried to save myself.

Q. In saving yourself, where did you go? A. I went to the lower end of my beat and took my overcoat and ran away. I didn't stay any more.

Q. No, how long was it before the fire was spread all over the No. 2 shed? A. About ten minutes.

Q. And about two seconds after you got there you had to run away on account of the fire, didn't you? A. Yes.

Q. Do you know where the fire started? A. Right in the center of the shed; I mean up the shed, about 40 or 50 feet this side.

Q. About 40 or 50 feet south of the upper end of No. 2 shed? A. I can't say exactly. About 70 feet, maybe. I don't know.

Q. About that far from the upper end of No. 2 shed? A. Yes, sir.

Q. And in the center of the shed, wasn't it? A. Yes, sir.

Q. And near the bottom of a pile of cotton, wasn't it? A. What?

Q. Was it near the bottom of the pile that it was burning? A. At the floor, I told you where it started.

Q. Was there a whole pile of cotton on fire? A. When I got there I saw the light of the fire.

Q. Where did you see the light from? Where were you when you saw the light of the fire? A. Didn't I tell you that?

Q. No, you have not. A. Didn't I tell you I was about 70 feet from the light of the fire?

Q. Was it in a gangway that the fire was? A. Yes, sir.

Q. Were you at the end of the gangway when you saw the light? A. I was on the platform outside.

Q. And did you see the light down the gangway? A. Yes, sir.

Q. How much of a fire was there then, when you saw that? A. I couldn't tell you.

Q. You did not see the fire? A. Yes; when I came to climb up on the cotton, Vaile says to me: "Go down and open the valve."

Q. I didn't ask that. I asked how much of a fire there was? A. I don't know.

Q. You did not see the fire? A. I saw the light of the fire.

Q. How much light was there: was it a big light? A. How much light was there?

Q. Yes; how much light did you see? A. I can't say exactly how much light I saw.

Q. Did you see it over the piles of cotton? A. No, sir; we couldn't see it.

Q. You could not see it over the piles of cotton? A. Because I passed there, about 15 paces from the places in the gangway.

Q. When? A. To come to Vaile.

Q. And you did not see it in the other gangway, then, did you? A. No, of course not.

Q. You say this blaze was about 6 feet high when you got there? A. 6 or 7 feet high, yes.

Q. And how many bales of cotton was it covering? A. I don't know. I saw the light of the fire.

Q. I know, but when you got there?

The Court: When you got there to Vaile?

A. Three or four bales.

Q. Had it burned the covering off the bales? A. They were spread out.

Q. How wide was the fire; how wide was the blaze? A. About 15 or 20 feet I should say.

Q. Was it on the end of a solid bale of cotton? Was the pile of cotton solid there that it was burning against? Do you understand that? A. What do you mean?

Q. Was this cotton piled? A. Yes, like that.

Q. And was it burning 15 feet high? A. Yes, spreading.

Q. Spreading rapidly? A. Yes.

Q. How long was it from the time you heard Vaile cry "fire" until you got to Vaile? A. Maybe half a minute. I don't believe it was.

three propositions, which we shall proceed to consider in their order.

First. The manner in which the cotton was stored and the operation of the locomotives in and about the same so as to subject the cotton to danger of fire and to cause the prompt detection of a fire to be so difficult as to render it practically impossible in time to prevent a conflagration.

That the storage of such a great mass of cotton in the open sheds and on the wharf, with only a few narrow gangways from front to rear, with no passageways between the tiers running lengthwise of the sheds, so as to enable the cotton to be inspected and to be accessible upon an alarm of fire, with substantially no tarpaulins or other covering, and the operation of the locomotives in and around the open sheds and in front of the wharf among the cotton so situated, at least afforded sufficient proof to go to the jury, we think is too clear for discussion. This was not controverted by either the trial court or the circuit court of appeals, but the proposition which those courts felt constrained to uphold was that, as the proof did not in their opinion furnish any reasonable ground from which it could be inferred that the acts above enumerated had actually tended to produce the fire, therefore, even although there was negligence in the matters suggested, they furnished no reasonable ground upon which the jury could have given a verdict for the plaintiffs. This reasoning proceeded upon three assumptions, (a) because the proof did not

[193] show that the locomotive *operating along the front of the wharf, on the morning of the 12th of November, had traversed the track opposite to or in the immediate vicinity of the place in No. 2 shed where the fire occurred; (b) because there was no proof that the locomotive was emitting sparks or dropping fire from its firebox, and if there had been, because the proof as to the direction of the wind showed that such sparks, if emitted, would have been blown away from the direction of the upper part of No. 2 shed where the fire broke out; and (c) because the fire was immediately discovered on its outbreak.

But each of these propositions either rested on premises of fact where no proof whatever existed, or disregarded what the jury would have had the right to conclude was the reasonable tendency of the proof as made. There was no question that the proof showed, leaving aside the movement of the engine on the wharf on the morning of the 12th of November, that other locomotives had been moving in the rear of the wharf and in its vicinity probably on the night of the 11th, and certainly on the 10th, and previously; and the proof also unquestionably showed that for days prior to the breaking out of the fire, except it may be Sunday, vessels had been loading at the wharf in front of the No. 2 shed, and the tendency of the proof was to show that the cargo which they took was carried on the wharf in front of the shed by locomotives. To hold, then, that there was no proof tending to show

that the conflagration was the result of the movement of locomotives about and among the piles of exposed cotton, was simply to say such must have been the case because the proof did not tend to show that the fire could have been caused by the locomotive which was on the wharf on the morning of the 12th. This, however, was only to find, in the absence of all proof as to any other origin of the fire, that it would have been unreasonable for the jury to deduce the conclusion that the fire was the result of other and previous proximity of the locomotives to the cotton. The obvious danger resulting from the use of the locomotives, as described, in and about so easily ignitable a material as cotton, particularly when stored and unprotected as this was, is to our mind so clear that we think the least that can be said is, when *the origin of the fire was otherwise unexplained, that the jury would have been reasonably justified in drawing the inference that the use of the locomotives caused the fire. And the general course of legislation, both in England and this country, demonstrates the soundness of this conclusion. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243. The only possible ground by which this can be met is the assumption that because there was no proof tending to show the operation of a locomotive in the rear of the sheds or on the front of No. 2 shed, for a considerable period of time before the fire, therefore sparks from the locomotives could not have caused the fire, because if they had the conflagration would have broken out sooner. But this assumes that compressed cotton, piled up as this was, if ignited by sparks, would necessarily at once break out into flame, and disregards the right to have the judgment of the jury as to whether the fiber of such cotton, when so situated, on being touched by a spark, might not have smoldered for a considerable time, until such headway had been gained as to cause the fire to break into flame. In other words, there being two inferences to be drawn from the testimony, one of a sudden outbreak of the fire and the other of a long-continued smoldering, it was the province of the jury to pass upon the question. And this disposes of the assumption that the fire was discovered immediately on its breaking out. Such assumption, however, was a mere unreasonable inference from the facts in favor of the defendant and against the plaintiff, and rested on the predicate that there was nothing in the proof which would have justified a jury, although the cotton was compressed and piled up, in inferring that the fire might have smoldered for a considerable time before bursting into flame. It was certainly open to the plaintiff to direct the attention of the jury to the obvious natural law that any fibrous material, like cotton, when tightly compressed and piled, as was the cotton in question, if ignited by a spark, may smoulder for an uncertain period. The only proof on the subject of the discovery of the fire is that to which we have referred, giving an account of the alarm of

[194]

fire by Valle. The mere fact, however, that he gave an alarm of fire when he discovered it does not support *the inference that the fire had not been burning for a considerable period before he knew of it. Indeed, when the state of the fire, as described by the witness Robeau when he first saw it, is taken into consideration, and the natural tendency of a tightly compressed fiber to smoulder is borne in mind, the jury might have reasonably inferred, we think, from the condition of the fire when first seen by Robeau and the rapid and extensive conflagration which almost immediately resulted, that the discovery marked, not the time when the ignition of the cotton took place, but the breaking out of the cotton into a flame as a consequence of its prior burning. This also disposes of the view that, although the cotton was negligently stored by leaving no gangways through the length of it, by which it could be inspected and the presence of fire be promptly detected, the proof did not tend to justify a recovery because the fire was discovered in the mass of cotton just as soon as it would have been if proper precautions had been taken in its storage. The description of the state of the fire, we think, afforded ground for a jury to otherwise find, for the only proof on the subject was that, in order to discover the fire, the watchmen had to climb up on the pile of cotton, and that it was not possible, from the gangway, to have seen the fire, as it would have been if suitable openings lengthwise had been left.

Second. That the proof showed negligence in the care of the property inasmuch as the number of watchmen who were engaged were greatly inadequate for the service, and therefore the jury would have been reasonably justified in finding that the destruction of the cotton was occasioned thereby.

Here, also, we think it was evident that the presence of only four watchmen to care for so vast an accumulation of cotton stored and exposed to the risks it was subjected to was sufficient to go to the jury on the question of negligence. Both the courts below with reference to this ground substantially concluded, as they did as to the former one, that even although the number of watchmen was insufficient, nevertheless as the inadequate number of watchmen discovered the fire as soon as it broke out, a greater number of watchmen could have done no more, [196]*therefore the inference of negligence contributing to the loss was, as a matter of law, unwarranted. This, however, but rested on the assumption that the fire was immediately discovered. On the contrary, as we have said, not only the reasonable inference that cotton stored and piled like that here in question, when ignited, would smoulder, but the actual facts as to the conflagration in hand, we think, were sufficient to go to the jury so as to enable the jury to conclude whether, if an adequate force of watchmen had been on hand, the fire might have been sooner detected and the property saved from destruction. But the larger number of watchmen would have been efficient, not only

in detecting the fire, but for the purpose, in such an emergency, of handling the cotton in order that the fire might be gotten at and extinguished. That an adequate force might have so done was reasonable to infer, especially in view of the proof that in the daylight, when a larger body of men were at work, smouldering cotton was discovered in one of the lower bales, and by removing the others and getting at the ignited bale in a tier, a conflagration was prevented.

Third. That the jury would have had reasonable ground to infer negligence from the inadequacy of the fire apparatus and from the want of instructions as to its use or competent men to handle it.

This proposition, we think, is also well founded. The argument to the contrary is that, as it was shown that if the apparatus which was there had been properly worked, the fire would have been extinguished, therefore there was no negligence in respect to such appliances. The proof was construed to be that when Robeau heard the alarm of fire and rushed to the point where Valle stood, upon the cotton, and was ordered by Valle to go down and open the valve, he found the valve open, because Valle had previously opened it. But we have searched the record in vain for any direct proof that Valle had opened the valve before Robeau's arrival. *Non constat*, therefore, that the valve had not been left open negligently some time previously, as it was hid from view by the cotton, and if the open valve therefore caused the tangling of the hose or *rendered it so that it could not be moved. [197] the negligence in respect to the care of the hose would be that of the company. If it be that one inference from the testimony would have justified the conclusion that Valle had opened the valve, as such inference was not necessarily to be drawn, then it was the function of the jury, and not of the court, to draw the proper inference.

But this, it is argued, is of no consequence since, it is asserted, the proof showed that the cause of the destruction of the cotton was not the imperfect nature of the appliances, but an error of judgment in the use of them by the employees in the emergency of the moment. The proof, it is insisted, left no room for any other inference than that Valle on the discovery of the fire had rushed to the spot, thrown the hose down from the platform, got down among the cotton and opened the valve, or had left the hose on the platform without unwinding it, and that the pressure of water had either so kinked or tangled the hose when thrown down, or rendered it so difficult to move it, if left coiled on the platform, that the water would not flow, and the failure to extinguish the fire resulted. But all the elements contained in these propositions involve mere inferences from the evidence which it was the province of the jury to make. The only testimony in the case showing the actual condition of the hose at the time of the discovery of the fire was that of Robeau. That testimony showed that the cotton was piled up around the post where

the hydrant was situated, above the platform on which the hose was coiled, to such an extent that neither the hydrant nor the hose could be seen from the gangway or from the top of the pile of cotton; that to get at the hose, if it was on the platform, required either reaching to or getting on the platform about 6 feet below, between the cotton, and to reach the valve necessitated squeezing down between the cotton to the floor. Under these circumstances and the difficulties which they necessarily created, we think the proof was such as would have reasonably justified the jury in concluding that the negligent acts of stowing the cotton high up around the hose and the hydrant and the valve connected with it created a condition so conducing to error of judgment and misdirected efforts as to

[198] render the railway company responsible therefor. And this conclusion is greatly fortified when the uncontradicted proof is considered that no general rules for the use of the fire apparatus had ever been promulgated, that no systematic inspection thereof had been made, that no fire drill or instructions as to the use of the apparatus was had or given, and that the too few watchmen were left in case of an emergency to use an apparatus which, even if it were intrinsically adequate, was surrounded by the act of the company with such conditions that its favorable and efficient use was rendered practically impossible.

This leaves for consideration only the question whether the case should have been allowed to go to the jury on the question of deviation. As the result of the conclusions to which we have come on the question of negligence is that a new trial must be granted, it follows that on the new trial the whole case will be open. Being so open, we cannot say that testimony may not be introduced at the new trial which may modify the aspect of this question as exhibited in the record now before us. Conducive, however, to the result that there may be an end to this litigation, we content ourselves on this branch of the case at this time with saying that we think the proof in this record fully justified the action of the trial court in respect to the question of deviation.

The judgments must be reversed and the cause remanded to the Circuit Court of the United States for the Southern District of New York with directions to set aside the verdict and grant a new trial, and it is so ordered.

[199]*STATE OF MINNESOTA, Complainant,
v.
NORTHERN SECURITIES COMPANY,
Defendant.

(See S. C. Reporter's ed. 199-247.)

Original jurisdiction of Supreme Court—suit between state and corporation of other state—domestic corporations as necessary parties.

1. Original jurisdiction of the Supreme Court
184 U. S.

of the United States cannot be exercised in a suit between a state and a citizen of another state, when, with the latter, citizens of the complainant state must necessarily be joined as parties.

2. A bill by a state against a corporation of another state to enjoin that corporation, its officers, representatives, agents, servants, or stockholders from interfering in any way with the management or control, and from holding any of the stock, of either of two railroad corporations of the complainant state, is one to which the domestic corporations are necessary parties for the representation of the interests of all other stockholders and of the general public.

[No. — Original.]

Argued January 27, 1902. Decided February 24, 1902.

ORIGINAL suit by the State of Minnesota against a corporation of another state to restrain interference with domestic corporations. *Dismissed for want of jurisdiction.*

Statement by Mr. Justice Shiras:

On the 7th day of January, 1902, came the state of Minnesota, by Wallace B. Douglas, its attorney general, and moved the court for leave to file a bill of complaint against the Northern Securities Company, a corporation of the state of New Jersey. [200] Thereupon the court directed that notice of such application should be given to the defendant, and set the motion for argument on January 27, 1902, when it was duly heard.

The bill proposed to be filed was in the following terms:

To the Judges of the Supreme Court of the United States of America:

Your oratrix, the State of Minnesota, complainant, by Wallace B. Douglas, attorney general thereof, brings this its bill of complaint against the Northern Securities Company, a corporation organized under and by virtue of the laws of the state of New Jersey, and alleges:

I.

That by an act of Congress, entitled "An Act for the Admission of Minnesota into the Union," approved May 11, A. D. 1858 (11 Stat. at L. 285, chap. 31), the said state of Minnesota was admitted into the Union upon an equal footing with the original states.

II.

That said Northern Securities Company is a corporation organized as hereinafter alleged, under and by virtue of the laws of the state of New Jersey, and is a citizen of the state of New Jersey.

III.

A.

That by an act of the Congress of the

United States, of March 12, 1860 (12 Stat. at L. 3, chap. 5), extending to the state of Minnesota the swamp-lands grant theretofore made to the state of Arkansas, and by various subsequent acts, the Congress of the United States donated to the state of Minnesota from the public domain large quantities of lands situated within the state of Minnesota, and of the value of several millions of dollars. That the state of Minnesota now has left and undisposed of more than 3,000,000 acres of said lands, of the value of more than \$15,000,000, much of which said land is located in the territory traversed by the railroads of the Great Northern and Northern Pacific Railway companies, as hereinafter alleged. That the value of said land, and the salability [201] thereof, depends*in very large measure upon having free, uninterrupted, and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway companies.

That many of said lands are vacant and unsettled and located in regions not at present reached by railway lines, and depend for settlement upon the construction of lines in the future; that it has heretofore been the practice of said Great Northern and Northern Pacific Railway companies, respectively, to extend spur lines into territory adjacent to each of said roads as well as into new territory for the purpose of developing such territory, as well as to obtain traffic therefrom: that such new lines have been built in the past very largely by reason of the rivalry heretofore existing between said companies, for existing, as well as new, business; that under the consolidation and unity of control hereinafter set forth such rivalry will cease, and many of the lands now owned by the state of Minnesota will not be reached by railroads for years to come, if at all, owing to such combination and consolidation removing all rivalry and competition between said companies; that the settlement and occupation of said lands will add very much to their value, and such occupation will depend entirely upon the accessibility of railway lines and transportation facilities for marketing the products raised thereon; that if said lands are sold and become occupied they will add very largely to the taxable value of the property of the state, and that said lands cannot be sold or the income of the state increased thereby without the construction of railroad lines to, or adjacent to, the same.

B.

That the state of Minnesota is now and for many years past has been the owner of and continuously maintained, an educational institution for the benefit of its citizens, known as the University of Minnesota; also a large number of hospitals for the insane, within its territorial limits; also five normal schools for the education of teachers within the state; also a state training school for boys and girls; also several state

schools for the education, care, and maintenance of the deaf, dumb, *blind, and feeble-[202] minded; also a state school for indigent and homeless children; also a state penitentiary and reformatory.

That for many years past the state of Minnesota has continuously maintained and supported each of said institutions, and in the care, maintenance, and management thereof has been compelled to and in the future, of necessity, will annually purchase large quantities of supplies for said institutions, including provisions, clothing, and fuel, a great portion of which the state of Minnesota is compelled to ship over the different lines of railway owned and operated by the Northern Pacific Railway Company and the Great Northern Railway Company.

That the state of Minnesota is compelled to expend annually more than \$700,000 in the operation and maintenance of said public institutions, most of which sum is raised by general taxation upon the lands and other property of the citizens of the state of Minnesota, and situated therein. That the amount of taxes which said state of Minnesota can collect, and the successful maintenance of its said public institutions, as well as the performance of its governmental functions and affairs, depends largely upon the value of the real and personal property situated within its territorial limits, and the general prosperity and business success of its citizens. That the value of said real and personal property of the citizens of the state of Minnesota, as well as their business success and general prosperity, depend very largely upon maintaining in said state free, open, and unrestricted competition between the railway lines of said Great Northern and Northern Pacific Railway companies, respectively, within said state.

C.

That it has been the settled policy and practice of the state of Minnesota, since its organization as a territory, to develop the resources of the state by encouraging railroad building therein; and in furtherance of this policy the territory of Minnesota, by an act thereof under the date of May 22, 1857, granted to the Minnesota & Pacific Railroad Company a charter, and in consideration of the construction and maintenance of a line of railway in Minnesota by said company said territory donated *to it [203] out of its public domain about 700,000 acres of land. That said Minnesota & Pacific Railroad Company thereafter became insolvent, and all its property was placed in the hands of a receiver; that such proceedings were thereafter had that all the property of the last-named company, including said land, was duly sold and conveyed to the St. Paul, Minneapolis, & Manitoba Railway Company, hereinafter mentioned.

That the state of Minnesota, by an act of its legislature, and in consideration of the construction and maintenance of a line of railway by the Great Northern Railway Company, hereinafter referred to, between

St. Cloud and Hinckley, a distance of 84 miles, donated and conveyed to said last-named company upwards of 400,000 acres of land then owned by and situated in the state of Minnesota, which said land was then worth more than \$1,000,000. That in carrying out said policy, and in aid of the building of railways within the state of Minnesota, there has been granted out of the public domain within the limits of the state of Minnesota upwards of 10,500,000 acres of land, nearly all of which has been granted to said Great Northern and Northern Pacific Railway companies, and the subsidiary companies owned and controlled by them.

D.

That by an act of the legislature of the state of Minnesota, approved March 3, 1881, entitled "An Act Granting Swamp Lands to Aid in the Construction of the Main Line of the Road of the Little Falls & Dakota Railway Company," and which now is a part of the Northern Pacific Railway Company system, hereinafter referred to, the state of Minnesota donated to said Little Falls & Dakota Railway Company two hundred forty-three thousand five hundred and ninety-one (243,591) acres of land situated in and then belonging to said state, in consideration of the construction and maintenance by said last-named railway company of a line of railway extending from Little Falls to Morris, in the state of Minnesota.

IV.

Your oratrix further alleges that immense [204] quantities of wheat and other products are shipped annually from East Grand Forks, Crookston, Moorhead, Fergus Falls, and other competitive points within the state of Minnesota, and all on the lines of railway of the said Great Northern and Northern Pacific Railway companies, hereinafter referred to, to the cities of Duluth, St. Paul, and Minneapolis, within the state of Minnesota. That nearly all of the shipment of such products made from the above-named initial points are consigned to various citizens at either the city of Duluth, St. Paul, or Minneapolis over one or the other of said lines of railroad last-above named. That enormous quantities of merchandise have been and will continue to be shipped annually over said lines of railway, between the cities of St. Paul and Minneapolis and various other cities and villages along said lines of railway situated within the state of Minnesota, and which are purchased and used entirely by the people of said state. That the competition in both freight and passenger traffic to and from said places has always been sharp and active between said railway companies, and has secured to the residents of said cities, as well as the state of Minnesota, and to the state of Minnesota itself, much lower rates for both freight and passengers than would otherwise have been obtained, or than will or can be obtained in case the consolidation or

unity of control and management of said Great Northern and Northern Pacific Railway companies, hereinafter alleged, is not enjoined as herein prayed.

V.

That the Great Northern Railway Company is a corporation organized and existing under and by virtue of the laws of the state of Minnesota, to wit, under an act duly passed by the territory of Minnesota, entitled "An Act to Incorporate the Minneapolis & St. Cloud Railroad Company," approved March 1st, A. D. 1856, and various subsequent acts of the state of Minnesota, amendatory thereof and supplemental thereto, respectively entitled as follows:

"An Act to Amend an Act Entitled 'An Act to Incorporate the Minneapolis & St. Cloud Railroad Company,' Passed March 1, 1856." Approved February 23, 1864.

"An Act of the Legislature of the State [205] of Minnesota Entitled 'An Act Granting Swamp Lands to Aid the Minneapolis & St. Cloud Railroad Company in Building Branches to Connect with the Lake Superior & Mississippi Railroad and the Winona & St. Peter, or Any Other Railroad in Southern Minnesota.'" Approved February 11, 1865.

"An Act to Amend an Act Entitled 'An Act to Incorporate the Minneapolis & St. Cloud Railroad Company,' Approved March 1, 1856, and to Repeal Certain Portions of an Act Amending the Charter of Said Company, Passed February 23, 1864.'" Approved February 28, 1865.

"An Act to Amend an Act Entitled 'An Act Granting Swamp Lands to Aid the Minneapolis & St. Cloud Railroad Company in Building Branches to Connect with the Lake Superior & Mississippi Railroad and Winona & St. Peter Railroad, or Any Other Railroad in Southern Minnesota.'" Approved March 5, 1869.

"An Act to Amend the Charter of the Minneapolis & St. Cloud Railroad Company." Approved March 6, 1869.

"An Act to Amend the Charter of the Minneapolis & St. Cloud Railroad Company." Approved March 2, 1870.

"An Act to Extend the Time for the Construction and Completion of the Branch of the Minneapolis & St. Cloud Railroad Company." Approved March 11, 1879.

"An Act to Amend an Act Entitled 'An Act Granting Swamp Lands to Aid the Minneapolis & St. Cloud Railroad Company in Building Branches to Connect with the Lake Superior & Mississippi Railroad and the Winona & St. Peter Railroad, or Any Other Railroad in Southern Minnesota,' Approved February 11, in the Year of our Lord One Thousand Eight Hundred and Sixty-Five, as Amended." Approved March 1, 1885.

That on the 16th day of September, 1889, the corporate name of said company was duly changed to the Great Northern Railway Company. That during the year 1889 said railway company caused to be constructed a line of railway extending from

[206] St. Cloud, Minnesota, to Hinckley, Minnesota, which line was immediately conveyed to the St. Paul, Minneapolis & Manitoba Railway Company, a corporation duly organized and existing *under and by virtue of the laws of the state of Minnesota, hereinafter referred to as the Manitoba Company. That said Manitoba Company, prior to the 1st day of February, 1890, had built, purchased, and put in operation various lines of railway within the state of Minnesota, as well as in the states of North Dakota, Montana, Idaho, and Washington, connecting by rail the cities of St. Paul and Minneapolis, within the state of Minnesota, and various other cities and villages within said state, with each other, and with Puget Sound, on the Pacific ocean; which said railways are hereinafter more particularly described.

That on the 1st day of February, 1890, said Manitoba Railway Company leased to the said Great Northern Railway Company, for a period of 999 years, all of the lines of railway, including the rolling stock then owned and controlled by said Manitoba Company; that ever since said last-named date said Great Northern Railway Company has continued to and now does control, operate, and maintain each and all of said lines as one complete railroad system. That said lines of railway so constructed by said Manitoba Company and now so controlled, operated, and maintained by said Great Northern Railway Company under said lease, are described as follows:

A line of railway extending from St. Paul, Minnesota, *via* Minneapolis, Elk River, St. Cloud, Sauk Center, Fergus Falls, Glyndon, Crookston to the northern boundary line of the state of Minnesota at St. Vincent.

Another line of railway extending from Minneapolis, Minnesota, along the western bank of the Mississippi river to St. Cloud, Minnesota.

Another line of railway extending from St. Cloud easterly to Hinckley, Minnesota.

Another line of railway extending from Elk River, Minnesota, northward to Malaco, Minnesota, on the line of the St. Cloud and Hinckley Branch, last above referred to.

Another line of railway extending from Minneapolis, Minnesota, to Breckenridge, Minnesota.

Another line extending from Sauk Center, Minnesota, to Park Rapids, Minnesota.

[207] *Another line of railway extending from Hutchinson Junction to Hutchinson, Minnesota.

Another line of railway extending from Benson, Minnesota, thence in a westerly direction to the western boundary line of the state; thence to Watertown, South Dakota.

Another line of railway extending from Evansville, Minnesota, westerly to the state boundary line, thence to Ellendale, North Dakota.

Another line of railway extending from Moorhead, Minnesota, westerly to the state boundary line; thence to Wahpeton, North Dakota.

Another line of railway extending from

Moorhead, Minnesota, to Crookston, Minnesota.

Another line of railway extending from Barnesville, Minnesota, to Moorhead, Minnesota.

Another line of railway extending from Carman, Minnesota, to Foster, Minnesota.

Another line of railway extending from Crookston, Minnesota, to Red Lake Falls and Thief River Falls, Minnesota.

All of the foregoing lines being situated in the state of Minnesota, except as herein-after otherwise expressly stated.

That said Great Northern Railway Company now either owns or controls, and operates and maintains, by virtue of said lease, a line or system of railways connecting with said lines above referred to, and extending from the western boundary line of the state of Minnesota through the states of North Dakota, Montana, Idaho and Washington, to Puget Sound on the Pacific coast. The said railway lines covered by said lease, or owned by said Great Northern Railway Company, aggregate a total of about 4,500 miles.

That many of said railroads above described, being located within the state of Minnesota, were built by subsidiary companies or corporations, and said Great Northern Railway Company now owns all of the capital stock of such corporations in addition and as supplemental to said lease; and in addition thereto said Great Northern Railway Company owns all of the capital stock of the Eastern Railway Company of Minnesota, a corporation organized under the laws of the state of Minnesota, *and [208] which owns and operates a railway line extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota; and from Duluth, Minnesota, to Bemidji, Minnesota; and by virtue of such ownership of stock said Great Northern Railway Company dictates the policy of said railway company and controls the lines of railway and properties of said Eastern Railway Company, and operates the same as a part of the Great Northern system of railway.

That said Great Northern Railway Company also owns all of the capital stock of the Willmar & Sioux Falls Railroad Company, a corporation owning a railroad extending from Willmar, Minnesota, to Yankton, South Dakota, and by virtue of such ownership of stock dictates the policy of and owns and controls the railway line and property of said Willmar & Sioux Falls Railroad Company.

That all of the railways and railway lines hereinbefore described are operated and controlled by and form a complete system under the name of said Great Northern Railway Company.

That the charter of said Great Northern Railway Company provides as follows: "That all of the affairs and business of said company shall be conducted by or under the direction of a board of directors, and they are authorized, for the purposes specified in this act, to make and establish regulations and by-laws, and to do all things

necessary to be done, and not inconsistent with the Constitution and laws of the United States, or the laws of this territory, or this act."

Your oratrix further alleges that the board of directors of said Great Northern Railway Company, at the time of the organization of the Northern Securities Company, hereinafter referred to, to wit, on or about the 13th day of November, 1901, was and now is composed of the following named persons, to wit: James J. Hill, James N. Hill, Samuel Hill, William P. Clough, Edward Sawyer, M. D. Grover, Jacob H. Schiff, and Henry W. Cannon; and at said date the managing or executive officers of said corporation were and now are as follows: president, James J. Hill; vice president, William P. Clough; secretary and assistant [209] treasurer, E. T. Nichols. That on *said last-named date said Great Northern Railway Company had issued, and there was then outstanding, a total of \$125,000,000, par value, of the capital stock of said corporation, and your oratrix is informed and believes, and upon information and belief alleges, that said James J. Hill was on said last-named date the owner of, or in possession and control of, or had subject to his direction and disposition, more than a majority of said capital stock so outstanding.

VI.

That the Northern Pacific Railway Company was formerly a corporation organized and existing under and by virtue of an act of the Congress of the United States, entitled, "An Act Granting Land to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route," approved July 2, 1864; and a joint resolution of Congress extending the time for the completion of said railroad until July 1, 1868; and a joint resolution granting the consent of Congress provided for in § 10 of said act, incorporating the Northern Pacific Railroad Company, approved March 1, 1869; the joint resolution of Congress granting the right of way for the construction of a railroad from Portland, Oregon, to a point west of the Cascade Mountains in Washington territory, approved April 1, 1869; the joint resolution of Congress authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes, approved May 31, 1870. And complainant asks leave to refer to and have each of said acts and resolutions considered as though fully herein set forth.

That under and in pursuance of the said several acts and joint resolutions of Congress, the Northern Pacific Railroad Company constructed and put into operation, prior to January 1, 1890, all of its main line of road, extending from Ashland, in the state of Wisconsin, westward across the states of Minnesota, North Dakota, Montana, and Idaho, and in the state of Washington to Walla Walla Junction; also all

that other part of its main line of railroad extending from Portland, *Oregon, to Taco- [210] ma, Washington; also the whole of its Cascade branch, extending from Pasco Junction, in the state of Washington, to Tacoma, in the state of Washington.

That said Northern Pacific Railroad Company had also, prior to said 1st day of January, 1880, acquired and then owned all of the capital stock of the following named railroad companies and corporations, to wit, the St. Paul & Northern Pacific Railroad Company, a corporation organized under the laws of the state of Minnesota, and which then owned a railroad extending from St. Paul, Minnesota, to Brainerd, Minnesota; and from Little Falls, Minnesota, to Staples, Minnesota; also of the Duluth & Manitoba Railroad Company, a corporation organized under the laws of the state of Minnesota, and which then owned a line of railroad extending from Winnipeg Junction, Minnesota, *via* Red Lake Falls, Minnesota, to the western boundary line of said state, and thence to Grand Forks, North Dakota; and thence to the international boundary line between the state of North Dakota and Canada; also of the Duluth, Crookston, & Northern Railroad Company, a corporation organized under the laws of the state of Minnesota, and which then owned a railroad extending from Fertile Junction, Minnesota, through Crookston to Carthage Junction, Minnesota; also of the Little Falls & Dakota Railroad Company, a corporation organized under the laws of the state of Minnesota, and which then owned a railroad extending from Little Falls, Minnesota, to Morris, Minnesota; also of the Northern Pacific, Fergus Falls, & Black Hills Railroad Company, a corporation organized under the laws of the state of Minnesota, and which owned a line of railroad extending from Wadena, Minnesota, thence westerly to the western boundary line of the state; and thence to North Dakota points; also all of the capital stock of various railroad corporations or companies organized in the states of North Dakota, South Dakota, Montana, and Washington, which owned and operated various railway lines in said states respectively. The said railway lines built by said companies within the state of Minnesota, as well as those built outside of the state of Minnesota, and the capital stock of the corporations so building said lines, and owned *by said Northern Pacific Railroad [211] Company, as hereinbefore alleged, were operated, managed, and controlled by said Northern Pacific Railroad Company as a system of railway or railways extending from and between various points in the state of Minnesota, more specifically hereinafter referred to, through said state and thence to the Pacific coast; and aggregate about 4,500 miles of railway.

VII.

That the Northern Pacific Railway Company is now and for upwards of five years last past has been a corporation organized

under and by virtue of the laws of the state of Wisconsin; said corporation being organized during the year 1895. That thereafter and prior to the time said Northern Pacific Railway Company became possessed of and the owner of the railway lines and property formerly owned and operated by said Northern Pacific Railroad Company, said Northern Pacific Railway Company filed with the secretary of state of the state of Minnesota, in accordance with the terms and provisions of the laws of said state of Minnesota, a duly authenticated and certified copy of its articles of incorporation, and thereupon said Northern Pacific Railway Company became a corporation of and within the state of Minnesota, and subject to all of the laws, regulations, and provisions of said state of Minnesota relating to railway or railroad corporations, including those acts or parts of acts hereinafter specifically pleaded or referred to.

That under the charter or articles of incorporation of said Northern Pacific Railway Company the powers of said company are delegated to and exercised by a board of fifteen directors; that during the month of April, 1901, the following-named persons constituted and now are the members of the board of directors of said last-named company: James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, H. McK. Twombly, Brayton Ives, D. Willis James, John S. Kennedy, Daniel S. Lamont, Charles S. Melan, Samuel Rea, William Rockefeller, Charles Steele, James Stillman, and Eben B. Thomas. That on the 13th day of November, 1901, J. Pierpont Morgan, with certain other persons to your oratrix unknown, but [212] who were acting with said Morgan, owned and had in their possession, or held under and subject to their control and disposition, upwards of 85 per cent of the total capital stock of said Northern Pacific Railway Company then outstanding. That the total amount of capital stock of said Northern Pacific Railway Company then issued and outstanding amounts to 155,000,000 of dollars, par value, 75,000,000 of dollars of which was preferred stock, subject to retirement as provided by the articles of incorporation and agreement under which the same was issued.

That during the year 1893 the said Northern Pacific Railroad Company became insolvent, and all of the property of said last-named company, of whatever kind or character, was duly placed in the hands of receivers appointed for that purpose by the circuit court of the United States for the eastern district of Wisconsin; and thereafter, in proceedings ancillary thereto, by the various circuit courts of the United States in whose jurisdictions said property was located. That after said Northern Pacific Railway Company had filed its said articles of incorporation in the state of Minnesota and had become subject to its laws, and during the year 1896, said Northern Pacific Railway Company duly purchased and became the owner of the entire railroad properties and railway lines, including the right

of way, rolling stock, and capital stock, formerly owned by said Northern Pacific Railroad Company; and immediately thereafter entered into the possession thereof; and at all times since has continuously owned and operated each and all of the said lines of railway so situated within the state of Minnesota, and which connect the cities of St. Paul and Minneapolis and Duluth, and various other villages and cities within the state of Minnesota, and connect with the lines of railway outside of said state of Minnesota.

That during the year 1899 said Northern Pacific Railway Company purchased, and ever since has owned and operated, a line of railway extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota; that said last-named line parallels and is a competing line of railway for both freight and passenger traffic with the line of railway between said *Minneapolis and St. Paul and [213] Duluth, hereinbefore described, and which is owned by said Eastern Railway Company of Minnesota, but operated, controlled, and managed by said Great Northern Railway Company as a part of the system of said last-named company, as hereinbefore alleged.

That the lines of railway now owned and operated by said Great Northern Railway Company within the state of Minnesota are parallel and competing lines for freight and passenger traffic with the lines of railway now owned, operated, and controlled by said Northern Pacific Railway Company within the state of Minnesota, between the following points in said state, to wit: The cities of St. Paul and Minneapolis and the city of Duluth, Minnesota, and the various cities and villages between said points; also between the cities of St. Paul and Minneapolis and Crookston, Minnesota, by way of Fergus Falls and the various cities and villages between said points; also between the cities of St. Paul and Minneapolis and Crookston by way of Breckenridge, and the towns and cities between said points; and also between the cities of Duluth and Crookston, and the cities and villages between said points, as well as the country adjacent to the lines of railway between each and all of said cities; and the said lines of railway owned, operated, and controlled by said Great Northern Railway Company, and also the lines of railway owned, operated, and controlled by said Northern Pacific Railway Company which connect with the said lines of railway owned, operated, and controlled by each of said companies respectively within the state of Minnesota, are parallel and competing lines through the states of North Dakota, Montana, Idaho, and Washington to Puget Sound on the Pacific coast for passenger and freight traffic. That during all of the time aforesaid each and all of said lines of railway were maintained and operated by said respective companies as common carriers of freight and passengers within the state of Minnesota; and that said companies are now, and for upwards of eleven years last past have been, the only railway companies

[214]owning or operating lines of railway crossing the state of Minnesota and connecting the Pacific ocean by rail with points in Minnesota; also the only lines of railway traversing east and west *the northern tier of states of the United States lying west of the Mississippi river, and connecting such territory and territory tributary thereto by rail with the Pacific ocean; and, with one exception, the only lines of railway crossing the north half of the state of Minnesota in any direction.

VIII.

That the Chicago, Burlington, & Quincy Railway Company is, and for many years last past has been, a corporation duly organized and existing under and by virtue of the laws of the state of Illinois; and, as such, until the disposition of its capital stock as hereinafter alleged, owned, operated, and controlled an extensive system of railway lines extending from the city of Chicago, in the state of Illinois, in a westerly direction to the city of Denver, in the state of Colorado; and also in a westerly and northwesterly direction from said city of Chicago, to the city of Billings, in the state of Montana; which last-named point is a junction and competitive point for freight and passenger traffic with the said Northern Pacific Railway Company; and also from said city of Chicago to the cities of St. Paul and Minneapolis, in the state of Minnesota; and in addition to said main lines, owned, operated, and controlled a large number of connecting and tributary lines, extending to various cities and towns in the states of Illinois, Iowa, Missouri, Wisconsin, Minnesota, Nebraska, Kansas, Wyoming, and Montana. That the total mileage of said railway company is approximately 7,400 miles. That during the year 1901 the said Great Northern Railway Company and said Northern Pacific Railway Company jointly purchased 98 per cent of the total capital stock of said Chicago, Burlington, & Quincy Railway Company, aggregating approximately 107,000,000 of dollars, par value, and now own the same; and issued in payment therefor the joint bonds of said Great Northern and Northern Pacific Railway companies, payable in twenty years from the date thereof, and bearing interest at the rate of 4 per cent per annum, payable semi-annually. That said Great Northern and Northern Pacific Railway companies issued and [215]delivered in exchange for each \$100 in amount of said Chicago, Burlington, & Quincy Railway Company stock \$200 in amount of the said bonds.

That under and by virtue of the purchase of said stock the joint ownership and control of the said Chicago, Burlington, & Quincy Railway Company is vested in and ever since has been exercised by the said Great Northern and Northern Pacific Railway companies.

IX.

That the defendant Northern Securities Company is a corporation organized, exist-
184 U. S.

ing, and doing business under and by virtue of the laws of the state of New Jersey. That said corporation was organized on the 13th day of November, A. D. 1901, with its principal office for the transaction of its business located at the city of Hoboken, county of Hudson and state of New Jersey, and is a citizen of the state of New Jersey.

That the articles of incorporation of said Northern Securities Company are as follows:

CERTIFICATE OF INCORPORATION OF NORTHERN SECURITIES COMPANY.

STATE OF NEW JERSEY, ss:

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the legislature of the state of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896), and the Acts Amendatory Thereof and Supplementary Thereto," do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the state of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be the registered office of the corporation.

Third. The objects for which the corporation is formed are:

* (1) To acquire by purchase, subscription, [216] or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory, or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country, and, while owner thereof, to exercise all the rights, powers, and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, shares of the capital stock of any other corporation or corporations, association or associations of the state of New Jersey, or of any other state, territory or country; and, while owners of such stock, to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

(4) To aid in any manner any corporation or association of which any bonds, or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5) To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other states and in foreign countries, and to have one or more offices out of this state, and to hold, purchase, mortgage, and convey real and personal property out of this state.

[217] Fourth. The total authorized capital stock of the corporation is four hundred million dollars (\$400,000,000), divided into four *million (4,000,000) shares of the par value of one hundred dollars (\$100) each. The amount of the capital stock with which the corporation will commence business is \$30,000.

Fifth. The names and postoffice addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business) are as follows:

<i>Name and postoffice address.</i>	<i>Number of shares.</i>
George F. Baker, Jr., 258 Madison Avenue	100
New York, New York.	
Abram M. Hyatt, 214 Allen avenue	100
Allenhurst, New Jersey.	
Richard Trimble, 53 East Twenty-fifth street	100
New York, New York.	

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time by the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose terms shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one third of their [218] number for the unexpired portion *of the term of the directors of the second class,

and one third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification, or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the state of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

As authorized by the act of the legislature of the state of New Jersey passed March 22, 1901, amending the 17th section of the act concerning corporations (Revision of 1896), any action which theretofore required the consent of the holders of two thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employee of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws, or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of *board of directors, including pow- [219] er to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice presidents, one or more assistant treasurers, and one or more assistant secretaries; and, to the extent provided in the by-laws, the persons so appointed respectively shall have and may exercise all the powers of the president, of the treasurer, and of the secretary respectively.

The board of directors shall have power from time to time to fix and to determine and to vary the amount of the working capital of the corporation; to determine whether any, and if any, what part of any accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and the

payment of dividends; and to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the corporation, to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors from time to time shall determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute of the state of New Jersey, or authorized by the board of directors or by a resolution of the stockholders.

[220] The board of directors may make by-laws and, from time to time, may alter, amend, or repeal any by-laws: but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting, or at any special *meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof, we have hereunto set our hands and seals, the 12th day of November, 1901.

George F. Baker, Jr. (L. S.)

Abram M. Hyatt. (L. S.)

Richard Trimble. (L. S.)

Signed, sealed and delivered in presence of— George Holmes.

State of New York, }
County of New York, } ss:
Manhattan,

Be it remembered, that on this 12th day of November, 1901, before the undersigned, personally appeared George F. Barker, Junior, Abram M. Hyatt, Richard Trimble, who, I am satisfied, are the persons named in and who executed the foregoing certificate, and I, having first made known to them, and to each of them, the contents thereof, they did each acknowledge that they signed, sealed, and delivered the same as their voluntary act and deed. George Holmes,

Master in Chancery of New Jersey.

Indorsed: "Received in the Hudson Co., N. J., Clerk's Office, Nov. 13, A. D. 1901, and recorded in Clerk's Record No. —, on page —. Maurice J. Stack, Clerk. Filed Nov. 13, 1901, George Wurts, Secretary of State."

That said Northern Securities Company was incorporated at the instigation and request and under the direction of James J. 184 U. S.

Hill and William P. Clough, and certain other stockholders of said Great Northern Railway Company to your oratrix unknown, who were co-operating with said James J. Hill and William P. Clough, and who, with said Hill and Clough, owned and controlled, or have the disposition and management, as hereinafter alleged, of a very large majority of the capital stock of said Great Northern Railway Company; and J. Pierpont Morgan and certain other stockholders of said Northern Pacific Railway Company, to your oratrix unknown, who were co-operating with said Morgan, and who, with said Morgan, *owned and controlled, or have the dis-[221] position and management of, a very large majority of the capital stock of said Northern Pacific Railway Company. That said Northern Securities Company was formed by George F. Baker, Jr., and Richard Trimble, of the city of New York and state of New York, and Abram Hyatt, of Allenhurst, in the state of New Jersey, who adopted the said articles of incorporation. That said three last-named parties had no interest in said corporation other than the formation of the same for and at the request of said James J. Hill, William P. Clough, J. Pierpont Morgan, and their several associate stockholders of said Great Northern Railway Company and said Northern Pacific Railway Company, as above alleged, acting in concert with said parties.

That said James J. Hill, William P. Clough, and J. Pierpont Morgan, who, with their associates, did on said 13th day of November, 1901, and prior thereto, own and control a large majority of the capital stock of both said Great Northern Railway Company and said Northern Pacific Railway Company, were prior to, and at the time of, the organization of said Northern Securities Company, almost continually in conference with each other and with a large number of other stockholders of said Great Northern Railway Company and said Northern Pacific Railway Company, but whose names are to your oratrix unknown, considering such organization and the scheme and agreement herein referred to, and the means and manner by which the laws of Minnesota, hereinafter referred to, could be most successfully evaded or avoided, all of which facts were well known to the organizers of said Northern Securities Company, including the parties executing the said articles of incorporation. That said Northern Securities Company was organized solely for the purpose of carrying out and accomplishing the designs, agreement, and plans of said James J. Hill and J. Pierpont Morgan and their said associate stockholders, as herein set forth, and to effect a consolidation of the property, railway lines, corporate powers and franchises of said Great Northern and Northern Pacific Railway companies, respectively through said defendant the Northern Securities Company.

*That prior to the organization of said [222] Northern Securities Company the said owners and holders of a large majority of the capital stock of said Great Northern Rail-

way Company, as well as the owners and holders of a large majority of the capital stock of said Northern Pacific Railway Company, as a part of the scheme or plan herein alleged, as well as a part of the plan and purpose of the organization of said Northern Securities Company, entered into a mutual agreement or arrangement, the exact terms of which are unknown to your oratrix, but which is in substance as follows:

The said owners of a large majority of the capital stock of said Great Northern Railway Company and said Northern Pacific Railway Company mutually agreed with each other and certain persons who thereafter became the officers and directors of said Northern Securities Company, to transfer or cause to be transferred to said Northern Securities Company in exchange for the capital stock of said last-named company substantially all of the capital stock of said Great Northern Railway Company and said Northern Pacific Railway Company, respectively; the said capital stock of the Great Northern Railway Company to be transferred to and exchanged for the capital stock of the said Northern Securities Company on the basis of one share of the capital stock of the Great Northern Railway Company for 1 and 80-100 shares of the capital stock of said Northern Securities Company, and one share of the common stock of said Northern Pacific Railway Company for 1 and 15-100 shares of the capital stock of said Northern Securities Company. The \$75,000,000 of the preferred stock of said Northern Pacific Railway Company to be retired in accordance with the provisions of the articles of incorporation of said Northern Pacific Railway Company, and the conditions and agreements under which the same was issued; said retirement to take place on the 1st day of January, 1902. The funds for retiring said preferred stock to be raised by the issuance by said Northern Pacific Railway Company of its negotiable bonds, bearing date November 15, 1901, of the aggregate amount of \$75,000,000, payable January 1, 1907, in gold coin of the United States, with interest thereon at the [223] rate of 4 *per cent per annum, payable semi-annually in like gold coin, from and after January 1, 1902. The said bonds, however, to be convertible at the option of either the holders thereof, or said railway company, into shares of the common stock of said Northern Pacific Railway Company at the rate of one share of stock for each \$100 of the principal sum of such bonds, and the said common stock, when so taken in exchange for such bonds, to be converted into stock of said Northern Securities Company upon the basis of one share for each 1 and 15-100 shares of stock of said Northern Securities Company.

That said preferred stock could only be retired by resolution of the board of directors of said Northern Pacific Railway Company; that a very large majority of said preferred stock was owned by certain individuals who were opposed to the agreement and plan herein referred to relative to turn-

ing over the management and control of said Northern Pacific Railway Company to said Northern Securities Company, and the holding of its stock by said Northern Securities Company; that the owners of said preferred stock so opposed to said agreement and plan were also owners of sufficient of the common stock of said Northern Pacific Railway Company to give them a small majority of the total capital stock of said Northern Pacific Railway Company; thus making it necessary, in order to carry out the plan and agreement herein set forth and to vest the management and control of said Northern Pacific Railway Company in said Northern Securities Company in the manner and for the purposes herein alleged, to retire said preferred stock; all of which was well known to the board of directors of said Northern Pacific Railway Company and to said J. Pierpont Morgan and his associate stockholders of said Northern Pacific Railway Company, as well as said Northern Securities Company.

That on or about the 13th day of November, 1901, the board of directors of said Northern Pacific Railway Company took such official action as was necessary to retire said preferred stock upon the basis and in accordance with the plan and agreement herein set forth; and thereafter said preferred stock was retired by the issuance of convertible bonds to the amount and *in the [224] manner herein alleged. That immediately after the retirement of said preferred stock, said Northern Pacific Railway Company, acting through its board of directors and executive officers, exercised its right and option of declaring said bonds to be convertible into the shares of the common stock of said Northern Pacific Railway Company, and thereupon the same were so converted and the common stock of said Northern Pacific Railway Company issued in exchange therefor, upon the basis and for the purposes herein alleged. That in order to prevent the persons who owned said preferred stock, and who were opposed to the carrying out of the plan and agreement herein referred to, from acquiring a like control of the common stock, it was provided that the \$75,000,000 of common stock into which the said bonds were convertible could only be subscribed for and taken by holders of the then outstanding \$80,000,000 of the common capital stock of said Northern Pacific Railway Company; each share of said common stock then outstanding entitling the owner and holder thereof to take an additional 75-80 of a share of said \$75,000,000 additional common stock. That the retirement of said preferred stock and the conversion of the said bonds into common stock of said Northern Pacific Railway Company, and the exchange of said common stock for stock of said Northern Securities Company, as herein alleged, were each and all a part of the agreement, plan, and scheme of said J. Pierpont Morgan and his said associate stockholders of said Northern Pacific Railway Company, who then and there owned and controlled a large majority of the then out-

standing common stock of said Northern Pacific Railway Company, under and by which the complete management and control of said Northern Pacific Railway Company was to be, and was thereafter, turned over to and vested in said Northern Securities Company in order that said Northern Pacific Railway Company, its property and franchises, might be in effect consolidated with the property and franchises of said Great Northern Railway Company, as herein alleged. That said James J. Hill and his associate stockholders of said Great Northern Railway Company had full knowledge of and assisted in retiring said [225] preferred stock for the purposes and objects herein alleged. That, as a part of said agreement and plan entered into between said James J. Hill and his associate stockholders and said J. Pierpont Morgan and his associate stockholders, each and all of whom were then, and are now, acting in concert for the purpose of evading and violating the laws of the state of Minnesota, in the manner, for the purposes, and with the object and design herein set forth, and in furtherance of said purposes and design, and to avoid the effect of any litigation which might be instituted to defeat the consummation of the agreement, plan, and scheme herein referred to of vesting the complete management and control of the railway lines, properties, and franchises of said Great Northern and Northern Pacific Railway Companies in said defendant Northern Securities Company, said parties further undertook and agreed with each other and the persons who thereafter became the officers and directors of the defendant Northern Securities Company, that pending the delivery and transfer of a majority of the capital stock of said Great Northern Railway Company to said Northern Securities Company, the same should be held by or under the control of some person or corporation to your oratrix unknown; and that pending such delivery it was mutually agreed between said Hill and his associate stockholders and said Morgan and his associate stockholders and the persons who thereafter became the directors and officers of the defendant, as well as the person or corporation so temporarily holding said stock, that the same should be held during said period for the purposes above set forth in trust for the use and benefit of the defendant, the Northern Securities Company; and that during such time the parties holding said stock should attend and vote the same at all meetings of the stockholders of said Great Northern Railway Company, in the interests of the defendant, and as directed by the board of directors of said Northern Securities Company or the executive committee thereof, or in unison with the stock of said railway companies, actually assigned to and held by the defendant. That said Northern Securities Company has not purchased, and does not intend to purchase, the stock of either of said railway companies, except by issuing its stock in exchange for and in lieu [226] of the stock of said railway companies *on

the basis and in the manner and for the purposes herein alleged.

That for the unlawful purposes aforesaid the said Northern Securities Company, by circular letter heretofore issued to the public, has offered and is still offering to issue and exchange for the capital stock of the said Great Northern and Northern Pacific Railway companies, capital stock of said Northern Securities Company to the amount of \$180 par value thereof for each share of capital stock of said Great Northern Railway Company, and to the amount of \$115 par value thereof for each share of stock of said Northern Pacific Railway Company. And that the said Northern Securities Company is about to receive, on the basis aforesaid, and will, unless enjoined therefrom, receive, hold, and hereafter control all the capital stock of said Great Northern and Northern Pacific Railway companies.

X.

That the organization of said Northern Securities Company in the manner hereinbefore alleged, and the making of said agreement or arrangement hereinbefore referred to, are each and all a part of a scheme or plan on the part of said James J. Hill and his said associate stockholders of the Great Northern Railway Company, and J. Pierpont Morgan and his said associate holders of the stock of said Northern Pacific Railway Company, under and by which the said two last-named railway companies are to be in effect consolidated, and the complete management and control of the business affairs of said corporations respectively placed in one body and under the direction and control of one man or one board of directors, through and by means of said defendant. That pursuant to said plan, agreement, and arrangement, and in consummation thereof, and for the purpose of placing the complete management and control of said Great Northern Railway Company and said Northern Pacific Railway Company under one management, and for the purpose of establishing, in effect, a consolidation of said railway companies, together with said railway lines and properties, in and through said defendant, the said J. Pierpont Morgan *and [227] his associate stockholders have actually assigned and delivered to said Northern Securities Company upwards of 85 per cent of the total capital stock of said Northern Pacific Railway Company; and your oratrix alleges on information and belief, that said James J. Hill, and his associate stockholders of said Great Northern Railway Company have also actually assigned and delivered to said Northern Securities Company upwards of 95 per cent of the said capital stock of said Great Northern Railway Company. That the sole purpose, object, and effect of the transfer of said stock by said James J. Hill and his said associates, and the said J. Pierpont Morgan and his said associates, to said Northern Securities Company, was, and is, to transfer to and vest in said defendant Northern Securities Company the complete

management and control of the respective lines of railway and railway properties of each of said railway companies within and without the state of Minnesota, and to place the complete management and control of the same, and the power to dictate the policy of each of said corporations, as well as the power and authority to fix rates and charges for the transportation of both freight and passengers within the state of Minnesota, as well as without said state, in the hands of and under the control of one party or board of directors, and thereby create, foster, and perpetuate a monopoly in railway traffic in the state of Minnesota.

That the purpose, object, and effect of the incorporation of the defendant and the receipt by it of a controlling amount of the capital stock of the said Northern Pacific and Great Northern Railway companies as well as each act of the officers and board of directors thereof, in entering into, adopting, or executing the agreement or plan herein set forth, including the issuance and exchange of the capital stock of the Northern Securities Company for the stock of the said Northern Pacific and Great Northern Railway companies on the basis hereinbefore set forth, was, and is, to place the said railway companies and the property and franchises thereof under a single management, and enable a single party or body of men acting as the board of directors of the said Northern Securities Company, or such executive committee as they may designate, [228] to fix all rates and *charges for the transportation of passengers and freight over any and all the lines of railway of each of said companies within the state of Minnesota; to determine what trains shall be operated over each or any of the lines of railway of each of said railway companies, and to remove all competition in freight or passenger traffic over said parallel and competing lines, and prevent the building of lines into new territory as well as into the territory now reached by only one of said lines of railway; that the purpose of said agreement and of the parties thereto was the creation of a trust or the formation of a combination by which a monopoly of railway traffic in northern Minnesota and elsewhere will be perfected; that the defendant company was organized for, and is to be used as a medium through and by which this unlawful agreement, purpose, and object can, and, if not enjoined, will, be accomplished; that this agreement and the consummation thereof is in restraint of trade, tends to create a monopoly in railway traffic, and is against public policy, and void.

That holders of a large majority of the capital stock of both said Great Northern and Northern Pacific Railway companies had knowledge of, consented to, and assisted in carrying out, the agreement, arrangement, and scheme herein set forth by which a large majority of the capital stock of each of said railway companies was to be exchanged for the capital stock of said Northern Securities Company upon the basis and

for the purposes herein set forth; and the said stockholders of said Great Northern and Northern Pacific Railway companies so consenting to, taking part, and assisting in the formation of said Northern Securities Company, and the perfecting of the agreement and scheme herein set forth, constitute all of the stockholders of said Northern Securities Company; and the board of directors and executive officers of said Northern Securities Company hereinafter named have been selected from and elected by such stockholders of said Great Northern and Northern Pacific Railway companies.

That under the articles of association of said Northern Securities Company, its corporate powers and entire business management is vested in a board of directors consisting of *such number as shall be fixed [229] from time to time, by the by-laws of said corporation, and the board of directors itself is authorized to make such by-laws as it deems best, and from time to time to alter, amend, or repeal any by-laws. That the board of directors of said company thereby has power to determine its own number, and to adopt rules and regulations for its own conduct and the conduct of the affairs of said corporation. The articles of association further provide that said board of directors may appoint an executive committee in the manner provided by the by-laws of the company, which committee shall exercise all the powers and duties of said board of directors.

That on or about the 14th day of November, A. D. 1901, the following-named persons were elected as and now constitute the board of directors of said Northern Securities Company, to wit: For the term of one year, James J. Hill, George F. Baker, Daniel S. Lamont, James Stillman, and N. Terhune; for the term of two years, Samuel Thorne, Charles E. Perkins, Jacob H. Schiff, and William P. Clough; for the term of three years, John S. Kennedy, D. Willis James, E. T. Nichols, Robert Bacon, and E. H. Harriman. That on the 15th day of November, A. D. 1901, said board of directors met and elected the following executive officers of said company, to wit: president, James J. Hill; first vice president, John S. Kennedy; second vice president, George F. Baker; third vice president, D. Willis James; fourth vice president, William P. Clough; secretary and treasurer, E. T. Nichols.

Complainant further alleges that said James J. Hill and said William P. Clough were, on said last-named date, the president and vice president respectively of said Great Northern Railway Company; and both were members of the board of directors of said last-named company. That said E. T. Nichols was, on said date and now is, the secretary and assistant treasurer of said Great Northern Railway Company. That said James J. Hill and his associates either own, or have in their possession or under their control, a large majority of the capital stock of said Great Northern Railway Company. That said James J. Hill, Robert

[230] Bacon, George F. Baker, E. H. Harriman, D. Willis James, John S. Kennedy, D. S. Lamont, and James Stillman were, on *said 14th day of November, 1901, and now are, members of the board of directors of said Northern Pacific Railway Company, and constitute a majority of the board of directors of said-named company.

That said James J. Hill and his associate directors and officers of said Northern Securities Company own and control a majority of the capital stock of said last-named company; that during the month of December, 1901, said Northern Securities Company, through its directors and executive officers, began dictating the policy and management of said Northern Pacific as well as said Great Northern Railway Company, and ever since has been and now is directing and managing the business and property of both said Great Northern and Northern Pacific Railway companies, and determining and enforcing freight and passenger rates on many of the lines of railway of said companies in the state of Minnesota, together with the manner and means of handling the freight and passenger business of said companies on such lines of railway, and will continue so to do unless enjoined as herein prayed.

That said Northern Securities Company has no authorized agent or representative within the state of Minnesota on whom a summons or other process in any legal proceeding may be served.

That the massing and concentration of said railway properties, and the control and management thereof in the defendant company in the manner hereinbefore outlined, tends to, and does, create a monopoly in railway traffic in the state of Minnesota, and tends to, and does, deprive the state of Minnesota and the citizens thereof of the privilege of competition in fixing charges and rates of transportation for a large amount of freight transported annually over the lines of railway of each of said railway companies, between stations upon the lines of railway of both said companies within the state of Minnesota.

[231] That it has ever been a part of the settled and public policy of the state of Minnesota to prohibit therein, in any way, the consolidation in any manner of competing and parallel lines of railway; and to this end the legislature of the state of Minnesota did, in the year 1874, pass the following enactment, which *ever since has remained and now is a part of the statute law of the state of Minnesota, known as chapter 29 of the General Laws of 1874, to wit:

"Sec. 1. No railroad corporation, or the lessees, purchaser, or managers of any railroad corporation, shall consolidate the stock, property, or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control, any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the

control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues.

"Sec. 2. This act shall take effect and be in force from and after its passage. Approved March 9, 1874."

That in the year 1881 the legislature of the state of Minnesota passed the following enactment, which ever since has remained, and now is, a part of the statute law of the said state and known as chapter 94 of the General Laws of 1881, to wit:

"Sec. 3. No railroad corporation shall consolidate with, lease or purchase, or in any way become the owner of or control any other railroad corporation or stock, franchises, rights, or property thereof, which owns or controls a parallel or competing line."

"Sec. 4. This act shall take effect and be in force from and after its passage. Approved March 3, 1881."

That said Northern Securities Company is a railroad corporation within the meaning of the laws of the state of Minnesota; and the purpose, object, and design of the said organizers and promoters of said Northern Securities Company, both in the organization thereof and in the making and carrying out of the said plans, agreement, and designs hereinbefore referred to, was and is to violate the said legislative enactments of the state of Minnesota, and to evade and escape the provisions thereof; and it is the purpose, intent, and design of said corporation, its stockholders, directors, executive committee, officers, agents, and representatives, to violate the said legislative enactments, *and to evade and escape [232] the terms and provisions thereof, and to effect a consolidation of said railway corporations and properties as herein alleged. That each and all the said acts are violations and evasions of the said laws and the settled public policy of the state of Minnesota, and unless said parties are enjoined will cause the state of Minnesota irreparable injury.

That for many years last past it has been a part of the settled policy of the state of New Jersey to permit the consolidation of only such lines of railroad as are or can be connected so as to form continuous lines of railroad, and not to permit the consolidation of parallel or competing lines; and to that end, in the year 1885, the legislature of the state of New Jersey enacted a law which permits the consolidation of such lines as shall or may form connecting or continuous lines of railroads.

Your oratrix is informed and believes, and upon information and belief alleges, that defendant is not the owner of any property or stock or securities of any corporation, except as above set forth, and is not engaged in any business whatever except such as is incidental to the ownership of such stock and the general management and control of said Great Northern and Northern Pacific

Railway companies and the railway lines and properties thereof.

Your oratrix further alleges that if the defendant is permitted to control and manage the affairs of said Great Northern and Northern Pacific Railway companies, in a manner hereinbefore alleged or otherwise, all competition between them will forever cease, and a monopoly in railway traffic in Minnesota be created, to the great and permanent and irreparable damage and injury to the state of Minnesota and to the people thereof, and in violation of its laws.

That your oratrix has and can have no other adequate remedy or relief by action at law except as herein prayed for in equity.

To the end, therefore, that the defendant, the Northern Securities Company, may, if it can, show cause why your oratrix should not have the relief herein prayed for, and that it may be compelled to answer all and singular the premises, and all matters and things herein stated, as fully and particularly as if they were here again repeated, and said company thereunto interrogated, [233] *and that the defendant may be required to answer without oath, its answer under oath being hereby expressly waived; and that the defendants may, by the decree of this court, be perpetually enjoined and restrained:

First. From voting at any meeting of the stockholders of either said Great Northern or Northern Pacific Railway Company any of the capital stock of either of said companies by any means or in any manner whatsoever, and from attending, by reason of such ownership, possession, or control of stock, either through its officers or by proxy, or in any other manner, any meeting of the stockholders of either of said companies.

Second. That the defendant, its stockholders, officers, directors, or the executive committee thereof, its attorneys, representatives, agents, or servants, and each of them, be enjoined and restrained from, in any way, aiding, advising, directing, interfering with or in any way taking part, directly or indirectly, in any manner whatsoever, in the management, control or operation of any of the lines of railway of either of said companies, or in the management or control of the affairs of either of said companies.

Third. That the said defendant, its officers, attorneys, representatives, agents or servants, including its board of directors, or any of its members as such, be enjoined and restrained from exercising any of the powers or performing any of the duties, or in any manner acting as a representative, officer, member of the board of directors or employee, of either said Great Northern or Northern Pacific Railway Company, or in any way exercising any management, direction, or control over the same.

Fourth. That said defendant, its stockholders, directors, and other officers, representatives, and agents, be enjoined and restrained from doing any and all acts and making any arrangements or combinations by contract or otherwise having for their object, effect, or result the consolidation or establishment of a joint management or con-

trol in any manner whatsoever of the said Great Northern and Northern Pacific Railway companies, their lines of railway or properties.

Fifth. That the said defendant be enjoined from either directly or indirectly holding, owning, or controlling any of the stock of *either of said companies at one and [234] the same time for any of the purposes or objects alleged in said bill, or otherwise.

Sixth. That in case it shall appear upon the hearing that the defendant owns or controls, or is acting in concert with the owners of, a majority of the capital stock of either of said railway companies, and owns or controls a minority of the stock of the other of said companies, then that the defendant, its officers, directors, agents, or representatives, be enjoined and restrained from receiving, acquiring, or controlling any additional capital stock of such other railway company.

Seventh. And your oratrix further prays the leave of this court to amend this its bill of complaint, if amendment thereto shall become necessary, including the right to bring in other parties defendant for the purpose of giving force and effect to any decree that may be made by the court herein.

And that complainant be granted such other and further or different relief as the nature of this case may require, and as shall be agreeable to equity and good conscience.

Messrs. Wallace B. Douglas and M. D. Munn argued the cause, and, with *Mr. George P. Wilson*, filed a brief for complainant:

The state of Minnesota is so far interested, in its individual capacity, in the subject-matter of this action as to entitle it to maintain the same.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 519, 14 L. ed. 249.

This court will assume that the citizens of the state generally will suffer material injury by the removal of competition in freight and passenger rates within the state.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

The state in its sovereign capacity can appeal to the courts for relief by injunction whenever its property is involved or the public interests are threatened and jeopardized by any corporation—especially one of a public nature like a railroad company—seeking to transcend its powers and to violate the public policy of the state.

Trust Co. v. State, 109 Ga. 736, 48 L. R. A. 520, 35 S. E. 323. See also *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335, 10 S. W. 81; *Com. ex rel. Atty. Gen. v. Pittsburg & C. R. Co.* 58 Pa. 45; *Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 501, 7 Atl. 374.

It is as much a part of the duty of a state, in its sovereign or governmental capacity, to secure to its citizens their common rights as it is of the United States to use its sovereign powers in behalf of its citizens for a similar purpose.

Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331.

Whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or to prevent it from taking measures therein to fully discharge those constitutional duties.

Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The sole ground upon which the state of Kentucky claimed the right to maintain the action brought by it against the Louisville & Nashville Railway Company, as well as one of the principal grounds upon which the state of Indiana claimed the right to maintain the action brought by it against the Ohio Oil Company, was that it was the representative of the interests of the citizens of those respective states.

See *Louisville & N. R. Co. v. Com.* 97 Ky. 675, 31 S. W. 476; *State v. Ohio Oil Co.* 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809.

Both of the above cases subsequently came before this court, and the decision of the state supreme court in each case was affirmed.

See *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576.

When the managing body is doing, or is about to do, an *ultra vires* act of such a nature as to produce a public mischief, the attorney general, as the representative of the public and of the government, may maintain an equitable suit for preventive relief.

Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 631; *Pom. Eq. Jur.* § 1093; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 524; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

The statutes of the state of Minnesota, referred to in the bill now under consideration, the enforcement of which form a partial basis for the relief sought, are in no sense penal statutes; they provide no punishment for their violation, but their violation creates a cause of action in favor of three different classes of individuals or persons: (1) The stockholder of any railroad corporation seeking to consolidate with another in violation of the act would have a cause of action against such corporation; (2) any individual or class of citizens in the state, suffering special injury by reason of such violation, would have a cause of action to enjoin the same (this includes the state in its individual capacity); and (3)

the state of Minnesota, acting as the representative of all the people of the state, has the right to maintain such an action to enjoin the violation of these statutes.

See *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705.

The question whether a statute of one state, which in some respects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

A part of the consideration which the state receives for granting the right to be a corporation and exercise the powers and privileges as such in the state is an agreement on the part of such corporation and its stockholders that it and they will observe the laws of the state relating to such corporation.

Supreme Lodge, K. of P. v. Weller, 93 Va. 605, 25 S. E. 891; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798.

A part of the consideration which the state received for the lands granted was the implied agreement on the part of such railroad corporations and their stockholders, that these lines of railway should be maintained and operated by such corporations as parallel and competing lines.

A railroad company, having constructed and put in operation its road, in part at least, by public aid in the way of taxation, has no right to abandon its road or turn it over to another company to the injury of the state or any portion of the citizens.

State v. Central Iowa R. Co. 71 Iowa, 410, 60 Am. Rep. 806, 32 N. W. 409.

A private action may be maintained in one state, if not contrary to its policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

The declared public policy of New Jersey and the United States is against the consolidation and unification of competing lines of railway, and the removal of competition in freight and passenger rates.

United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

The right to maintain a cause of action created by statute, or which arises by reason of the violation of a statute other than a strictly penal law, has been recognized by this court.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep.

905; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

The franchise of being a corporation belongs to the stockholders.

Memphis & L. R. R. Co. v. Railroad Comrs. 112 U. S. 609, *sub nom. Memphis & L. R. R. Co. v. Berry*, 28 L. ed. 837, 5 Sup. Ct. Rep. 299.

It logically follows that the obligation to obey the law is imposed in the first instance, and forever after remains, upon the stockholders of the corporation. This contract is a binding one, and cannot be escaped.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950. See also *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553.

The stock of the Great Northern and Northern Pacific Railway Companies, in the manner and for the purposes set forth in the bill, must be deemed to be held by the Northern Securities Company as though located in and subject to all the laws of the state of Minnesota; and every power sought to be exercised by it by virtue of such stockholding must be in harmony with, and not in violation of, the laws of the state of Minnesota. The Northern Securities Company can exercise no power by reason of this stockholding, nor any management or control over the Great Northern and Northern Pacific Railway Companies, which is in violation of, or which tends to contravene, the laws of the state of Minnesota.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274.

The Northern Securities Company, as declared by its articles of incorporation, was organized to purchase the stock of railway companies in the state of New Jersey or any other state in the Union, and to vote the same. From this it follows that any stock of a railway company acquired by it outside the state of New Jersey is subject to all obligations or limitations imposed upon such stock, as well as the corporations issuing it.

See *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 52, 22 Sup. Ct. Rep. 52.

The state of Minnesota, in entering the Union, has surrendered its right to enter into any agreement or compact with another state, or to enforce its claims or protect its rights against a citizen of another state, by any means other than through the peaceful halls of judicial tribunals.

Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

It now finds itself confronted with a flagrant and defiant attempt to violate its laws and invade its rights as well as the rights of its citizens; and it comes before this court, the constitutionally authorized tribunal to hear its claims and adjust its controversies with the citizens of another state, and asks the privilege of that jurisdiction. It would ill suit the dignity of the state to be denied this jurisdiction.

No. 81 Federalist.

In this connection we have no doubt this language of Chief Justice Marshall will recur to the minds of the court: "As this court has never grasped an ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it."

See *Fisher v. Cockerell*, 5 Pet. 259, 8 L. ed. 118.

Also this language of Chief Justice Waite: "The evident purpose was to open, and keep open, the highest court of the nation for the determination, in the first instance, of suits involving a state, or a diplomatic or commercial representative of a foreign government."

See *Ames v. Kansas ex rel. Johnston*, 111 U. S. 469, 28 L. ed. 490, 4 Sup. Ct. Rep. 437.

The creation and maintenance, by a citizen or citizens of another state, of a nuisance which operates upon and affects the property of the citizens of the state making the complaint, entitles such state to enjoin the same.

Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331.

Messrs. **William D. Guthrie** and **John W. Griggs** argued the cause, and, with *Mr. John G. Johnson*, filed a brief for defendant:

This court will not entertain a suit brought by a state in this court against a citizen of another state, to enforce a penalty or a penal statute.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. See also *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

It will, indeed, be a surprising revelation if this court shall now declare that it has original jurisdiction to enforce the anti-trust laws of the various states against citizens of other states domiciled in such other states.

United States v. Lathrop, 17 Johns. 4; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 51 L. R. A. 151, 60 S. W. 91.

No state or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein.

Story, Conf. L. §§ 7, 8, 20; *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19; *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691; The Blue Book, 1887, p. 125.

Jurisdiction of the offense or subject-matter, and judicial power to try the offender, are very different things. The first exists whenever the offense is committed within the state; the other, when the offender is brought into court, and not before.

Adams v. People, 1 N. Y. 173; *State v. Hall*, 115 N. C. 814, 28 L. R. A. 289, 20 S. E. 729.

The nature of laws prohibiting the consolidation of railroad companies is substan-

tially similar to that of the anti-trust acts. Such laws have always been recognized as enacted under the police power of the state.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

Both classes of legislation seek the same end, and are exercises of the police power. So, also, as to the regulation of railroad rates. A suit to enforce such regulations, to enjoin their breach, or to collect penalties, would not be a "suit of a civil nature."

Iowa v. Chicago, B. & Q. R. Co. 3 L. R. A. 554, 37 Fed. 497; *Dey v. Chicago, M. & St. P. R. Co.* 45 Fed. 82; *Moloney v. American Tobacco Co.* 72 Fed. 801; *Indiana use of Delaware County v. Alleghany Oil Co.* 85 Fed. 870. See also *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 47, 22 Sup. Ct. Rep. 47.

If, as here, a foreign state "claims the right to maintain [an] action . . . by virtue of its sovereign powers for and in behalf of the citizens of the state," to enforce its penal and police laws, the controversy is not of a civil nature, or one of which courts of other sovereignties take cognizance.

Hardcastle, Statutory Law, 3d ed. 1901, pp. 450, 451; *Huntington v. Attrill* [1893] A. C. 150; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Dicey*, Conf. L. pp. 220, 221.

The real nature of legislation cannot be affected or determined by the mere form of procedure, any more than the absence of a penalty or other punishment can change the real nature of a police law.

Moloney v. American Tobacco Co. 72 Fed. 801.

If the public or police laws of one state are ever recognized and enforced in the courts of a sister state, it is only from considerations of utility and the mutual convenience of states, *ex comitate, ob reciprocam enim utilitatem*; and whatever force and obligation they are permitted to have in such sister state depend solely upon the comity exercised by the latter.

Story, Conf. Laws, §§ 18-23; *Hoyt v. Sprague*, 103 U. S. 613, 26 L. ed. 585; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221.

Proceedings or prosecutions to enforce police or penal laws were, at the time the Constitution was adopted, and ever since have been, considered to be such as would not be entertained by the judiciary of the foreign state at all.

Wisconsin v. Pelican Ins. Co. 127 U. S. 287, 32 L. ed. 242, 8 Sup. Ct. Rep. 1370.

This court has recognized that it cannot enforce those governmental regulations and police laws which are essentially within the comity of states, to be conceded or withheld at their will.

Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. ed. 717, 729.

Cases in which extraterritorial force has been allowed to rights based upon the statute 184 U. S.

ute law of other states have been those in which rights of a purely private nature were concerned,—none the less private and individual because conferred by statute.

Courts, for example, have enforced the so-called statutory liability of stockholders or officers of foreign corporations, although such liability is frequently termed a penalty. But relief has been extended, not upon the theory that the statutes in question conferred ubiquitous rights, but upon the distinct ground that the rights were in fact contractual and personal, and the penalty or redress was for violated private rights.

Flash v. Conn. 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

So, likewise of statutes conferring a right of action for wrongful death. Such statutes are given in other states an apparent force and obligation. The right of action, however, is not based on comity, but, after all, upon a personal trespass or tort, in its essence a civil injury the world over, and upon the theory that the cause of action has accrued within the jurisdiction of the state which enacted the remedy, and that such statutes are not penal. Such enactments are purely remedial.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

*Mr. Justice Shiras delivered the opinion [234] of the court:

Whether a bill in equity filed in this court, in the name of a state, which seeks to prevent by injunction a corporation organized under the laws of another state, with power to acquire and hold shares of the capital stock of any other corporation, from obtaining and exercising ownership and control of two or more competing railroad companies of the complainant state, so as to evade and defeat its laws and policy forbidding the consolidation of such railroads when parallel and competing, presents the case of a controversy of a civil nature whereof this court has jurisdiction under the Constitution and laws of the *United [235] States, and whether the bill in the present case is of that description, or whether it is the case of a suit brought by a state to enforce its penal statutes, and hence within the principle of the decision in *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, are questions which have been ably discussed by counsel.

But it is not necessary for us to consider and answer those questions, for, in view of the nature of the facts presented and the remedies prayed for in the bill proposed to be filed, we think that the suit is defective for want of essential parties whose rights would be vitally affected by the relief sought therein.

The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there

may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. § 72.

The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel. *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Hipp v. Rabin*, 19 How. 271, 278, 15 L. ed. 633, 635; *Parker v. Winnipiseogee Lake Cotton & Woolen Co.* 2 Black, 545, 17 L. ed. 333.

[236] In the case of *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158, the question was fully discussed, and it was shown, upon a review of the previous cases, that there are three classes of parties to a bill in equity. *They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. The court in respect to the act of Congress of February 28, 1839, 5 Stat. at L. 321, chap 36, and to the 47th rule in equity practice, said:

"The 1st section of that statute enacts 'that when in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree

rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties, who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit.'

"This act relates solely to the nonjoinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmation of the rule previously established by the cases of *Cameron v. M'Roberts*, 3 Wheat. 591, 4 L. ed. 467; *Osborn v. Bank of United States*, 9 *Wheat. 738, 6 L. [237] ed. 204, and *Harding v. Handy*, 11 Wheat. 132, 6 L. ed. 437. For this court had already there decided that the nonjoinder of a party who could not be served with process would not defeat the jurisdiction. The act says it shall be lawful for the court to entertain jurisdiction; but as is observed by this court, in *Mallow v. Hinde*, 12 Wheat. 198, 6 L. ed. 600, when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity; whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.' So that, while this act removed any difficulty as to jurisdiction, between competent parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of Congress, and of the previous decisions of the court, on the subject of that rule. *Hogan v. Walker*, 14 How. 36, 14 L. ed. 315.

"It remains true, notwithstanding the act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

California v. Southern P. Co. 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591, was a case in several particulars like the present one. There a bill was filed in this court by the state of California against the Southern Pacific Company, a corporation of the state of Kentucky, claiming title and jurisdiction by the state over certain large tracts of land lying upon the shores of the bay of San Francisco and over the harbor waters of said bay, including San Antonio creek, and averring that the Southern Pacific Company claimed adversely to the state, and was engaged in placing structures

[238] in and upon said tracts of land, thereby obstructing navigation in the bay and adjoining waters. The bill prayed *for a decree quieting the title of the state and enjoining the defendant company from maintaining the structures that it had placed upon said tracts and the adjacent waters. The defendant company answered the bill, denying the ownership of the complainant in the premises in dispute, and setting forth its own title derived from the town of Oakland, as to the whole of the water front of that town, through one Carpentier, as grantee of said town by ordinance and deed of conveyance, and claiming that by subsequent mesne conveyances the said title and property had become vested, as to a part thereof, in the Central Pacific Railroad Company, and, as to another part, in the South Pacific Coast Railway Company, and in the defendant company as lessee. It further was claimed that certain ordinances and deeds of the town of Oakland operated as a grant by the city of Oakland and the state of California of the land to the Oakland Water Front Company, as grantee or alienee of Carpentier. The case was duly put at issue, and a commissioner was appointed to take testimony therein and to return the same to the court.

When the case came on for hearing it was held by this court that the city of Oakland and the Oakland Water Front Company were so situated in respect to the litigation that the court ought not to proceed in their absence. In reaching this conclusion the court reviewed the cases, including the cases above cited and others.

Upon the contention that the city of Oakland and the Oakland Water Front Company might be made parties defendant, and the court thus enabled to proceed with the case, the court held that this could not be done, because this court could not exercise original jurisdiction in a suit between a state on the one hand and a citizen of another state and citizens of the complainant state on the other. Accordingly, the bill was dismissed for want of parties who should be joined, but could not be without ousting our jurisdiction.

We shall therefore proceed to examine the substance of the bill proposed to be filed, in order to see whether it discloses a case in which a decree could be granted which would do final and complete justice between [239] the nominal parties without *vitally affecting other persons not before the court. As already stated, a conclusion reached that the suit cannot be entertained for want of necessary and essential parties will not imply any expression of opinion beyond that question.

As the bill is set forth in full in the preceding statement, it will not be necessary to here repeat its allegations. They may be summarized as follows:

The complainant is the state of Minnesota; the defendant is the Northern Securities Company, a corporation of the state of New Jersey.

It is part of the policy of the state of 134 U. S. U. S., Book 46.

Minnesota, as declared in its public statutes, to prohibit therein the consolidation in any manner of competing and parallel lines of railway. The statutes specially recited in the bill are the act of March 9, 1874, the 1st section whereof is in the following terms: "No railroad corporation, or the lessees, purchaser, or managers of any railroad company, shall consolidate the stock, property, or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control, any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues;" and the act of March 3, 1881, of which the 3d section is as follows: "No railroad company shall consolidate with, lease, or purchase, or in any way become the owner of or control, any other railroad corporation or stock, franchises, rights or property thereof, which owns or controls a parallel or competing line."

The Great Northern Railway Company is a corporation organized and existing under an act duly passed by the territory of Minnesota and under various subsequent acts of the state of Minnesota, and owns and controls, as lessee, several important lines of railroad, some only within and others extending beyond the state of Minnesota, and which are maintained by the Great Northern Railway Company as one complete system. The *board of directors of the Great [240] Northern Railway Company, at the time of the organization of the Northern Securities Company, to wit, on or about November 13, 1901, was and now is composed of the following-named persons, to wit: James J. Hill, James N. Hill, Samuel Hill, William P. Clough, Edward Sawyer, Jacob H. Schiff, and Henry W. Cannon. That on said last-mentioned date the Great Northern Railway Company had issued and there was then outstanding a total of \$125,000,000 par value of the capital stock of said corporation, of which, it is alleged, that said James J. Hill was on said last-mentioned date the owner of, or had subject to his direction and disposition, more than a majority of said capital stock so outstanding.

The Northern Pacific Railway Company was organized under the laws of the state of Wisconsin of the year 1895, and afterwards, by filing a certified copy of its articles of incorporation, became a corporation of the state of Minnesota and subject to the laws of that state relating to railroad corporations. In the year 1896 the Northern Pacific Railway Company duly purchased and became the owner of the entire railroad properties and lines formerly owned by the Northern Pacific Railroad Company, and at all times since has continuously owned and operated each and all of said lines of railway situated within the state of Minnesota,

and which connect the cities of St. Paul and Minneapolis and Duluth, and connect with the lines of railways outside the state of Minnesota. During the year 1899 the said Northern Pacific Railway Company purchased, and ever since has owned and operated a line of railway extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota. Said last-mentioned line parallels and is a competing line of railway for both freight and passenger traffic with the line of railway between said Minneapolis and St. Paul and Duluth, owned by the Eastern Railway Company of Minnesota, but which is operated, controlled, and managed by said Great Northern Railway Company, as a part of the system of that company. The lines of railway now owned and operated by said Great Northern Railway Company within the state of Minnesota are parallel and competing lines for freight and passenger traffic *with the lines of railway now owned, operated, and controlled by said Northern Pacific Railway Company within the state of Minnesota; and also said lines of railway owned, operated, and controlled by said Great Northern Railway Company, and also the lines of railway owned, operated, and controlled by said Northern Pacific Railway Company, which connect with the lines of railway owned, operated, and controlled by each of said companies respectively within the state of Minnesota, are parallel and competing lines through the states of North Dakota, Montana, Idaho, and Washington to Puget Sound on the Pacific Coast, for passenger and freight traffic. That said companies are the only railway companies owning or operating lines of railway crossing the state of Minnesota and connecting the Pacific ocean by rail with points in Minnesota.

That the Chicago, Burlington, & Quincy Railway Company, a corporation of the state of Illinois, has, for many years last past, owned, operated, and controlled an extensive system of railway lines connecting the city of Chicago with the city of Denver, in the state of Colorado, and with the city of Billings, in the state of Montana, which last-named point is a junction and competitive point for freight and passenger traffic with said Northern Pacific Railway Company, etc. That during the year 1901 the said Great Northern Railway Company and said Northern Pacific Railway Company jointly purchased 98 per cent of the total capital stock of said Chicago, Burlington, & Quincy Railway Company, aggregating approximately 107,000,000 of dollars, par value, and now own the same, and issued in payment therefor the joint bonds of said Great Northern and Northern Pacific Railway companies, payable in twenty years from the date thereof, and bearing interest at the rate of 4 per cent per annum, payable semi-annually. That the said Great Northern and Northern Pacific Railway companies issued and delivered in exchange for each \$100 in amount of said Chicago, Burlington, & Quincy Railway Company stock \$200 in amount of the said bonds; and that under

and by virtue of the purchase of the said stock the joint ownership and control of the said Chicago, Burlington, & Quincy Railway Company are vested in, *and ever since [242] have been exercised by, the said Great Northern and Northern Pacific Railway companies. During April, 1901, and ever since, the following-named persons constituted and now are the members of the board of directors of the Northern Pacific Railway Company: James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, H. McK. Twombly, Brayton Ives, D. Willis James, John S. Kennedy, Daniel S. Lamont, Charles S. Mellen, Samuel Rea, William Rockefeller, Charles Steele, James Stillman, and Eben B. Thomas. On November 13, 1901, J. Pierpont Morgan, with certain other unknown persons, but who were acting with said Morgan, owned and had in their possession, or held and had subject to their control and disposition, upwards of 85 per cent of the total capital stock of said Northern Pacific Railway Company. The Northern Securities Company was organized on November 13, 1901, with its principal office at Hoboken, in the state of New Jersey, and the objects for which the corporation was formed, as stated in the articles of incorporation, are to acquire and hold, as investments, the bonds, securities, and capital stock of any other corporation or corporations of the state of New Jersey, or of any other state, territory, or country, and while owner of said stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon; and it is declared that the corporation shall have power to conduct its business in other states and in foreign countries, to have one or more offices out of the state, and to purchase, hold, and convey real and personal property out of the state.

It is alleged that the Northern Securities Company was incorporated at the instigation and request of James J. Hill, William P. Clough, and certain unknown stockholders of said Great Northern Railway Company, who, with said Hill and Clough, owned or controlled, or have the disposition and management of, a large majority of the capital stock of said Great Northern Railway Company, and with the co-operation of J. Pierpont Morgan and certain other unknown stockholders of said Northern Pacific Railway Company, who, with said Morgan, owned and controlled, or have the disposition and management *of, a large majority [243] of the capital stock of said Northern Pacific Railway Company.

On November 14, 1901. James J. Hill, George F. Baker, Daniel S. Lamont, James Stillman, N. Terhune, Samuel Thorne, Charles L. Perkins, Jacob H. Schiff, William P. Clough, John S. Kennedy, Willis James, E. T. Nichols, Robert Bacon, and E. H. Harriman were elected directors of the Northern Securities Company, and said directors on November 15, 1901, elected James J. Hill to be president, and John S. Kennedy, George F. Baker, Willis James, and William P. Clough to be vice presidents, and E. T. Nich-

ols to be secretary and treasurer, of said company. It is alleged that the holders of a large majority of the capital stock of both said Great Northern and Northern Pacific Railway companies had knowledge of and assisted in the formation of the said Northern Securities Company, and that such stockholders, so consenting and assisting, constitute all of the stockholders of said Northern Securities Company.

The bill charges that the purpose of the formation of the Northern Securities Company was to place the management and control of the Great Northern Railway Company and of the Northern Pacific Railway Company under one management, and to thus, in effect, establish a consolidation of said railway companies, and defeat and evade the statutes and policy of the state of Minnesota forbidding consolidation of parallel and competing lines of railway.

[244] The relief prayed by the bill is that the defendant company be perpetually enjoined and restrained from voting, at any meeting of either said Great Northern or Northern Pacific Railway Company, any of the capital stock of either of said companies by any means or in any manner whatsoever, and from attending, by reason of such ownership, possession, or control of stock, either through its officers or by proxy, or in any other manner, any meeting of the stockholders of either of said companies, and from, in any way, aiding, advising, directing, interfering with or in any way taking part, directly or indirectly, in any manner whatsoever, in the management, control, or operation of any of the lines of railway of either of said companies; and that said defendant, its officers, attorneys, representatives, *agents, or servants, including its board of directors, or any of its members as such, be enjoined and restrained from exercising any of the powers or performing any of the duties, or in any manner acting as a representative, officer, member of the board of directors or employee, of either said Great Northern or Northern Pacific Railway Company, or in any way exercising any management, direction, or control over the same; and that said defendant, its stockholders, directors, and other officers, representatives, and agents, be enjoined and restrained from doing any and all acts and making any arrangements or combinations, by contract or otherwise, having for their object, effect, or result the consolidation or establishment of a joint management or control in any manner whatsoever of the said Great Northern and Northern Pacific Railway companies, their lines of railway or properties; and that said defendant be enjoined from either directly or indirectly holding, owning or controlling any of the stock of either of said companies at one and the same time for any of the purposes or objects alleged in the bill, or otherwise, and that in case it shall appear upon the hearing that the defendant owns or controls, or is acting in concert with the owners of, a majority of the capital stock of either of said railway companies, and owns or controls a minority of the stock of the

other of said companies, then that the defendant, its officers, directors, agents, or representatives, be enjoined and restrained from receiving, acquiring, or controlling any additional capital stock of such other railway company; and further for leave to amend the bill of complaint, if amendment thereto shall become necessary, including the right to bring in other parties defendant for the purpose of giving force and effect to any decree that may be made by the court herein.

More briefly stated, the case presented by the charges and prayers of the bill is that the state of Minnesota is apprehensive that a majority of the stockholders respectively of the Great Northern Railway Company and of the Northern Pacific Railway Company have combined and made an arrangement, through the organization of a corporation of the state of New Jersey, whereby such a consolidation, or, what is alleged to amount to the same thing, a joint control and management *of the Great Northern and [245] Northern Pacific Railway companies, shall be effected as will operate to defeat and overrule the policy of the state in prohibiting the consolidation of parallel and competing lines of railway, and therefore appeals to a court of equity to prevent by injunction the operation and effect of such a combination and arrangement.

But at once, as we have seen, the court is put upon inquiry whether the parties and persons to be affected by such an injunction are before it.

The narrative of the bill unquestionably discloses that the parties to be affected by a decision of the controversy are, directly, the state of Minnesota, the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that state, and the Northern Securities Company, a corporation of the state of New Jersey, and, indirectly, the stockholders and bondholders of those corporations and of the numerous railway companies whose lines are alleged to be owned, managed, or controlled by the Great Northern and Northern Pacific Railway companies.

Can such a controversy be determined, with due regard to the interests of all concerned, by a suit solely between the state of Minnesota and the Northern Securities Company? It is, indeed, alleged that all of the stockholders of the Northern Securities Company are stockholders in the two railroad companies, and therefore it may be said that the latter stockholders are sufficiently represented in the litigation by the Northern Securities Company; but it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company. It is obvious, therefore, that the rights of the minority stockholders of the

two railroad companies are not represented by the Northern Securities Company. They have a right to be represented in the controversy by the companies whose stock they hold, and their rights ought not to be affected without a hearing, even if*it were conceded that a majority of the stock in such companies, held by a few persons, had assisted in forming some sort of an illegal arrangement. Moreover, it must not be overlooked that it is not the private interests of stockholders that are to be alone considered. The directors of the Great Northern and Northern Pacific Railway companies are appointed to represent and protect, not merely the private and pecuniary interests of the stockholders, but the rights of the public at large, which is deeply concerned in the proper and advantageous management of these public highways. It is not sufficient to say that the attorney general, or the governor, or even the legislature of the state, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a state, when she voluntarily becomes a complainant in a court of equity, cannot claim to represent both sides of the controversy. Not only have the stockholders, be they few or many, a right to be heard, through the officers and directors whom they have legally selected to represent them, but the general interests of the public, which might be deeply affected by the decree of the court, are entitled to be heard; and that, when the state is the complainant and in a case like the present, can only be effected by the presence of the railroad companies as parties defendant.

Upon investigation it might turn out that the allegations of the bill are well founded, and that the state is entitled to relief; or it might turn out that there is no intention or design on the part of the railroad companies to form any combination in disregard of the policy of the state, but that what is proposed is consistent with that policy and advantageous to the communities affected. But, in making such investigation, a court of equity must insist that both sides of the controversy shall be adequately represented and fully heard.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond*the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States.

As, then, the Great Northern and the Northern Pacific Railway companies are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed, and as our constitutional jurisdiction would not extend to the case if

those companies were made parties defendant, the motion for leave to file the proposed bill must be and is denied.

UNITED STATES, Appt.,

v.

ST. LOUIS & MISSISSIPPI VALLEY
TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 247-257.)

Appeal—from court of claims—finality of judgment—effect of amendment of findings—collision—improper anchorage of war vessel—contributory negligence of vessel with barges.

1. The finality of a judgment of the court of claims cannot be contested by the defendant on account of the filing of amended findings of fact, where this was done at his own request in connection with a motion for a new trial, and he also subsequently took an appeal from the judgment after his motion for new trial was overruled.
2. An amendment of its findings of fact may properly be made by the court of claims in order to make its findings conform to the truth, though final judgment has already been entered, but while its record has not yet passed out of its control by the allowance of an appeal.
3. Anchoring vessels of the United States in an unusual and improper position in a harbor, in total disregard of the usages and regulations of the port requiring notice to the harbor master of the intention to anchor, constitutes negligence on the part of the officers of the vessel, which will render the United States liable in the court of claims for damages thereby caused to other vessels navigating the harbor.
4. A vessel with barges in tow is not chargeable with contributory negligence in case of a collision between war vessels of the United States and some of the barges in tow, when the war vessels were anchored in an improper place in a harbor, where vessels had never anchored before, and were concealed from view by a projecting point of land until the vessel with the tow had come so near that it was impossible to prevent some of the barges from being carried by their headway and by the current into collision with the vessels at anchor.

[No. 89.]

Argued January 10, 13, 1902. Decided February 24, 1902.

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 842, and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

As to rules for avoiding collisions—see notes to *St. John v. Paine*, 13 L. ed. U. S. 537; *Williamson v. Barrett*, 14 L. ed. U. S. 68; *The Abbotsford v. Johnson*, 25 L. ed. U. S. 168; *The E. A. Packer v. New Jersey Lighterage Co.* 35 L. ed. U. S. 453; *The Niagara*, 28 C. C. A. 532; *The Mount Hope*, 29 C. C. A. 368, and *The Imperial* (D. C. D. Or.) 3 L. R. A. 234.

As to liability of tug and tow in a collision between vessels—see note to *The Imperial* (D. C. D. Or.) 3 L. R. A. 234.

A PPEAL from a judgment of the Court of Claims sustaining a claim for damages to barges by collision with war vessels improperly anchored in a harbor. *Affirmed*. See same case below, 33 Ct. Cl. 251.

Statement by Mr. Justice **Shiras**:

[248] On October 17, 1894, the St. Louis & Mississippi Valley Transportation Company filed in the court of claims a suit by way of petition against the United States, in pursuance of the provisions of the act of August 3, 1894, alleging that said company was a corporation of the state of Missouri, and the owner* of the towboat Future City, her barges in tow and freight earning; that owing to a collision on May 5, 1888, in the Mississippi river between said steam towboat and barges and war vessels of the United States, several of the barges, with their cargoes and contents, were sunk and wholly lost, and the freight earnings of such barges for the voyage in progress were lost, or not earned and paid to the claimant; and that said collision and the loss and injury resulting therefrom were solely and directly the result of negligence on the part of those in charge of the said vessels of war; and claimed damages in the sum of \$24,308.

The United States appeared in said court of claims by its Attorney General, and filed an answer traversing and denying the allegations of the claimant's petition. The case was so proceeded in that on March 21, 1898, the court found for the claimant, and adjudged and decreed that the St. Louis & Mississippi Valley Transportation Company should have and recover of and from the United States the sum of \$19,808.85.

On March 21, 1898, the court filed findings of fact and conclusion of law. Subsequently, to wit, on May 14, 1900, the court filed an order withdrawing its former findings of fact, and filed new and amended findings in lieu thereof.

On May 21, 1900, an appeal was prayed for and allowed to this court.

Mr. George Hines Gorman argued the cause, and, with **Assistant Attorney General Pradt**, filed a brief for appellant:

The orders of an executive head of a department, when formulated as regulations and published under express congressional authority, are in effect a statutory enactment, and have all the force and effect of a law of Congress.

Ex parte Reed, 100 U. S. 13, 25 L. ed. 338; *Gratiot v. United States*, 4 How. 80, 11 L. ed. 884; *Maddux v. United States*, 20 Ct. Cl. 193; *Stotesbury v. United States*, 23 Ct. Cl. 292.

A fortiori is this true of a rule of the Supreme Court of the United States made under and pursuant to law. Therefore every judgment of the court of claims must conform to rule 4 of the Supreme Court of the United States for the government of appeals from the court of claims, made in pursuance of the authority conferred by act of March 3, 1863, requiring the court of claims to make and file the findings of fact and

conclusions of law in open court before or at the time they enter judgment in the case.

Findings of the court amount to nothing more than an order for judgment, and are not of themselves the judgment of the court.

Andrews v. Welch, 47 Wis. 134, 2 N. W. 98.

There must be either findings by the court or the verdict of the jury; and a judgment entered without either verdict or findings is fatally erroneous, if not absolutely void.

Stansell v. Corning, 21 Mich. 242; *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721; *Whittlesey v. Hartford, P. & F. R. Co.* 23 Conn. 436; *Haxton v. McClaren*, 132 Ind. 235, 31 N. E. 48; *Ferguson v. Seawell*, 1 Mo. 256; *Watson v. Manhattan R. Co.* 17 Abb. N. C. 289; *Merchants' Nat. Bank v. Pope*, 19 Or. 35, 26 Pac. 622; *Stahl v. Gotzenberger*, 45 Wis. 121; *Pierpont v. Pierpont*, 19 Tex. 227; *Maryott v. Gardner*, 50 Neb. 320, 69 N. W. 837; *Garner v. State ex rel. Moon*, 28 Kan. 790.

In states in which the court is required by law to state separately the facts found and the conclusion of law, as is required of the court of claims, it is universally held that the failure on the part of the court to make such separate statements in the findings renders its judgment reversible upon appeal.

Harris v. Hay, 111 Pa. 564, 4 Atl. 715; *Sweigard v. Wilson*, 106 Pa. 213; *Russell v. Armador*, 2 Cal. 305; *Drainage Dist. No. 4 v. Crow*, 20 Or. 535, 26 Pac. 845; *Stansell v. Corning*, 21 Mich. 244.

After the special finding of the court is filed and judgment rendered, the power of the court over it is at an end, except that the court may, at any time before the close of the term at which the judgment is rendered, grant a new trial.

Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427; *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217; *Levy v. Chittenden*, 120 Ind. 37, 22 N. E. 92; *Hartlepp v. Whiteley*, 129 Ind. 576, 28 N. E. 535, 31 N. E. 203; *Wray v. Hill*, 85 Ind. 546; *Turkington v. Purvis*, 128 Ind. 189, 9 L. R. A. 607, 25 N. E. 879; *Lang v. Baxter*, 69 Fed. 905; *Baptist v. Farwell Transp. Co.* 29 Fed. 180; *Marye v. Strouse*, 6 Sawy. 204, 5 Fed. 494; *Klever v. Seawell*, 12 C. C. A. 653, 22 U. S. App. 458, 65 Fed. 373.

A court may make such modification or correction of its findings as shall make them conform to the truth and cover the issues in the case, but this must be done before the entry of judgment.

Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; *Calhoun v. Gilliland*, 2 Wash. Terr. 174, 2 Pac. 355; *Dowell v. Talbot Paving Co.* 138 Ind. 691, 38 N. E. 389.

It is the duty of the harbor masters to notify a shipmaster of the regulations of a port concerning a certain anchorage ground, and not the business of the shipmaster to inquire concerning it of the harbor master.

Cushing v. The John Fraser, 21 How. 184, sub nom. *The Jas. Gray v. The John Fraser*,

16 L. ed. 106; *The Russia*, 3 Ben. 471, Fed. Cas. No. 12,168.

If a vessel anchors at an improper or unlawful place it is the duty of the harbor master to notify her of that fact, and to require her to move to some place which he considers to be proper and lawful; and if he fails to do so no blame can be attached to the shipmaster for remaining there.

Ibid.

If a harbor master, or others in authority, are lax or careless in their enforcement of harbor regulations, the courts will not enforce such regulations with any more strictness.

Ibid.

A vessel anchored about the middle of a stream 1,600 feet wide is properly anchored.

The Ogemaw, 32 Fed. 920. To the same effect, see *Culbertson v. The Southern Belle*, 18 How. 585, 15 L. ed. 493; *The Culberg v. The Continental*, 3 Woods, 32, Fed. Cas. No. 3,460; *The Masters*, Brown, Adm. 342, Fed. Cas. No. 9,267; *Maltby v. Steam Derrick-boat*, 3 Hughes, 480, Fed. Cas. No. 9,000; *Mereer v. The Florida*, 3 Hughes, 488, Fed. Cas. No. 9,433; *The E. A. Paeker*, 10 Ben. 520, Fed. Cas. No. 4,241; Speneer, Marine Collisions, § 110; *The Mary Powell*, 31 Fed. 622; *Brush v. The Plainfield*, 2 N. J. L. J. 331, Fed. Cas. No. 2,058; *The D. S. Gregory*, 2 Ben. 166, Fed. Cas. No. 4,099.

It is the custom in navigating western rivers, including the Mississippi, for descending vessels to navigate in midstream as nearly as possible, and for ascending vessels to navigate inshore.

Bates v. The Natehez, Newberry, Adm. 489, Fed. Cas. No. 1,102; *The Relief*, Olcott, 104 Fed. Cas. No. 11,693; *Shaw v. The Bridgeport*, 1 Ben. 65, Fed. Cas. No. 12,217; *Shirley v. The Richmond*, 2 Woods, 58, Fed. Cas. No. 12,795; *The Seranton*, 5 Blatchf. 400, Fed. Cas. No. 12,558; *The Belle*, 34 Fed. 669; *Barrett v. Williamson*, 4 McLean, 589, Fed. Cas. No. 1,051.

The custom of navigation on western rivers, including the Mississippi, requires a descending boat to run down the channel where it finds the strongest current and the deepest water, and the ascending boat to keep as close as possible to shore, where the current is less resistful.

Keys v. The Ambassador, 1 Bond, 237, Fed. Cas. No. 7,747.

Neglect of this custom of navigation will render the one neglecting it, if such neglect produces injury, liable in damages.

Sinnott v. The Dresden, Newberry, Adm. 474, Fed. Cas. No. 12,908; *Shirley v. The Richmond*, 2 Woods, 58, Fed. Cas. No. 12,795.

Although the usual rule requires a descending boat to keep in the middle of the river, it may hug the shore so long as it does not interfere with the rights of others; and if an ascending boat is met, and indicates its disposition to hold the shore, the descending boat must give way.

Thorp v. The Defender, 1 Bond, 397, Fed. Cas. No. 14,003.

The rule is applicable to tows.

Snow v. Hill, 20 How. 543, 15 L. ed. 1017.

The burden of proof is always on the moving craft to prove by clear and affirmative evidence that the collision was not due to the persons navigating it, the presumption being always against them.

The Lady Franklin, 2 Low. Dec. 220, Fed. Cas. No. 7,984; *New York & V. SS. Co. v. Calderwood*, 19 How. 241, 15 L. ed. 612; *The Ogemaw*, 32 Fed. 920. See, in accord, *The D. S. Gregory*, 6 Blatchf. 528, Fed. Cas. No. 4,102; *The Virginia Ehrman*, 97 U. S. 309, *sub nom. The Virginia Ehrman v. Curtis*, 24 L. ed. 890; *The Batavier*, 40 Eng. L. & Eq. 25; *The Louisiana*, 3 Wall. 164, *sub nom. Baltimore Steam Packet Co. v. Flushing, C. P. & N. Y. Steam Ferry Co.* 18 L. ed. 85; *The Girolamo*, 3 Hagg. Adm. 169; *The Granite State*, 3 Wall. 310, *sub nom. Wetmore v. The Granite State*, 18 L. ed. 179; *The Wanata*, 4 Ben. 314, Fed. Cas. No. 17,138; *The Bridgeport*, 14 Wall. 119, *sub nom. The Bridgeport v. Shaw*, 20 L. ed. 788.

These general doctrines of maritime law are emphasized by the provisions of the special act referring this case to the court of claims, wherein it is provided "that no judgment shall be rendered against the government unless it shall affirmatively appear from the evidence adduced that such collision was the result of negligence on the part of the officers in command of said vessels of war."

A tug having the power of directing her movements is bound to pursue a safe and consistent course, and is not permitted to place itself and its tow in an unnecessarily exposed or hazardous situation; and it is no defense that it used all reasonable means to avoid danger after having placed itself in a dangerous situation.

The Osecola, 33 Fed. 719; *The Syracuse*, 12 Wall. 166, *sub nom. The Syracuse v. Langley*, 20 L. ed. 382; *The Gioranni v. Philadelphia*, 59 Fed. 303; *The David Morris*, Brown, Adm. 273, Fed. Cas. No. 3,596.

On approaching a narrow channel or dangerous situation it is the duty of the tug to ascertain that the channel is not obstructed, and that there is sufficient room for its tow to pass in safety.

The Osecola, 50 Fed. 326; *The Senator D. C. Chase*, 46 Fed. 874; *The T. W. Snook*, 49 Fed. 686; *Miller v. The Argonaut*, 37 Fed. 910; *Scott v. The Drew*, 38 Fed. 858.

Extraordinary precautions are required of a tug navigating a narrow channel with a tow so large as to occupy the larger portion of the channel.

The Lucy D., 21 Fed. 142; *The Iron Chief*, 11 C. C. A. 196, 22 U. S. App. 473, 546, 63 Fed. 289.

Where in a high and uncertain state of the wind a vessel is approaching a part of the river in which there may be obstructions to navigation, it is her duty to lay by until the wind has gone down and she can pass in safety.

The Mohler, 21 Wall. 230, *sub nom. The Mollie Mohler v. Home Ins. Co.* 22 L. ed. 485.

A steamer having a very large tow, approaching a place where, from the number of vessels in the water and the force of counter currents, navigation with a smaller tow would be less dangerous, is bound to approach with great care, and if, within 2 or 3 miles of the place, she can divide her tow, she is bound to divide it.

The Syracuse, 12 Wall. 167, *sub nom. The Syracuse v. Langley*, 20 L. ed. 382.

A steam tug with a tow in going around a dangerous point where the tide sets strongly across the river is not entitled to occupy half of the river on the right-hand side.

The B. K. Washburn, 19 Fed. 788.

If a vessel chooses to avail herself of a particular mode of going down a river at a particular time and place, which renders it difficult to escape collisions, and a collision does take place, she must bear the consequences of the contingency to which she has exposed herself.

1 Parsons. Shipping & Admiralty, ed. 1869, p. 575: *The Hope*, 2 W. Rob. 8; *The Nettie*, 35 Fed. 615; *The Uncle Abe*, 18 Fed. 270.

A tug has been frequently held in fault for assuming to tow under circumstances rendered dangerous by its own lack of power to handle the tow.

The Osecola, 50 Fed. 326; *The Senator D. C. Chase*, 46 Fed. 874; *The T. W. Snook*, 49 Fed. 686; *Miller v. The Argonaut*, 37 Fed. 910; *Scott v. The Drew*, 38 Fed. 858.

Precautions not seasonably taken afford no defense against the charge of negligence in cases of collision, where it appears that the disaster might have been prevented by earlier action.

The Vanderbilt, 6 Wall. 225, *sub nom. The Vanderbilt v. McKibbin*, 18 L. ed. 823; *The Teutonia*, 23 Wall. 77, *sub nom. Seward v. The Teutonia*, 23 L. ed. 44; *The Connecticut*, 103 U. S. 710, *sub nom. Schuyler's Steam Tow-Boat Line v. Caleb*, 26 L. ed. 467. See also *The Syracuse*, 12 Wall. 167, *sub nom. The Syracuse v. Langley*, 20 L. ed. 382.

In navigating in foggy weather near piers, or where the presence of boats may reasonably be expected, or in the navigation of a narrow channel, prudence demands the greatest care, and the speed should be reduced to a point where the forward direction of the boat may be changed on approach of danger.

The St. John, 29 Fed. 221; *Gray v. The Jessie Russell*, 5 Fed. 639; *The Minnie*, 20 Fed. 543.

Seven or eight miles an hour is too great a rate of speed for a steamboat having barges in tow at a dangerous point on the Mississippi river.

Security Ins. Co. v. The Milwaukee, 4 Am. L. T. 147; Spencer, Marine Collisions, § 148.

Proof that excessive speed did not contribute to the injury must be clear and positive, and the burden is always upon the party asserting the fact.

The City of Macon, 47 Fed. 919; *The Florida*, 4 Blatchf. 470, Fed. Cas. No. 4,889. 184 U. S.

Mr. James H. Hayden argued the cause, and, with Mr. Joseph K. McCammon, filed a brief for appellee:

The amendment of the findings was made prior to the allowance of the application for this appeal, and therefore while the court of claims had control of the case.

Ex parte Roberts, 15 Wall. 384, 21 L. ed. 131; *Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632; *Ex parte United States*, 16 Wall. 699, 21 L. ed. 507.

So long as it retained control of the case and the record, it was competent for the court of claims to correct mistakes in the findings, when brought to its notice, so that the findings sent up on appeal should state the truth.

Ex parte Roberts, 15 Wall. 384, 21 L. ed. 131, 8 Ct. Cl. 118; *Kirk v. United States*, 28 Ct. Cl. 276.

Other courts in this country possess and exercise the same power over their records until these pass from their control by appeal, by the termination of a term of court, or by some other limitation prescribed by local statute.

North v. Peters, 138 U. S. 271, 34 L. ed. 936, 11 Sup. Ct. Rep. 346; *Goddard v. Ordway*, 101 U. S. 745, *sub nom. Phillips v. Ordway*, 25 L. ed. 1040; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872.

The appeal which the United States has taken, of necessity admits the existence and the finality of the judgment.

Ex parte Roberts, 15 Wall. 384, 21 L. ed. 131; *Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632; *Ex parte United States*, 16 Wall. 699, 21 L. ed. 507.

For the purposes of this appeal, the facts set out in the findings "must be taken as undisputed."

United States v. Adams, 6 Wall. 101, 18 L. ed. 792; *McClure v. United States*, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 321.

The presumption that where a collision occurred between two vessels, one of which was at anchor and the other in motion, the latter was at fault, may be rebutted by proof that the moving vessel exercised ordinary care, and that the collision was caused by the fault of the anchored vessel.

Spencer, Marine Collisions, § 120; *The Scioto*, 2 Ware, 365, Fed. Cas. No. 12,508.

Every vessel, from whatever part of the world she may come, is bound to take notice of, and conform to, local usages of navigation.

Cushing v. The John Fraser, 21 How. 184, *sub nom. The Jas. Gray v. The John Fraser*, 16 L. ed. 106.

In courts of admiralty such usages and local rules sanctioned by authority of a state are taken as evidence of what is a vessel's duty under the circumstances provided for.

The Raithwaite Hall, 30 L. T. N. S. 233; *The Vanderbilt*, 6 Wall. 225, *sub nom. The Vanderbilt v. McKibbin*, 18 L. ed. 823; Spencer, Marine Collisions, § 21.

Even where a particular custom involves a departure from the general rules of navi-

gation, if it has received general sanction in the locality where it prevails, and has been found necessary or reasonable, it will be respected in determining the propriety of a vessel's course.

Spencer, *Marine Collisions*, § 22; *The Favorita*, 18 Wall. 598, *sub nom. The Favorita v. Union Ferry Co.* 21 L. ed. 856.

Sailing vessels, especially when descending the river, usually keep well over to the western side of the channel, leaving the eastern side of the same for the uninterrupted passage of vessels propelled by steam. Vessels of all kinds, whether propelled by steam or sails, are allowed and expected to vary their respective courses to correspond with well-known sinuosities of the navigable portion of the river, and to avoid the dangers of navigation arising from rocks, shoals, and sand bars, as well as from curves and bends in the banks of the river or channel of navigation.

The John L. Hasbrouck, 93 U. S. 405, *sub nom. Lyman v. The John L. Hasbrouck*, 23 L. ed. 962.

A vessel cannot be held in fault for proceeding in the manner sanctioned by local custom, and is under no obligation to take the precautions required by a custom prevailing in another port of the same river.

The Victoria, 37 C. C. A. 40, 95 Fed. 184.

In several cases where the facts were similar to those under consideration, it was held that the moving vessels were blameless, while the vessels with which they collided, having anchored in improper, exposed, or unusual positions, were guilty of fault and liable for the losses which ensued.

Fawcett v. The L. W. Morgan, 6 Fed. 200; *The Scioto*, 2 Ware, 360, Fed. Cas. No. 12,508; *Cusning v. The John Fraser*, 21 How. 184, *sub nom. The Jas. Gray v. The John Fraser*, 16 L. ed. 106.

The United States vessels, without necessity or excuse, came to anchor and remained in unusual and improper positions, where their presence rendered the navigation of the river by certain vessels extremely dangerous. In so doing they were guilty of negligence.

Cushing v. The John Fraser, 21 How. 184, *sub nom. The Jas. Gray v. The John Fraser*, 16 L. ed. 106; *The Vanderbilt*, 6 Wall. 225, *sub nom. The Vanderbilt v. McKibbin*, 18 L. ed. 823; *The Raithwaite Hall*, 30 L. T. N. S. 233; Spencer, *Marine Collisions*, §§ 21-23, 99, 106; *The Scioto*, 2 Ware, 360, Fed. Cas. No. 12,508; *Fretz v. Bull*, 12 How. 466, 13 L. ed. 1068; *The Jeremiah Godfrey*, 17 Fed. 738; *Morten v. Five Canal-Boats*, 24 Fed. 500; *The Margaret J. Sanford*, 30 Fed. 714; *The Fort Lee*, 31 Fed. 570.

The United States ships were under obligation to signify their presence to approaching vessels, and to endeavor to avoid collisions by veering chain.

The Richmond, 12 C. C. A. 1, 26 U. S. App. 183, 63 Fed. 1020.

The defense that a collision was the result of inevitable accident cannot be maintained where a vessel voluntarily put itself

in a situation where it received the effect of natural forces, the results of which could have been foreseen and might reasonably have been anticipated.

Spencer, *Marine Collisions*, § 195; *Union SS. Co. v. New York & V. SS. Co.* 24 How. 301, 16 L. ed. 699; *Sampson v. United States*, 12 Ct. Cl. 480; *The Clarita*, 23 Wall. 1, *sub nom. The Clara Clarita v. Cox*, 23 L. ed. 146.

It appearing that the future city was without fault, and that the United States ships anchored and remained in exposed and unlawful positions, the burden of proof is upon the latter to show a valid excuse for their conduct.

Spencer, *Marine Collisions*, § 125; *The Scioto*, 2 Ware, 360, Fed. Cas. No. 12,508; *The Great Republic*, 23 Wall. 20, *sub nom. Thompson v. The Great Republic*, 23 L. ed. 55; *The Grace Girdler*, 7 Wall. 196, *sub nom. Lockwood v. The Grace Girdler*, 19 L. ed. 113.

The officers of the United States ships were in absolute command of them, and were responsible for their management.

Ayers v. Knox, 7 Mass. 310.

*Mr. Justice Shiras delivered the opinion of the court: [248]

After the findings of fact, conclusions of law, and judgment were filed by the court of claims on March 21, 1898, two successive motions for a new trial were made on behalf of the defendant. The result of these motions was that on May 14, *1900, the court [249] filed an order withdrawing its former findings of fact, and filed new and amended findings and opinion; and it is now contended that by such action in amending its findings of fact and modifying its opinion the court must be deemed to have set aside its judgment. But as the amendments of the findings were made at the request of the defendant in connection with the motions for a new trial, we think that the existing conclusions of law and judgment were not thereby disturbed. Obviously the changes or modifications in the findings, at the instance of the defendant, were intended by the court to enable the case of the defendant to be most advantageously presented for review by the court below on the motions for a new trial, and by this court on appeal. The motions for a new trial having been overruled, the judgment rendered on March 21, 1898, remained as the judgment of the court of claims, and that is the judgment from which the defendant appealed, and which is now before us for review. By taking such appeal, the defendant must be deemed to have admitted the existence and finality of the judgment. Nor is it perceived that the defendant has any reason to complain that the findings, on which the conclusions of law and the judgment were based, were amended at its instance. So far as the amendments were at all material, they were, in some instances, favorable to the case of the defendant, and, at all events, must be regarded as a proper exercise of authority by the trial court in making its findings conform to the

truth, while its record had not passed out of its control by the allowance of an appeal.

The material facts found by the court of claims were as follows: The Future City and the barges comprising her tow were all staunch, sound, and seaworthy, and were fully and adequately manned, officered, and equipped, and the Future City was ample, powerful, and able to handle her tow under any and all circumstances arising in the navigation of the Mississippi river. On May 7, 1888, the Future City with her tow was descending the river and approaching the port of New Orleans, with the intention of making a landing, and while so descending the river the Future City followed the proper and customary course of navigation for descending towboats with tows. A towboat [250] with *a tow bound for the port of New Orleans, and pursuing the proper and customary course for such vessels, cannot make out and see vessels and other objects lying in that portion of the river below a point of land at Celeste street and between the western shore and the middle of the stream, because that point and the buildings standing upon it, and the shipping moored along its banks, intervene and completely shut off the view in that direction.

Upon rounding the point of land at Celeste street the Future City for the first time sighted five United States vessels, to wit, the Atlanta, Galena, Ossipee, Yantic, and Richmond, lying at anchor below the said point of land and between the western bank of the river and the middle of the stream. The Future City could not have made out and discovered the United States vessels before, because the said point of land intervened and, with the buildings upon it and the shipping moored along its banks, completely shut off the view in the direction of the portion of the river where those vessels lay at anchor. As soon as she sighted and discovered the United States vessels lying at anchor in her usual and proper course, the Future City backed under a full head, working full stroke, with all the power she had, thus adopting the only course feasible and proper in the circumstances, or in anywise calculated to prevent her from colliding with the United States vessels. On account of the insufficiency of time and space after she discovered the United States vessels, and notwithstanding that she made every possible effort to keep clear of the United States vessels, and, in order that her tow might extend out into the river as short a distance as its length would permit, backed her stern as close to the New Orleans shore as it was in anywise possible without coming into collision with the shipping moored therealong, and notwithstanding that she was skilfully and properly handled and managed by her officers and crew, the Future City was unable, on account of the short distance intervening, either to check her headway or to straighten up, and still being in a flanking position, she and her tow were carried by her headway and the current of the river, and barge 73, the leading barge of her tow on the port side, came into

collision with the Atlanta,*striking against[251] the ram of that vessel broadside on with great force. As a result of this collision barge 73 was cut down, and sank, with all her cargo.

Thereafter, notwithstanding that the Future City continued to pursue the only course feasible and proper in the circumstances and in anywise calculated to avoid further collisions with other of the United States vessels, and continued to back with all her power, and notwithstanding that she was skilfully managed and handled by her officers and crew, yet her stern having been swung slightly down stream by the collision of barge 73 with the Atlanta, she was unable to check her headway or straighten up, and was carried by her headway and the currents of the river, and barge 68, the leading barge on the starboard side, collided with the Galena, and was sunk with all her cargo. Notwithstanding that the Future City was skilfully and properly handled, and that she and her officers and crew did their utmost to control her remaining barges and to prevent further collisions between them and the United States vessels, barge 50 broke loose and was carried by the current, and came into collision with the Richmond, and thereby sustained great damage and the loss of part of its cargo.

The United States vessels, as they lay at anchor on May 7, 1888, were ranged in an irregular line along the western bank of the river, which is the city side, their distances from said bank varying from 500 to 700 feet. The Atlanta was anchored highest up stream, and was about 150 feet below the Richard street ferry, and the entire fleet extended down the river for the distance of about 1 mile—the Richmond lying off and about opposite the barge landing. At Celeste street the shore extends into the river to a sharp point, and the river bends from that point to the north. Just below, the width of the stream is about 1,800 feet. The location of the Atlanta, 600 feet, or a little less, from the New Orleans shore, put that vessel in the track of tows entering the harbor from above. It was in the pathway of a tow of even less length than the plaintiff's, at that particular place engaged in flanking down to the landing. The upper vessel was at the entrance to the harbor, and the fleet was located in the way of all vessels descending and seeking *to land in [252] the neighborhood of the barge landing. When the United States vessels were first sighted or discovered by the Future City the Atlanta was distant from her about 150 yards.

The positions occupied by the United States vessels were directly in the track of towboats with tows descending the Mississippi river bound for the port of New Orleans, and pursuing their proper and customary course of navigation, and were thus directly in the track of course of which the Future City and her tow were pursuing when she first sighted and discovered them. The positions thus occupied by the United States vessels were improper and unusual, by reason of their being higher up stream, too

short a distance below the point of land at Celeste street, not at the bank, but nearer to the New Orleans or western shore in the river, than the proper, usual, and customary anchorage grounds for such or other vessels, or than vessels had ever before been known to occupy while at anchor. By reason of their being anchored so high up the river such short distances below the point of land at Celeste street and so close to the New Orleans shore, and by reason of their swinging at anchor, they rendered the navigation of the river by towboats with tows, pursuing their usual and customary course, hazardous and extremely dangerous. On May 7, 1888, and prior thereto, there was an abundance of good and suitable anchorage ground lower down the river and nearer its eastern or Algiers shore, where it was usual, customary, and proper for vessels to lie at anchor while at the port of New Orleans, and where the United States vessels could have lain at anchor in perfect safety and without rendering the navigation of the river at the port of New Orleans either hazardous or dangerous for any vessels pursuing their usual, proper, and customary courses. Good holding ground for vessels like the men-of-war to safely anchor at all times existed within 20 feet of the Algiers shore. The United States vessels came to anchor in their said positions on or about May 5, 1888, while the *Future City*, with her tow, was descending the Mississippi river on her voyage from St. Louis, and none of her officers or crew had notice or knowledge of their presence at New Orleans, or of their whereabouts, or of the manner in which they were

[253] anchored, until they were sighted and discovered after the *Future City* had rounded the point of land at Celeste street. There is a clear and well-defined custom at New Orleans respecting the course and practice of tows to land. Descending tows come close to the shore on the city side of the river. If they did not pursue this course descending tows would come down in the current so far out that the motive power could not back the tow to land. One of the reasons for coming in close to the shore is to catch the slack near vessels moored to the shore.

Under the laws of the state of Louisiana there existed, at the time of this occurrence, a board of five harbor masters, who were charged with the duty of "regulating and stationing all vessels in the stream of the river Mississippi, within the limits of the port of New Orleans, and at the levees thereof." Among the rules and regulations adopted by the board, and at that time in force, was one prescribing that "the harbor masters have authority by law to regulate, moor, and station all seagoing or coasting vessels at the levee, and to remove them from time to time to make room for others, and of the degree of accommodation which one vessel shall afford another the harbor master is constituted sole judge;" and another which provides that "all vessels arriving at this port shall notify the harbor master of the district or leave word at the central office, where the place of landing will be desig-

526

nated; otherwise they will be removed at the expense of the vessel;" and another which declares that "masters of vessels failing to comply with the rules will be held responsible for all damages in consequence, besides laying themselves liable under the law."

Upon the arrival of these United States vessels in May it does not appear that the harbor master was notified of the fact, nor was word left at the central office that the vessels had arrived. The harbor master exercised no personal supervision over the matter of the anchorage of the fleet, and was without knowledge of the places taken in the river by the said war vessels.

The court of claims further found, in its twenty-fourth finding, that "the said collisions were the result of negligence on the part of the officers in command of the United States vessels *in bringing them to anchor [254] in improper and unusual positions, and in causing them to be anchored on swinging chains, as aforesaid."

A lengthy discussion is made in the briefs of the respective counsel as to the nature of this finding. Is it a finding of the ultimate fact in the case, or is it merely a conclusion of law based on the facts previously found?

It is said, on the one hand, that, by the express terms of the act of Congress authorizing this suit to be brought, no judgment shall be rendered against the government unless it shall affirmatively appear, from the evidence adduced, that such collision was the result of negligence on the part of the officers in command of said vessels of war, and that the court of claims, having affirmatively found that the collisions were the result of negligence on the part of the officers in command of the United States vessels, such finding is a conclusion of fact, which conclusively disposes of the case, and which, so far as the right to recover is concerned, leaves no question of law to be passed upon by this court. On the other hand, it is claimed that negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence, and that, hence, this court can determine, from the facts otherwise found, whether the collision was the result of negligence on the part of the officers in command of the vessels.

We do not think it necessary to weigh this question in a very delicate balance, as we are of opinion that, even if the government's contention in that particular is sound, yet the evidence adduced, as it appears in the facts found, was sufficient to warrant the court below in holding that it affirmatively appeared that the collision was the result of the negligence of the officers in command of the vessels.

Undoubtedly, by entering the port of New Orleans, intending to anchor and remain there, in total disregard of the usages and regulations of the port, the officers in command of the vessels were negligent. Ports like those of New Orleans and New York, which are frequented, not merely by seagoing vessels, but by numerous vessels and barges engaged in commerce, or *rivers which [255]

184 U. S.

enter and form part of the harbors, require regulations suited to the local exigencies.

"An ordinance of the city authorities of Charleston, prescribing where a vessel may lie in the harbor, how long she may remain there, what light she must show at night, and making other similar regulations, is not in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States. It is therefore valid. A vessel at anchor is bound to show such a light as is required by the local regulations." *Cushing v. The John Fraser*, 21 How. 184, sub nom. *The Jas. Gray v. The John Fraser*, 16 L. ed. 106; *The Vanderbilt*, 6 Wall. 225, sub nom. *The Vanderbilt v. McKibbin*, 18 L. ed. 823.

There was also culpable negligence in anchoring in an unusual and improper position.

"It is negligence for a vessel to moor so near the entrance to a harbor that shipping, entering in stress of weather, is liable to become embarrassed by its presence; and where the usual difficulties of navigation make the entrance to a harbor a dangerous undertaking, it is especially reprehensible for a vessel to moor in a situation tending to increase these difficulties."

"Where a vessel is at anchor in a proper place, and is observant of the precaution required by law, it is not liable for damages sustained by a vessel in motion colliding with it, but where it anchors in an unlawful position, or fails to observe the statutory requirements and such other precautions as good seamanship would suggest, it must suffer the consequences attending a violation of the law." *Spencer, Marine Collisions*, §§ 99, 106.

"A vessel ought not to be moored, and lie in the channel or entrance to a port except in cases of necessity; or, if anchored there from necessity, she ought not to remain there longer than the necessity continues. If she does and a collision takes place with a vessel entering the harbor, she will be considered in default." *The Scioto*, 2 Ware, 360, Fed. Cas. No. 12, 508.

The treatment of the question of negligence on the part of those in command of the government's vessels was so full and satisfactory by the court below that we think it sufficient to refer to its opinion, reported in 33 Ct. Cl. 251.

[256] The dissent on the part of Peelle, J., did not arise out of any *view that the United States officers had not been negligent, but was based on the opinion of the dissenting justice that negligence on the part of the plaintiff had contributed to the accident.

Adverting to that aspect of the case, we think that, upon the findings made, which of course control us, the plaintiff was not chargeable with contributory negligence. The findings show that the *Future City* entered the harbor and maneuvered for landing, in the manner customary for vessels of her class; that she had no reason to expect to find vessels at anchor, where none had ever

been known to anchor before, on the city side of the river and close under the point at Celeste street, and that her management, when she encountered the exigency, was skilful and proper.

The court of claims further found that the damages caused to the plaintiff, as a result of the collisions, amounted to the sum of \$19,808.85.

It is contended on behalf of the government that, even if the collision was the result of negligence on the part of the officers in command of said vessels of war, and even if, on the facts found, the plaintiff was properly exonerated from the charge of contributory negligence, yet that the judgment of the court below was erroneous in including the loss and damages caused to barge 68.

This contention is based on an alleged difference between the findings of fact filed on March 21, 1898, and those filed on May 14, 1900, whereby, it is claimed that the facts that were found in the first finding, and upon which the liability of the government for barge 68 was based, were eliminated, and hence there was no foundation left for the judgment in that respect. This record does not disclose to us the first finding, and, of course, we can only consider the findings as amended and filed on May 14, 1900. But, even conceding that the discrepancies pointed out exist, yet we think that the findings actually and finally made furnish sufficient support for the judgment in the particular complained of. Finding sixteen is explicit, that, "notwithstanding the *Future City*, after the collision with the *Atlanta*, continued to pursue the only course feasible and proper *in [257] the circumstances, and in anywise calculated to avoid further collisions with other of the United States vessels, and continued to back with all her power, and notwithstanding that she was skilfully and properly handled and managed by her officers and crew, yet her stern having been swung slightly down stream by the collision of barge 73 with the *Atlanta*, she was unable to check her headway or straighten up, and was carried by her headway and the currents of the river, and went down toward the *Galena*, which was lying about 400 feet astern of the *Atlanta* and closer to the New Orleans shore than the latter. In the collision between barge 68 and the *Galena* the lines and fastenings of the said tow and the rigging of the *Future City* were parted or greatly damaged, and her tow was broken up and the lead barge (68), the barge on the starboard side, struck the *Galena* and was sunk, with all cargo aboard, and the barge and her freight earnings became a total loss."

Inasmuch as the court found that everything that was possible to avert further collisions after the collision with the *Atlanta* was done by the *Future City*, it, in effect and indeed in terms, found that the loss of the three barges occasioned by collision with the *Atlanta*, the *Galena*, and the *Richmond*, was occasioned by negligence of the officers in command of the said United States ves-

sels, in bringing them to anchor in improper and unusual positions, and in causing them to be anchored on swinging chains.

The judgment of the Court of Claims is affirmed.

[258]*CLEMENT STUDEBAKER, *Plff. in Err.*,
v.

JOHN PERRY, as Receiver of the National Bank of Kansas City.

(See S. C. Reporter's ed. 258-269.)

National banks—individual liability of shareholders—second assessment—statutes—contemporaneous construction.

1. The Comptroller of the Currency is authorized to make a second assessment upon the shareholders of an insolvent national banking association, where the first assessment proves insufficient to pay the debts and liabilities of the bank, by U. S. Rev. Stat. § 5234, empowering him, if necessary to pay the debts of such association, to enforce the individual liability of its shareholders, which, by § 5151, is measured by the par value of their stock in addition to the amount invested therein, so long as both assessments do not exceed that amount.
2. Contemporaneous and practical construction put upon a statute by executive officers will not be resorted to in aid of the interpretation of such statute, unless the construction involved is one of doubt, and those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance.

[No. 122.]

Argued January 17, 20, 1902. Decided February 24, 1902.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Illinois in favor of plaintiff in an action to enforce an assessment on a shareholder in an insolvent national bank. *Affirmed.*

See same case below, 43 C. C. A. 69, 102 Fed. 947.

Statement by Mr. Justice Shiras:

On November 9, 1899, in the circuit court of the United States for the northern district of Illinois, John Perry, as receiver of the National Bank of Kansas City, brought an action against Clement Studebaker, to recover an assessment made by the Comptroller of the Currency on stock held by the defendant in said bank.

The declaration set forth the incorporation of the National Bank of Kansas City; the ownership by the defendant of 189 shares of its capital stock of the par value

of \$100 each; the insolvency of the bank; an assessment by the Comptroller of the Currency on February 11, 1896, of 16 per cent on the stock; the payment by the defendant of said assessment; a finding by the Comptroller of the Currency on February 25, 1899, that the first assessment was insufficient, and the necessity of an additional assessment of 7 per cent; the levy of said second assessment; the direction by the Comptroller to the receiver to collect it, and the refusal of the defendant to pay.

A demurrer was filed raising the question of the sufficiency in law of the declaration. The demurrer was overruled, and the defendant electing to stand by his demurrer, judgment was rendered for the amount of second assessment upon the stock owned by the defendant. A writ of error was allowed, and the cause was taken to the circuit court of appeals of the seventh circuit, where the judgment of the circuit court was affirmed. *43 C. C. A. 69, 102 Fed. 947. [259] The case was then brought to this court by a writ of error duly allowed.

Mr. Hugh C. Ward argued the cause and filed a brief for plaintiff in error:

The individual liability of national bank shareholders is contractual.

United States v. Knox, 102 U. S. 424, 26 L. ed. 216; *Richmond v. Irons*, 121 U. S. 55, 30 L. ed. 873, 7 Sup. Ct. Rep. 788; *First Nat. Bank v. Hawkins*, 174 U. S. 372, 43 L. ed. 1011, 19 Sup. Ct. Rep. 739; *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

The individual liability of stockholders in corporations generally is a contract liability.

Cook, Corp. § 223.

The statute making national bank shareholders individually liable for the debts of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, being in derogation of the common law, must be strictly construed.

1 *Cook, Corp.* § 241; *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216; *Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738; *Lowry v. Inman*, 46 N. Y. 119.

If such liability is sought to be enforced to its full extent, it must be by an action at law, and by a proceeding in equity or at law if only a part is sought to be enforced.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; *Cascy v. Galli*, 94 U. S. 676, 24 L. ed. 168.

The determination of the Comptroller of the Currency is conclusive as to the extent to which liability of stockholders of insolvent banks may be enforced in suits against them.

Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448.

As soon as the Comptroller decides that the assets are insufficient to pay such bank's debts, he has a right of action for the full amount of such liability, or so much thereof as he may elect to collect.

O'Connor v. Witherby, 111 Cal. 523. 44 184 U. S.

NOTE.—On construction of statutes—see notes to *Riggs v. Palmer* (N. Y.) 5 L. R. A. 340; *United States v. Saunders*, 22 L. ed. U. S. 736; *Maillard v. Lawrence*, 14 L. ed. U. S. 925; and *Blake v. National City Bank*, 23 L. ed. U. S. 119.

Pac. 227; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476.

Stockholders of a corporation are individually liable according to the plain meaning of the terms employed by the legislature, and not otherwise; and the operation and effect of the statute, or the liability of the stockholder, which is measured by it, cannot be extended by implication.

Carroll v. Green, 92 U. S. 509, 23 L. ed. 738; *Lowry v. Inman*, 46 N. Y. 119.

The Comptroller is authorized to make but one order fixing the individual liability of a national bank shareholder.

2 Morawetz, Priv. Corp. 2d ed. § 882; *Cook, Corp.* § 218.

A single contract liability cannot be divided so as to support two actions.

Baird v. United States, 96 U. S. 430, 24 L. ed. 703; *Hennequin v. Barney*, 24 Fed. 582; *Bartels v. Schell*, 16 Fed. 341; *United States v. Throckmorton*, 98 U. S. 65, 25 L. ed. 95; *Secor v. Sturgis*, 16 N. Y. 558; *Mascarel v. Raffour*, 51 Cal. 242; *Day v. Prescott*, 40 Ala. 624; *Codwise v. Taylor*, 4 Sneed, 346.

The rule against splitting demands is a legal right of defendant.

Lawrence v. United States, 8 Ct. Cl. 252; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423.

There is always a presumption against an intent to change the existing law.

Black, Interpretation of Laws, § 52; *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239. See also *Manuel v. Manuel*, 13 Ohio St. 458; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376.

The engagement of the shareholder is to pay an amount equal to the entire par value of the stock if demanded. This liability constitutes a single and indivisible cause of action.

Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; *Re Hollister Bank*, 27 N. Y. 393, 84 Am. Dec. 292; *Smith v. Huckabee*, 53 Ala. 191.

A court of equity in a proceeding to enforce the individual liability of national bank shareholders has power to make successive assessments, and will do so at the request of a receiver under direction of the Comptroller.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; *Godfrey v. Terry*, 97 U. S. 177, 24 L. ed. 946; 2 Morawetz, Priv. Corp. 2d ed. § 902; *De Weese v. Smith*, 97 Fed. 309.

Corporations have no implied power to make such levies beyond the par value of stock; and even when the power is expressly conferred it will receive a strict construction.

23 Am. & Eng. Enc. Law, pp. 803, 817; Morawetz, Priv. Corp. § 131; 2 Beah, Priv. Corp. § 590; *Price's Appeal*, 106 Pa. 421; *Upton v. Tribilecock*, 91 U. S. 45, 23 L. ed. 203; *Sagory v. Dubois*, 3 Sandf. Ch. 466.

The contemporaneous construction of a statute by those charged with its execution—especially when it has long prevailed—is entitled to great weight, and should not be disregarded or overturned except for cogent
184 U. S.

reasons and unless it is clear that such construction is erroneous.

John v. Virginia, 6 Wheat. 418, 5 L. ed. 294; *United States v. Moore*, 95 U. S. 760, 24 L. ed. 588; *United States v. Johnston*, 124 U. S. 253, 31 L. ed. 396, 8 Sup. Ct. Rep. 446; *United States v. Philbrick*, 120 U. S. 59, 30 L. ed. 561, 7 Sup. Ct. Rep. 413; *Robertson v. Downing*, 127 U. S. 613, 32 L. ed. 271, 8 Sup. Ct. Rep. 1328.

Messrs. George W. Wall and Francis F. Oldham argued the cause, and, with Messrs. Walter W. Ross and M. J. Kirkman, filed a brief for defendant in error:

The Comptroller has the exclusive power to determine what amount it is necessary for the stockholders to pay, and suit can be maintained by the receiver only after such levy of an assessment by the Comptroller.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476.

The obvious purpose of the statutes is that the stockholders shall be liable for the full 100 per cent of the par value of their stock, in addition to the amount invested therein, if it be necessary to pay the debts of the association, and that such full liability shall be enforced by the Comptroller, who is charged with the execution of the law. The amount to be paid by them is the deficiency of the assets, and it is apportioned among the stockholders in the proportion which the stock of each shareholder bears to the whole capital stock of the bank.

United States v. Knox, 102 U. S. 422, 26 L. ed. 216.

Under the United States statutes relating to national banks the whole power of ascertaining and fixing the liability is delegated to the Comptroller. The judicial power of the courts is limited to enforcing payment of the sum required by the Comptroller.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476.

When the full amount is assessed there can be but one suit against each stockholder. He is sued for his full liability at once, and there is no reason for equitable jurisdiction. If a partial assessment, however, is made, there may be other assessments. Hence, while the receiver is at liberty to sue at law for even a partial assessment, equity has concurrent jurisdiction to prevent a multiplicity of suits.

Bailey v. Tillinghast, 40 C. C. A. 93, 99 Fed. 801.

This court has recognized the power of the Comptroller to levy second assessments.

United States v. Knox, 102 U. S. 422, 26 L. ed. 216; *Germanica Nat. Bank v. Case*, 131 U. S. app. cxliv, and 23 L. ed. 961.

Cases where the question has been considered sustain the power of the Comptroller to levy successive assessments.

Aldrich v. Yates, 95 Fed. 78; *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663; *Studebaker v. Perry*, 43 C. C. A. 69, 102 Fed. 947; *De Weese v. Smith*, 45 C. C. A. 408, 106 Fed. 438.

Contemporary or practical construction will be resorted to merely as an aid when the statute is doubtful or obscure, and then

only for the purpose of saving important rights built up or acquired on the faith of such construction.

Cooley, Const. Lim. 5th ed. §§ 67, 69; Story, Const. 407; Sedgw. Stat. & Const. Law, 251; 23 Am. & Eng. Enc. Law, p. 342; *United States v. Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *People ex rel. Badger v. Loewenthal*, 93 Ill. 191; *Rogers v. Goodwin*, 2 Mass. 475.

[259] *Mr. Justice Shiras delivered the opinion of the court:

The single question for our determination is whether the Comptroller of the Currency, acting under the national banking laws, can validly make more than one assessment upon the shareholders of an insolvent national banking association.

It is not denied by the plaintiff in error that the first assessment, which he voluntarily paid, was insufficient to pay the debts and liabilities of the bank, but his contention is that the Comptroller of the Currency exhausted his power to levy assessments upon the shareholders of stock in an insolvent national bank by a single exercise of that power. He advances two arguments in support of his contention: First, that the individual liability of national bank shareholders is contractual, and that hence only one assessment and suit to enforce the same is authorized by law; and, second, that by a course of practice for many years the Comptrollers of the Currency, charged with the execution of the laws, construed them to authorize but one assessment, and that such construction is now conclusive upon the courts.

Those portions of the statutes which are involved in this controversy are found in § 5151 of the Revised Statutes of the United States, in the following terms:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested *in such shares, except that shareholders of any banking association now existing under state laws, having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares. . . ."

And in § 5234 in the following terms:

"On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and upon the order

of a court of record of competent jurisdiction may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct: and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

And § 5236, as follows:

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The proposition of the plaintiff in error, as expressed in the *brief of his counsel, is [261] "that § 5234 simply authorizes the Comptroller to enforce the individual liability of shareholders in a national bank, if necessary to pay the debts of such bank: that the Comptroller is therefore plainly authorized to decide as to the necessity of enforcing such liability and as to the time when the same is to be enforced, and fix the amount to be collected; that there is to be a decision by the Comptroller as to these matters, and then a demand or requisition by him, followed by one suit, at law or in equity, as circumstances require; that it is this decision, which is termed an assessment; that the Comptroller is nowhere expressly authorized to enforce such liability by several decisions and suits; that he is simply authorized to enforce the individual liability of national bank stockholders according to law; and that there can be but one decision by the Comptroller as to the time, necessity, and extent of enforcing this liability, and, therefore, but one assessment, as the statute certainly does not authorize an assessment which could not be enforced by suit."

It is further urged, in behalf of the plaintiff in error, that as the liability of a shareholder of an insolvent national bank for all contracts, debts, and engagements of such association to the extent of the amount of his stock therein, at the par value thereof, in addition to the amount invested in such shares, is contractual in its nature, it therefore follows that the general rule that the plaintiff cannot split up a single and entire cause of action and make it the subject of different suits applies.

We do not deem it necessary in the case

[262]

before us to enter at length into the discussion suggested. It is sufficient that, by entering into the relation of a shareholder in a national banking association, the plaintiff in error subjected himself to the obligation created by the statute, and the only question is whether the Comptroller of the Currency has power to make and to enforce by a suit at law more than one assessment upon the shareholders of an insolvent national bank, if necessary to pay the debts thereof. The general purpose of the statute undoubtedly was to confer upon the creditors of the bank a right to resort to the individual liability of the shareholders to the extent, if necessary, of the amount of their stock therein, and it *would be a singular construction of law that would empower the Comptroller, by making an inadequate assessment, to relieve the shareholders, upon paying such assessment, from their entire liability.

The logic of the plaintiff in error requires him to convince us that his voluntary payment of one assessment, made when the Comptroller was imperfectly acquainted with the amount of the bank's indebtedness, amounts to a satisfaction *in toto* of his obligation. Such may be the true construction of the statute; but, defeating, as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only be made by a court when compelled by the necessary meaning of the language. The inconveniences that would be occasioned by the meaning proposed are so great and obvious as to lead us to expect to find that a reasonable construction of the law does not require us to adopt it.

If it be the duty of the Comptroller to give the creditors of an insolvent national bank the remedy providing for the individual liability of the shareholders, and if the law be that he can do so by one assessment only, then he must, no matter what the condition of the bank may appear to be, make an assessment upon the shareholders up to the entire amount of their liability. In many instances, the value of the bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up, and then be returned without interest, would certainly be a hardship upon the shareholders. If, to avoid that hardship, the Comptroller should postpone the assessment until he could fully inform himself of the condition of the bank's affairs, in the time that might thus elapse, some of the stockholders might become insolvent or remove their property from the reach of legal proceedings, and thus a loss be thereon upon the creditors.

There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences.

[263] *In *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476, some aspects of the question were considered. Mr. Justice Swayne said:
184 U. S.

"The receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

"The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the result in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious *policy and purpose of Congress to give it. [264] If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered."

These observations clearly imply that the Comptroller, in the exercise of his discretion, may levy successive assessments as they may appear to be necessary. If the power can be exercised only once no reason is apparent why equity should have jurisdiction for the collection of an assessment less than 100 per cent. If the stockholders' liability is fixed once for all by the first assessment of the Comptroller, the legal remedy for the collection of a 10 per cent

assessment is as full, adequate, and complete as it is for the collection of the 100 per cent assessment. The reason why, when the assessment is for the 100 per cent, the proceeding must be at law, and when for a less amount it may be in equity, is obvious. When the full amount is assessed there can be but one suit against each stockholder. He is suable for his full liability at once, and there is no reason for equitable jurisdiction. If a partial assessment is made, there may be other assessments, when the receiver has liberty to sue at law for even a partial assessment, though equity has concurrent jurisdiction to prevent a multiplicity of suits.

Casey v. Galli, 94 U. S. 673, 24 L. ed. 168, was the case of a suit at law by the receiver of a national banking association to enforce the individual liability of a shareholder. It was there contended that the defendant was bound to contribute ratably, and that the proper amount could be ascertained only in equity; that the defendant was bound to contribute ratably a large sum; that this sum was not stated in the declaration, and hence what would be ratable and proper did not appear; that the obligation of the defendant was to pay into the hands of the Comptroller of the Currency a ratable portion of the debts of the association proved before him, and that the declaration did not show that any debts had been so proved; and that the declaration demanded a larger sum than the defendant is required by *the statute to pay, and also an additional sum by way of interest. But it was held by this court that "in regard to the first three of these objections it is sufficient to say that *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476, is conclusive against them. It is there said that the amount to be paid rests in the judgment and discretion of the Comptroller; that his determination cannot be controverted by the stockholders in suits against them, and that, when the order is to collect the full amount of the par of the stock, the suit must be at law. It is unnecessary to reproduce the reasoning of the court in support of these propositions. The sum to be paid being liquidated, and due and payable when the Comptroller's order was made, it follows that the amount bears interest from the date of the order."

In *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216, an attempt was made to enforce a deficiency, caused by the insolvency of some of the shareholders of an insolvent national bank, against solvent shareholders, but it was held that the liability of the shareholders was several, and was not affected by the failure of any other shareholder to pay the amount assessed against him, and it was said by this court that, "although assessments made by the Comptroller under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders."

Germania Nat. Bank v. Case, 131 U. S. app. cxliv, and 23 L. ed. 961, was a case

where the Comptroller had levied an assessment for an amount on each shareholder, not sufficient to justify an appeal from the circuit court of the United States, and where a motion to dismiss the appeal was made in this court, but the motion was denied, Chief Justice Waite saying: "If the decree asked and obtained in this cause had been confined to an order for the payment of the 70 per cent upon the amount of the stock held by the appellants respectively, which the Comptroller of the Currency has already instructed the receiver to collect, the objection taken by the appellee to our jurisdiction might have been good; but the decree as given goes further, and after providing for the 70 per cent, adjudges that each of the appellants shall be liable to further contribution as stockholders *until a sufficient sum is realized to pay the debts of the bank, and that the bill be retained until it shall be certain that no further contribution will be required. This fixes the liability of each of these appellants to contribute in this suit to the extent of the nominal amount of his stock if necessary, and as the bill alleges that at least 25 per cent more will be required, it is apparent that the 'matter in dispute' is not alone the amount already decreed, but a sum in addition that may amount to 30 per cent of the stock, and is now expected to reach 25 per cent. Their liability generally as stockholders to make contributions has been fully established. That can never again be contested in this suit except under this appeal. For the purposes of jurisdiction, we may consider that as in dispute which would be settled by the decree if it had not been appealed from." The right of the Comptroller to levy a further assessment was thereby plainly implied.

Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209, was a late case, in which the power of the Comptroller to determine the necessity and amount of an assessment upon the shareholders was challenged on constitutional grounds, but it was held, in the language of Mr. Justice White: "All these alleged errors may be reduced to the single contention that under the national banking law the Comptroller of the Currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank; and that the lodgment of authority in the Comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power, in violation of the Constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Casey v. Galli*, 94 U. S. 674, 24 L. ed. 168; *United States v. Knox*, 102 U. S. 423, 26 L. ed. 216."

The precise question raised in the present case has several times been argued and de-

terminated in the lower Federal courts. In *Aldrich v. Yates*, 95 Fed. 78, the question [267] was thus *stated and answered by District Judge Evans in the circuit court for the district of Kentucky: "The question, then, remains, Has the Comptroller of the Currency the power to make a second assessment in any event? The ultimate liability of the shareholder in such cases is for the full amount of the par value of the stock, . . . under the statutory conditions, if they are found by the Comptroller to exist. A mistake of that officer in making an estimate of the amount of a needed assessment cannot be held to release the shareholder from the full statutory liability. A mistake of such a character would be natural, if not inevitable, in many instances, in view of the uncertain value of assets; and the indisposition, in the first instance, to make an assessment unnecessarily large may well excuse its not being done, when there is certainly no statutory provision prohibiting, in terms or by necessary implication, further assessments, if the necessity exists. In practice, second assessments have frequently been made. The court is of opinion that such a course is within the power of the Comptroller, in the exercise of his duty to see that the liability of the stockholder is sufficiently enforced to pay the debts of the bank, and that practice has been recognized as proper by the Supreme Court. *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216."

In *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663, it was held by the circuit court of appeals for the ninth circuit that the action of the Comptroller of the Currency in ordering an assessment against the stockholders of an insolvent national bank, whether a first assessment or one subsequently made, is a determination of the necessity for such assessment, which is conclusive on the stockholders, and cannot be questioned by them in any litigation which may ensue, either at law or in equity.

In *De Weese v. Smith*, 97 Fed. 309, it was held by the circuit court that a judgment against a shareholder of an insolvent national bank on a first assessment was a bar to a second suit brought to recover a later assessment, but this judgment was reversed by the circuit court of appeals for the eighth circuit, in *De Weese v. Smith*, 45 C. C. A. 408, 106 Fed. 438. And, as already stated, the circuit court of appeals for the seventh circuit held in the case now [268] before us that it was discretionary *with the Comptroller to make one or more assessments (*Studebaker v. Perry*, 43 C. C. A. 69, 102 Fed. 947), Woods, Circuit Judge, saying:

"The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts 'to the extent of the amount of their stock therein,' and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the Comptroller the receiver is authorized to enforce the share-

holder's liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design."

The cases cited by the plaintiff in error wherein courts of high authority have held that, where some particular act involving judicial discretion is to be performed by an executive officer, the power is exhausted by its single exercise, are not applicable to cases like the present, where the law merely provides that the shareholder shall pay what may be necessary to meet the debts and obligations of the bank. How much that is may not be ascertained at once, but as it is important that the settlement shall progress without delay, it is a reasonable construction of the statute that, while it is just and for his benefit that the stockholder be called on for no more than seems to be necessary, so it is just to the creditor that further calls may be made when necessary. This is a case where the power to assess belongs exclusively to the Comptroller, and the power to enforce the assessment belongs to the courts, and the construction contended for on behalf of the plaintiff in error refuses the remedy provided for by this statute of the United States with the ordinary remedy for the enforcement of statutory liability of stockholders by the courts.

It is finally argued on behalf of the plaintiff in error that the doctrine of contemporaneous and practical construction put upon a statute by executive officers is applicable. It is said that former comptrollers of the currency held, in several instances, that the power to assess under the national banking law was exhausted by a single exercise; that subsequent *comptrollers ought not to [269] have departed from that construction; and it is urged that this court should, by its decision in this case, set aside the construction at present prevailing and restore the former one.

The doctrine invoked is a useful one, but its application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance. The rule is well expressed in *Cooley on Constitutional Limitations*, 5th ed. p. 69:

"If the question involved is really one of doubt the force of their [officers'] judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind. Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow intrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers."

That the language of the statute under consideration is plain and its construction free from doubt are sufficiently shown by the decisions of the courts heretofore cited; and it would be absurd to claim that the plaintiff in error bought his stock in a national banking association with a right to rely on the contingency that the Comptroller might inadvertently or mistakenly make an insufficient assessment should the bank become insolvent.

The judgment of the Circuit Court of Appeals is affirmed.

[270] *GERHARD TERLINDEN, Appt.,

v.

JOHN C. AMES, United States Marshal for the Northern District of Illinois.

(See S. C. Reporter's ed. 270-290.)

Habeas corpus—extradition—change in status of foreign government—continued existence of treaty—political question.

1. Evidence to show that no extraditable offense has been committed is not admissible on an application for a writ of habeas corpus in behalf of a person arrested under extradition proceedings, since that is a matter to be determined by the commissioner, if competent legal evidence of the commission of such crime shall be presented to him.
2. A violation of a law of the German Empire against crime, such as forgery, is an offense extraditable under the treaty of the United States with Prussia, when such offense is committed in Prussia, and such law is recognized and enforced in that Kingdom as its law on that subject.
3. The existence of the treaty of June 16, 1852, between the United States and Prussia, which has been repeatedly recognized by both governments as still in force, notwithstanding the incorporation of Prussia into the German Empire, cannot be questioned by the judicial department in proceedings for a writ of habeas corpus to prevent the extradition of a fugitive from Prussia who is held under extradition proceedings under that treaty, as the question is a political one, and the courts must accept the determination thereof by the political department of the government.
4. Pending proceedings for extradition regularly and constitutionally taken under the acts of Congress cannot be put an end to by writ of habeas corpus.

[No. 475.]

Argued January 6, 7, 1902. Decided February 24, 1902.

NOTE.—On extradition—see notes to Tennessee v. Jackson (D. C. E. D. Tenn.) 1 L. R. A. 370; and *Ex parte* Kentucky v. Dennison, 16 L. ed. U. S. 717.

On the jurisdiction of the United States courts on habeas corpus—see *Re Reinitz* (C. C. S. D. N. Y.) 4 L. R. A. 236, and note. See also notes to *State ex rel. Cochran v. Winters* (Kan.) 10 L. R. A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to review on habeas corpus of extradition proceedings—see note to Tennessee v. Jackson (D. C. E. D. Tenn.) 1 L. R. A. 370.

534

APPEAL from a decision of the District Court of the United States for the Northern District of Illinois dismissing a petition for writ of habeas corpus. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

August 15, A. D. 1901, Dr. Walther Weyer, Imperial German Consul at Chicago, filed his complaint before Mark A. Foote, Esq., a commissioner of the United States in and for the northern district of Illinois, and specially authorized to issue warrants for the apprehension of fugitives from justice of foreign governments, stating that he was "the duly accredited official agent and representative of the German Empire at Chicago *and also the Kingdom of Prussia, [271] forming a part of said German Empire," and charging that one Gerhard Terlinden, alias Theodor Graefe, a subject of the Kingdom of Prussia, did, within the first six months of the year 1901, "commit within the jurisdiction of the said Kingdom of Prussia various crimes of forgery and counterfeiting and the utterance of forged papers," in that as a director of the Gerhard Terlinden Stock Company, organized and doing business in said Kingdom, said Terlinden forged and counterfeited certain certificates of the stock of said company amounting to about a million and a half of marks, and put out, uttered, and disposed of the same to Robert Suermont of the city of Aachen, Prussia; the Amsterdamsche Bank, Netherlands; the Disconto Gesellschaft, a corporation doing business in Berlin, Prussia; and other persons and corporations, with felonious intent to cheat and defraud them respectively. The complaint further charged that Terlinden was at the time of committing said crimes a resident of the city of Duisburg and a citizen of said Kingdom of Prussia; that he was a fugitive from said Kingdom; that on or about the 1st day of July, 1901, he fled into the jurisdiction of the United States of America for the purpose of seeking an asylum therein; that he was now said to be concealed within the northern district of Illinois or in the eastern district of Wisconsin; and that the crimes with which he was charged were crimes embraced within the treaty of extradition between the United States and the Kingdom of Prussia, concluded on the 16th day of June, 1852, and ratified May 30, 1853.

It was therefore prayed that a warrant be issued for the apprehension and commitment of Terlinden "in order that the evidence of his criminality may be inquired into, and the said Gerhard Terlinden, alias Theodor Graefe, may be extradited and delivered up to the justice of the said Kingdom of Prussia, in accordance with the stipulations of said treaty and the acts of Congress passed in pursuance thereof."

The complaint was duly verified and the commissioner issued his warrant, which was placed in the hands of John C. Ames, United States marshal in and for the northern district of Illinois, and Terlinden was

184 U. S.

apprehended and held to be dealt with according to law.

[272] *Subsequently and on September 25, 1901, Dr. Wever, in his capacity aforesaid, made another complaint before the commissioner, charging (1) the forging of a large number of stock certificates of the Gerhard Terlinden Stock Company; (2) uttering said stock certificates, well knowing them to be forged; (3) forging and counterfeiting the steel stamp of the Royal Prussian revenue office at Duisburg, Prussia; (4) imprinting said forged steel stamp upon the forged certificates of stock so as to make it appear that the tax required by the Prussian revenue law had been paid on said certificates issued by the company in said Kingdom, and thus to give said forged certificates the appearance of genuineness; (5) uttering forged certificates of stock with said forged stamp thereon; (6) forging the acceptance of one Heinrich Schulte to a certain draft for 9,582 marks and 35 pfennings, and uttering the same; (7) forging the acceptance of one Wilhelm Seven to two certain drafts for the sums of 26,250 marks and of 25,912 marks and 45 pfennings, respectively, and uttering the same; or causing all these things to be done; "contrary to the laws of the Kingdom of Prussia."

It was stated that these several crimes were fully shown by the testimony of a number of witnesses heard before the examining judge of the Landgericht at Duisburg in the Kingdom of Prussia, "a court of competent jurisdiction in which the matter of the penal investigation instituted against the said Gerhard Terlinden, alias Theodor Graefe, is now pending, in order that he may answer for said several crimes;" and with the complaint were submitted copies of the depositions of the witnesses together with a copy of the warrant of arrest issued by that court against Terlinden, "and of the provisions of the Penal Code of the German Empire applicable to said several crimes and providing punishment therefor," all of which were duly authenticated; and also a verified English translation thereof. This second complaint also showed that the crimes charged were committed within the jurisdiction of the Kingdom of Prussia; and that Terlinden was, at the time of committing the same, a subject of that Kingdom; and the commissioner in accordance with the prayer of the complaint issued another warrant, which was served on Terlinden the following day, he being discharged from arrest on the first warrant. On the 17th of October, before any evidence was taken before the commissioner, Terlinden presented to the district court of the United States for the northern district of Illinois his petition praying for a writ of habeas corpus on the following grounds:

"1. No treaty or convention for the extradition of fugitives from justice exists between the United States and the German Empire.

"2. That the treaty or convention for the extradition of fugitives from justice concluded between the United States and the
184 U. S.

Kingdom of Prussia on the 16th day of June, 1852, and ratified May 30, A. D. 1853, was terminated by the creation of the German Empire and the adoption of the Constitution of said Empire in A. D. 1871, and that no treaty or convention for the extradition of fugitives from justice has been concluded between the United States, on the one part, and the Kingdom of Prussia or the German Empire, on the other, since said time.

"3. Said complaint does not charge an extraditable offense under the provisions of the treaty of 1852, concluded between the United States and Prussia and other German states, were said treaty still in force and of binding effect.

"4. Your petitioner is not guilty of any extraditable offense under the provisions of said treaty of 1852, were said treaty still in force and of binding effect.

"5. All proceedings had or attempted to be had before said commissioner under said complaint and warrant are illegal, void, and without authority in law because said commissioner did not have jurisdiction over the person of this petitioner."

The writ of habeas corpus was issued and the marshal for the northern district of Illinois filed his return October 21, setting forth that he "arrested said petitioner within said district on the 26th day of September, 1901, upon a warrant duly issued by Mark A. Foote, a United States commissioner specially appointed and authorized by the district court of the United States for the northern district of Illinois to hear applications for extradition and to issue warrants therefor, which *said warrant was duly [274] issued by said commissioner upon a complaint duly made by Walther Wever, Imperial German Consul at Chicago as representative of the Kingdom of Prussia, charging said Gerhard Terlinden, who, it appears, falsely assumed in this country the name of Theodor Graefe, with having, as a subject of the Kingdom of Prussia and within the jurisdiction of the said Kingdom, committed the crimes of forgery, counterfeiting, and the utterance of forged instruments, and with being a fugitive from justice of said Kingdom of Prussia. . . ."

The matter was brought on for hearing October 21, and after arguments of counsel the court gave leave to present briefs and adjourned the hearing to October 28. On that day the relator filed with the clerk of the court a traverse, reciting that with the complaint of September 26 there were filed "copies of the original testimony and translations of the same contained in the depositions taken before certain court officials in the Empire of Germany, relative to the alleged offenses with which said complaint charges your petitioner; that said complaint refers to said depositions so filed in words following, to wit:" [Then setting forth the passages of the complaint to the effect that Dr. Wever therewith submitted "to the commissioner and files with this complaint a copy of all depositions of witnesses taken in said matter, together with a copy of the warrant of arrest issued by

said court against the said Gerhard Terlingen, alias Theodor Graefe, and of the provisions of the Penal Code of the German Empire applicable to said several crimes and providing punishment therefor.”]

The traverse then continued:

“That the provisions of the Criminal Code of the German Empire applicable to the facts and circumstances of this case as shown by the evidence hereto annexed are §§ 240, 47, 49 1st paragraph; § 360 4th and 5th paragraphs; § 275 and § 56 of the Code of Criminal Procedure, also § 234 of the Civil Code, a correct translation of which sections are hereto annexed and marked Exhibit ‘B’ and made a part hereof.

[275] “That said depositions so filed do not show or tend to show that your petitioner is guilty of any extraditable offense; that a copy of said deposition so referred to in said complaint and heretofore filed with said commissioner is hereto attached marked Exhibit ‘A’ and made a part of this traverse.

“Wherefore your petitioner prays that the return of the United States marshal herein be dismissed and your petitioner discharged.”

Copies of depositions were attached to the alleged traverse; but no copy of the warrant of arrest issued by the court at Duisburg, or of the provisions of the Penal Code attached to the complaint.

An affidavit accompanied the traverse to the effect that affiant as an expert had made the annexed translations of certain sections and parts of sections of the German Criminal and Civil Codes.

October 29, to which day the hearing of the cause had been continued, Terlingen presented a petition for a writ of certiorari to bring before the court “for its consideration the depositions, provisions of the German Criminal Code, and copy of the original warrant issued by said German court heretofore referred to.”

This application was denied by the district court October 31, and the court ordered “that the question of whether since the formation of the German Empire the extradition treaty concluded between the government of the United States and the Kingdom of Prussia in 1852 is still in force or abrogated by the Constitution of the German Empire, be submitted to the court on briefs to be filed,” and continued the hearing. It was also ordered “that said relator be remanded to the custody of the marshal, and that the motion to stay all further proceedings before the United States commissioner be and the same hereby is denied.”

Thereafter, on November 5, the district court entered an order finding that the petitioner was lawfully restrained of his liberty, directing the petition to be dismissed, and remanding petitioner, from which an appeal was taken to this court. Errors were assigned, in substance, that the court erred in declining to hold that no treaty exists between the United States and the

Kingdom of Prussia or the German Empire; in assuming “the existence of such treaty; [276] in denying the right to introduce evidence for the purpose of showing that no extraditable offense had been committed; in denying the application for a certiorari; in holding that the record showed the commission of an extraditable offense.

Messrs. Albert W. May and A. C. Umbreit argued the cause, and, with Mr. Joseph B. Doe, filed a brief for appellant:

It is true that political questions are preeminently the function of the political department of the government, and such questions, when so determined, are not otherwise decided by the courts.

Doe ex dem. Clark v. Braden, 16 How. 635, 14 L. ed. 1090; *Foster v. Neilson*, 2 Pet. 314, 7 L. ed. 435.

But the construction of treaties, including questions as to their validity and existence, is a question for the courts to determine.

The *Federalist*, No. 22; *Jones v. Walker*, 2 Paine, 688, Fed. Cas. No. 7,507; Wharton, *International Law*, § 133; *Wilson v. Wall*, 6 Wall. 83, 18 L. ed. 727; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; *Re Metzger*, 1 Park. Crim. Rep. 108.

This court has time and again construed, interpreted, and determined the validity of treaties.

The Amiable Isabella, 6 Wheat. 1, 5 L. ed. 191; *The Nereide*, 9 Cranch, 388, 3 L. ed. 769; *Harcourt v. Gaillard*, 12 Wheat. 523, 6 L. ed. 716; *United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547; *New Orleans v. De Armas*, 9 Pet. 224, 9 L. ed. 109; *United States v. The Amistad*, 15 Pet. 518, 10 L. ed. 826; *Strother v. Lucas*, 12 Pet. 410, 9 L. ed. 1137; *United States v. D’Auterive*, 10 How. 609, 13 L. ed. 560; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

Under the Constitution, treaties, as well as the Constitution and laws of the United States, are the supreme law of the land. Consequently, treaties are on the same plane with provisions of the Constitution and acts of Congress.

Whitney v. Robertson, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Botiller v. Dominguez*, 130 U. S. 239, 32 L. ed. 927, 9 Sup. Ct. Rep. 525.

The question of the existence of the treaty under discussion must be decided in accordance with the principles of international law. International law is a part of the law of the land, and must be ascertained and administered by the courts whenever such questions are duly submitted to their determination.

Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *The Paquete Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

It has been held that acts of Congress

ought to be construed with reference to the law of nations.

Murray v. The Charming Betsy, 2 Cranch, 64, 2 L. ed. 208.

In the absence of a treaty there is no law which authorizes the President to deliver up anyone found in the United States, who is charged with having committed an offense against the laws of a foreign country.

Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; *Re Metzger*, 5 How. 176, 12 L. ed. 104; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; Wharton, *Private International Law*, § 835; Wheaton, *International Law*, Boyd's ed. § 115; Wharton, *International Law Digest*, § 268; Hawley, *International Extradition*, 2; *Respublica v. De Longchamps*, 1 Dall. 110, 1 L. ed. 59.

The doctrine that without a treaty there can be no extradition has been steadily and uniformly maintained, and the political department of our government has adopted the same policy.

Jefferson to Ghent, 1 Am. St. Pap. 177; J. C. B. Davis to Delfosse, For. Rel. 1873; Bayard to Davis, 1886, Mss. Dom. Let.; Cushing, Op. 85, 1853.

Extradition of a fugitive from justice is essentially a national act. . . . Nations in their intercourse with one another do not recognize any local territorial divisions, or deal with any authority except the supreme or sovereign government.

Hawley, *International Extradition*, 1.

Extradition is a proceeding by which one sovereign government whose laws have been violated by a person who thereafter flees from justice demands, and the government to which he flees, surrenders, the fugitive to be tried for the offense.

Anderson, *Law Diet.* 438; Bouvier, *Law Diet.* 637; Rapalje & Lawrence, *Law Diet.* 491; 1 Moore, *Extradition*, § 1.

It has been held that "the rights and duties of nations towards each other relative to fugitives from justice are a part of the law of nations, and have always been treated as such by the writers upon public law."

Holmes v. Jennison, 14 Pet. 569, 10 L. ed. 593.

That extradition is a matter of foreign intercourse between nations has also been held by state courts.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; *People ex rel. Barlow v. Curtis*, 50 N. Y. 326, 10 Am. Rep. 483; *People ex rel. Gardenier v. Columbia County*, 134 N. Y. 9, 31 N. E. 322.

A treaty is nothing more than a contract between sovereign and independent states.

1 Kent, Com. 175; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25; *Foster v. Neilson*, 2 Pet. 253, 7 L. ed. 415; *Davis v. Police Jury*, 9 How. 287, 13 L. ed. 141; *Head Money Cases*, 112 U. S. 580; *sub nom. Eddy v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

Extradition treaties are executory contracts calling for the personal service of the contracting nations in regard to certain
184 U. S.

specified matters that may occur in the future.

Wheaton, *International Law*, Boyd's ed. § 275; Taylor, *International Pub. Law*, 1901, p. 367.

A contract to render personal service is subject to the implied condition that the party shall be alive and able to perform it. Death or disability which renders the performance impossible discharges the contract.

1 Beach, *Modern Law of Contracts*, 946; 1 Parsons, *Contr.* 131; 1 Addison, *Contr.* § 396; *Marvel v. Phillips*, 162 Mass. 399, 26 L. R. A. 416, 38 N. E. 1117; *Lorillard v. Clyde*, 142 N. Y. 457, 24 L. R. A. 113, 37 N. E. 489.

Treaty obligations are founded, not merely on the contract itself, but upon those mutual relations between the contracting nations which may have induced them to enter into certain engagements.

Wheaton, *International Law*, Boyd's ed. § 29.

A transfer of these obligations, thus contracted, to a new nation, without the consent of the other contracting party, is impossible.

The internal sovereignty of a nation is determined by its municipal constitution. Its external sovereignty is to a large extent determined by the same instrument.

Id. § 20.

By the adoption of the Constitution, Prussia surrendered to the Empire her right of legislation on national affairs, to declare war, make peace, conclude treaties, receive and accredit ambassadors, and every other incident of sovereignty and independence as a nation.

4 Convention Manual of the 6th New York Constitutional Convention, 1894, p. 265; Klueber, §§ 103a, 176, 248, 260, 261, 462; Heffter, *das Europaische Voelkerrecht*, § 21; German Const. arts. 2, 11 (Wheaton, § 51b); German Const. arts. 3, 11 (Hart, *Intro. Fed. Gov.* pp. 99, 138-141, 165).

The sovereignty of a state consists in the right of independent action without reference to the will of any other state.

Wheaton, *International Law*, Boyd's ed. § 33a; Levi, *International Law*, p. 81, No. 9, p. 82, No. 10.

Germany has now become a compositive state, and the independence of its various members is merged in the sovereignty of the Empire though the respective heads of the several states retain their personal positions as sovereigns.

Wheaton, *International Law*, Boyd's ed. § 51b; Freeman's *Historical Essays*, 4th series, p. 389. See also Taylor, *International Pub. Law*, p. 123.

General alliances under the principles of international law are limited to contracts between nations having in view co-operation in cases of defensive or offensive wars waged against or by the parties to the alliance.

Wheaton, *International Law*, Boyd's ed. §§ 278, 280; Taylor, *International Pub. Law*, p. 370.

German public jurists likewise hold that

all sovereignty and independence of the individual German states were merged in the empire.

Annals American Academy of Political Science, July–Nov. 14, p. 78.

Courts take judicial notice of the existence of a sovereign power.

Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80.

The United States, having recognized the internal and external sovereignty of the German Empire as distinct from its states, is bound thereby.

United States v. Wagner, L. R. 2 Ch. 582.

That the political department of our government—that is, the executive and legislative branches—has recognized the German Empire as the sovereignty now existing over the territory formerly composing the Germanic states, is conceded. Such recognition is binding upon the courts.

Gelston v. Hoyt, 3 Wheat. 246, 4 L. ed. 381; *United States v. Yorba*, 1 Wall. 412, 17 L. ed. 635; *United States v. Lynde*, 11 Wall. 632, 20 L. ed. 230.

Over the same territory, however, only one sovereignty can exist. When such sovereignty is once recognized and established, it excludes every other.

Wharton, International Law Digest, § 1; *Church v. Hubbard*, 2 Cranch, 187, 2 L. ed. 249; *The Exchange v. M'Faddon*, 7 Cranch, 137, 3 L. ed. 294.

The territory now included within the Kingdom of Prussia is represented in international affairs by the German Empire. Consequently, in such affairs said Kingdom can exercise none of the incidents, functions, or duties of sovereignty. If it could, there would then exist two co-ordinate sovereignties over the same territory, a condition not only not recognized by the law of nations, but specifically denied.

Taylor, International Pub. Law, pp. 170, 173, 174.

Prussia has been merged in the German Empire, and has therefore disappeared as a nation.

Id. p. 201.

The obligations of treaties, even where some of their stipulations are in their terms perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things.

Halleek, International Law, ed. 1866, § 8, p. 370; Vattel, Law of Nations, Chitty's ed. 1872, § 203, p. 312; 1 Wildman, International Law, chap. 4, § 174; Wheaton, International Law, § 29; Wheaton, International Law, Boyd's ed. § 275.

Even the political department of our government has considered a large number of other treaties as terminated when the sovereignty of the nation with which treaties had been concluded was destroyed by its absorption into another sovereignty.

U. S. Treaties & Conventions (1889); Treaties of the United States, 1146 (1889);

Treaty of 1868 with Wuerttemberg, art. 3; Treaty of 1868 with North German Union, art. 3; Wharton, International Law Digest, § 137a.

A contract executory in its nature and calling for the personal service of one of the contracting parties cannot be assigned without the express consent of the other contracting party.

Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308; *Delaware County v. Diebold Safe Lock Co.* 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399.

For the same reason the doctrine of novation of the compact cannot be successfully invoked.

Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; *Spycher v. Werner*, 74 Wis. 456, 5 L. R. A. 414, 43 N. W. 161.

There can be no tacit ratification of the renewal or extension of a treaty under our Constitution. No treaty, under our system of government, becomes effectual because of failure to repudiate. Nor will mere affirmative action by the executive department alone create treaty obligations.

Taylor, International Pub. Law, p. 389, note.

By the law of nations no duty is imposed upon a nation to deliver up persons accused of crimes who have escaped into its territories, on the demand of another nation against whose laws the alleged crime was committed. There is no such obligation under the principles of international law.

Wharton, International Law Digest, § 268; Wheaton, International Law, Boyd's ed. § 115; *United States v. Watts*, 8 Sawy. 370, 14 Fed. 130.

The surmised confusion that might arise in case our contention is sustained could not possibly affect persons surrendered by either nation under what we contend is a terminated treaty, because it has been uniformly held that it makes no difference how a person is brought within the jurisdiction of the court; the fact that the accused is in court is sufficient to require him to answer to the charge brought against him.

State v. Brewster, 7 Vt. 118; *Dow's Case*, 18 Pa. 37; *The Richmond v. United States*, 9 Cranch, 107, 3 L. ed. 672; *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 607, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225.

As extradition proceedings are purely statutory, compliance with the statutes is requisite to jurisdiction at every step.

State ex rel. Durner v. Huegin, 110 Wis. 189, 85 N. W. 1046; Church, Habeas Corpus, §§ 237–247; *Re Snell*, 31 Minn. 110, 16 N. W. 692; *Re Hardigan*, 57 Vt. 100; *People ex rel. Van Riper v. New York Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9.

A crime is an act committed or omitted in violation of a public law either forbidding or commanding it.

4 Bl. Com. 15; *United States v. Jacobi*, 1 Flipp. 111, Fed. Cas. No. 15,460; *Re Bergin*, 184 U. S.

31 Wis. 386; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764.

A crime is an offense against the sovereignty, and can only be taken notice of and punished by the sovereignty offended. Others have no concern in it, and must treat it as a matter of indifference.

People v. Williams, 24 Mich. 163, 9 Am. Rep. 119; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

With the enforcement of the criminal laws of one independent state within its territory, another state has no concern.

Wheaton, International Law, Boyd's ed. § 113.

Previous to the formation of the German Empire the North German Union had adopted a criminal code. The German Constitution provides that imperial legislation shall supersede all legislation as to civil and criminal matters and judicial procedure theretofore enacted by the several states.

Dr. H. Wagner, University of Koenigsberg, in Ency. Britannica, article, *Germany*.

It provides that the enactment of the general criminal law be exclusively confined to the imperial legislature.

German Const. art. 4, § 13 (Hart. Intro. Fed. Gov. p. 135).

The criminal code of the North German Union, above referred to, was adopted as the code of the German Empire, and took effect as such imperial code January 1, 1872.

German Const. art. 80, subd. 2; Proclamation of Emperor, April 16, 1871.

If Prussia is still an independent nation, she then has no concern whatever in the violation of the imperial laws. "The courts of no country execute the penal laws of another."

The Antelope, 10 Wheat. 123, 6 L. ed. 282.

The conditions existing at the time the treaty of 1852 was concluded have so materially and radically changed that, even if such treaty was not *ipso facto* terminated by the formation of the German Empire, its obligations cannot now be performed, and therefore the whole compact has absolutely expired.

Wheaton, International Law, Boyd's ed. § 275; Wharton, International Law Digest, § 137a.

Forgery is not a crime within the jurisdiction of Prussia, although it is a crime within the jurisdiction of the German Empire, which jurisdiction extends over Prussian territory and is exclusive.

Taylor, International Pub. Law, p. 206.

The United States will not grant extradition for crimes not committed within the jurisdiction of the demanding state.

Hawley, International Extradition, 22; Wharton, International Law Digest, § 271.

Habeas corpus proceedings are original civil suits.

Ex parte Tom Tong, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871; *Cross v. Burke*, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; *Kurtz v. Moffit*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; *Re Frederick*, 149 U. S. 73, 37 L. ed. 656, 13 Sup. Ct. Rep. 793.

184 U. S.

In a proper case the court can hear testimony outside of the record of the inferior tribunal.

Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; *Ex parte Yerger*, 8 Wall. 85, 19 L. ed. 332; *Re Mayfield*, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939.

Before final judgment by a court of competent jurisdiction, the whole case will be examined under a habeas corpus proceeding.

United States v. Hamilton, 3 Dall. 17, 1 L. ed. 490; *Ex parte Burford*, 3 Cranch, 448, 2 L. ed. 495; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Ex parte Bollman*, 4 Cranch, 75, 2 L. ed. 554.

The court ought to have granted appellant's prayer for a writ of certiorari in aid of the writ of habeas corpus. It may be true that the granting of the writ of certiorari is within the discretion of the court to which the application is made, yet this discretion is not an arbitrary one, but is a sound judicial discretion, dependent upon certain legal principles applicable to the case.

Trustees of Schools v. School Directors, 88 Ill. 100; *Flournoy v. Payne*, 28 Ark. 87.

At common law the writ of certiorari was frequently used in aid of the writ of habeas corpus, to bring up the record of the proceeding resulting in the commitment, when such record was necessary to a complete understanding of the case.

Rex v. Marks, 3 East, 157; *Fazacharly v. Baldo*, 1 Salk. 352.

In the Federal courts the writ of certiorari has been considered, in appropriate cases, as ancillary to that of habeas corpus, and has been frequently used as a means of rendering their jurisdiction under the latter writ effective; and even this court has granted writs of certiorari in aid of its original jurisdiction, in cases of habeas corpus.

Re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151; *Ex parte Yerger*, 8 Wall. 85, 19 L. ed. 332; *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872.

At common law the writ was more properly used to remove proceedings before judgment than after judgment.

Hinchman v. Cook, 20 N. J. L. 271.

Unless the common-law writ has been modified by statute, it will be allowed at any stage of the criminal proceedings.

Rex v. Hube, 5 T. R. 542; *Rex v. Wadley*, 4 Maule & S. 508; *Mowery v. Camden*, 49 N. J. L. 106, 6 Atl. 438.

Mr. William Vocke argued the cause, and, with Mr. William Mannhardt and Messrs. Vocke & Healey, filed a brief for appellee:

The alliance which Prussia has formed with the other German states in establishing the German Empire has not had the slightest effect upon her international treaty obligations. The question of the existence of a treaty is not within the province of the courts to decide, but should be determined by the political department of the government.

State Department's Compilation of Treat-

ies and Conventions between the United States of America and Other Powers since July 4, 1776, published in 1889, p. 1234; *Doe ex dem. Clark v. Braden*, 16 How. 635, 14 L. ed. 1090; *Foster v. Neilson*, 2 Pet. 314, 7 L. ed. 435; *Taylor v. Morton*, 2 Curt. C. C. 455, Fed. Cas. No. 13,799; *Maiden v. Ingersoll*, 6 Mich. 376.

The extradition treaty with Bavaria was not abrogated because that Kingdom became part of the German Empire.

Re Thomas, 12 Blatchf. 379, Fed. Cas. No. 13,887.

If it is properly set forth in the complaint that the crimes were committed "within the territory" or "within the jurisdiction" of the Kingdom of Prussia, then the complaint is sufficient under the treaty and the law to form the basis of extradition proceedings, and, upon proper showing before the commissioner, to warrant a fugitive's extradition, no matter whence the demanding government derived its laws.

The question of a prisoner's guilt or innocence must, after indictment, be submitted to a jury. It cannot be tried on habeas corpus.

People v. McLeod, 1 Hill, 377, 37 Am. Dec. 328; *Cancemi v. People*, 18 N. Y. 129; *People v. Rulloff*, 5 Park. Crim. Rep. 77; *People v. Richardson*, 18 How. Pr. 93; *Ex parte Crouch*, 112 U. S. 178, 28 L. ed. 690, 5 Sup. Ct. Rep. 96; *Re Reynolds*, Fed. Cas. No. 11,721; *Re Mayfield*, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Horner v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407; *Luis Oteiza v. Cortes*, 136 U. S. 330, *sub nom. Luis Oteiza v. Jacobus*, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; *Stevens v. Fuller*, 136 U. S. 468, 34 L. ed. 461, 10 Sup. Ct. Rep. 911; *Ornelas v. Ruiz*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; *Bryant v. United States*, 167 U. S. 104, *sub nom. Ex parte Bryant*, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

The writ of certiorari is never granted before the final determination of the case pending in the lower court whose record is called for.

People ex rel. San Francisco v. County Judge, 40 Cal. 479; *People ex rel. Huston v. Lindsay*, 1 Idaho, 394; *State, Stokes, Prosecutor, v. Early*, 45 N. J. L. 478; *Re Hamilton*, 58 How. Pr. 290; *People ex rel. Noble v. Pilot Comrs.* 37 Barb. 120; *Re Road*, 2 Serg. & R. 419.

International treaties of this character have been invariably construed by this honorable court in a spirit of fairness toward the foreign government; and in extradition treaties in particular this court has always held that technicalities should be excluded as far as possible, in order that full justice may be done.

Re Herres, 33 Fed. 165.

[276] *Mr. Chief Justice Fuller delivered the opinion of the court:

The treaty of June 16, 1852, between the

United States and the Kingdom of Prussia, and other states of the Germanic Confederation included in or which might accede to that convention, provided that the parties thereto should, upon requisition, "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of each other." 10 Stat. at L. 964, 966.

Pursuant to § 5270† of the Revised Statutes (and the acts *from which that section [277] was brought forward), complaint was duly made before a commissioner appointed and authorized by the district court of the United States for the northern district of Illinois to hear applications for extradition and to issue warrants therefor, charging Terlinden with having as a subject of the Kingdom of Prussia, and within the jurisdiction of that Kingdom, committed the crimes of forgery, counterfeiting, and the utterance of forged instruments, and with being a fugitive from the justice of said Kingdom.

The complaint charged with much particularity, among other things, the forging and uttering of forged stock certificates of the Gerhard Terlinden Stock Company; the forging of the revenue stamp of the German government employed by the Royal Prussian Revenue Office; and the forging and uttering of several enumerated acceptances.

Attached to the complaint and referred to therein were duly authenticated‡ copies

†Sec. 5270. Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

‡Sec. 5271. In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other

[278] of certain depositions taken before the examining judge of the court at Duisburg, Prussia, in which an investigation against Terlinden, that he might answer for said several crimes, was pending, together with a copy of the warrant *for the arrest of Terlinden issued by that court, and of the provisions of the Penal Code of the German Empire applicable to the crimes in question and providing punishment therefor.

The commissioner issued his warrant and Terlinden was apprehended, whereupon and before the commissioner had entered upon the hearing, Terlinden petitioned and obtained from the district court the writ of habeas corpus under consideration.

The settled rule is that the writ of habeas corpus cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus. *Ornelas v. Ruiz*, 161 U. S. 502, 508, 40 L. ed. 787, 789, 16 Sup. Ct. Rep. 689, and cases cited; *Bryant v. United States*, 167 U. S. 104, *sub nom. Ex parte Bryant*, 42 L. ed. 94, 17 Sup. Ct. Rep. 744.

The statute in respect of extradition gives no right of review to be exercised by any court or judicial officer, and what cannot be done directly cannot be done indirectly through the writ of habeas corpus. The court issuing the writ may, however, "inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion." *Blatchford, J., Re Stupp*, 12 Blatchf. 501, Fed. Cas. No. 13,563; *Ornelas v. Ruiz*, 161 U. S. 508, 40 L. ed. 787, 16 Sup. Ct. Rep. 689.

By § 754 of the Revised Statutes it is provided that the complaint in habeas corpus shall set forth "the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known;" and by § 755 that the writ shall be awarded

"unless it appears from the petition itself that the party is not entitled thereto."

*On the face of the complaint extraditable [279] offenses were charged to have been committed, and if petitioner desired to assert, as he now does in argument, that it appeared from the depositions taken before and the warrant of arrest issued by the court at Duisburg and the provisions of the Criminal Code that such was not the fact, they should have been set out. *Cramer v. Washington*, 168 U. S. 128, 42 L. ed. 407, 18 Sup. Ct. Rep. 1.

And this clearly must be so where, as in this case, the writ is issued and petitioner undertakes to traverse the return. The return was that Terlinden was arrested and held by virtue of warrants of arrest and of commitment issued by the commissioner, under the extradition acts, against Terlinden as a fugitive from the justice of Prussia, and charged with the commission of crimes embraced by the treaty of extradition with that Kingdom; and copies of the warrants were attached as part thereof. The alleged traverse referred to the complaint and annexed copies of the depositions filed with it, but did not annex a copy of the warrant of arrest issued by the court at Duisburg, or of the provisions of the Penal Code made part of the complaint; and also annexed certain sections and paragraphs of the Criminal Code of the German Empire, and of the Code of Criminal Procedure, and of the Civil Code, as applicable to "the facts and circumstances of the case," and then alleged that the depositions did not show or tend to show guilt of an extraditable offense.

This was manifestly insufficient. Petitioner could not select a portion of the documents accompanying the complaint and ask the court to sustain his conclusion of law thereon. Nor could he subsequently supply the inadequacy of the traverse by a certiorari, which could do no more, if it could be, in any view, properly issued at that stage of the proceedings, than bring up what he should have furnished in the first instance.

Generally speaking, "whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the *preliminary examination un-[280] less palpably erroneous in law." 161 U. S. 509, 40 L. ed. 789, 16 Sup. Ct. Rep. 691.

Necessarily this is so, for where juris-

papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants, or other papers, shall, if authenticated 184 U. S.

according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant, or other paper, or copy thereof, is authenticated in the manner required by this section.

diction depends on the merits, the decision is not open to collateral attack involving a retrial, although if on the whole record the findings are contradicted, the inquiry as to lack of jurisdiction may be entertained.

In this case the writ of habeas corpus was issued before the examination by the commissioner had been entered upon, and his jurisdiction was the only question raised. If he had jurisdiction, the district court could not interfere, and he had jurisdiction if there was a treaty and the commission of extraditable offenses was charged.

But it is said that the offenses complained of were not extraditable because their commission was averred to be "contrary to the laws of Prussia," whereas the criminal laws asserted to have been violated were those of the German Empire, and Prussia had no criminal laws dealing with such offenses. Hence it is argued that the commissioner had no jurisdiction, because if an extradition treaty existed it was with Prussia, and not with the German Empire; and if any crime was committed, it was against the German Empire and not Prussia.

It is true that by article 2 of the Constitution of the German Empire it was provided that, "within this territory the Empire shall have the right of legislation according to the provisions of this Constitution, and the laws of the Empire shall take precedence of those of each individual state."

And by article 4: "The following matters shall be under the supervision of the Empire and its legislation: . . . 13. General legislation regarding the law of obligations, criminal law, commercial law, and the law of exchange; likewise judicial proceedings."

Counsel for petitioner states in his brief that on January 1, 1872, the German Imperial Code went into effect, embracing provisions as to the crime of forgery "contained in §§ 267, 268, 146, and 149, the very sections quoted in the depositions filed with the amended complaint." Counsel for respondent agrees with this except that he includes §§ or ¶¶ 147 *and 270. All these are given below as furnished by counsel for respondent.† And see Drage's Criminal Code

[281] of *the German Empire, 227, 266. The traverse set up that there were filed with the complaint "a copy of all depositions taken

†267. Whoever with unlawful intent forges or counterfeits a domestic or foreign public instrument or such a private instrument as may be of importance for the purpose of proving rights or legal relations, and makes use of the same for the purpose of deception, is punishable with imprisonment for forgery of instruments.

268. Forgery of an instrument made by anyone with the intent of obtaining for himself or another a pecuniary gain, or to inflict injury upon another, is punishable as follows:

1. When the instrument is a private instrument, with imprisonment in the penitentiary up to five years, besides which a fine not exceeding 3,000 marks may be imposed.

2. When the instrument is a public instru-

542

in said matter, together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the Penal Code of the German Empire applicable to said several crimes, and providing punishment therefor." The traverse did not set forth the warrant of arrest or the provisions of the Code referred to, and merely attached certain other provisions which it was averred were applicable. The presumptions were against petitioner, apart from which, accepting the admissions of counsel, extraditable offenses were charged, if the laws quoted applied, as we think cannot be denied. We are unable to perceive that these laws were not the laws of Prussia, although prescribed by imperial authority, and the record discloses that they were being administered as such, in Prussia, by the Royal Prussian Circuit Court at Duisburg. The inquiry into the source of the laws of the demanding government is not material, and the objection is untenable.

It is obvious that the district court could not remove the case from the commissioner by virtue of the writ of habeas corpus, and that the court rightly declined to hear evidence, to grant the certiorari, or to interfere with the progress of the case.

This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The 5th article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

*Undoubtedly treaties may be terminated [283] by the absorption of powers into other nationalities and the loss of separate existence, as in the case of Hanover and Nassau,

ment, with imprisonment in the penitentiary for a term not exceeding ten years, besides which a fine of from 150 to 6,000 marks may be imposed.

In case of mitigating circumstances imprisonment in the common jail will take place, which, in the case of forgery of a private instrument, shall be not less than one week, and in case of forgery of a public instrument, not less than three months.

In addition to the imprisonment, a fine not exceeding 3,000 marks may be imposed.

146. Whoever counterfeits inland or foreign coin or paper money for the purpose of using such counterfeited money as genuine or otherwise to put it in circulation; or who, with like intent, gives to genuine money, by alteration

184 U. S.

which became by consent incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other states of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other states, including the Kingdom of Wurtemberg and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse Cassel, Nassau, and the free city of Frankfort, by Prussia.

The North German Union was then created under the presidium of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially, not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount Constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions: and his action was entirely approved by this government. Messages and Documents, Dep. of State, 1867-8, Part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the 3d article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other states of Germany on the other [284] *part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the states of the North German Confederation." 15 Stat. at L. 615. This recognized the treaty as still in force, and brought the Republics of Lu-

beck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Wurtemberg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his Kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that "His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, His Majesty the King of Wurtemberg, His Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse, and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual states, and it was vested with the power of general legislation in respect of crimes.

Article 11 read: "The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries, accredit ambassadors, and receive them. . . . So far as treaties with foreign countries refer to matters which, according to article IV., are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required *for their ratification, and the ap-[285] proval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Consti-

made upon the same, the appearance of higher value, or gives to invalidated money the appearance of money still current, shall be punished with imprisonment in the penitentiary for not less than two years. Police surveillance is also admissible. In the case of mitigating circumstances imprisonment in the common jail may be provided.

147. The same penalty extends to all persons who circulate the money counterfeited or altered by them with the above-mentioned intent, and also to such persons who obtain counterfeited or altered money and either utter the same or bring the same from abroad with the intent of circulating the same.

149. Certificates of indebtedness made payable
184 U. S.

able to the holder, bank notes, stock certificates, or preliminary certificates or receipts taking their place, as well as coupons and dividends or renewal certificates thereto belonging, which may be issued by the Empire, the North German Confederation, a state of the Confederation, or a foreign state, or by any other community, corporation, company, or private person authorized to issue such papers, are deemed equivalent to paper money.

270. It is treated as equivalent to forgery of an instrument in case anybody makes use of any forged or altered document, knowing the same to be forged or altered, with intent to deceive.

tution created a composite state instead of a system of confederated states, and even that it was called a confederated Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this Constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practised by the German government, the Imperial Foreign Office transmitted to our charge at Berlin a memorial on the subject in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the confederated German states, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

[286] "In so far as by-laws and treaties of the Empire relating to the extradition of criminals, provisions which bind all the states of the union have not been made, those states are not hindered from independently regulating extradition by agreements with foreign states, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later, period, for the extradition of criminals, entered into by individual states of the union with various foreign states, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides, the treaty of June 16, 1852, which applies to all of the states of the former North German Union, and also to Hesse, south of the Main, and to Württemberg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German gov-

ernment has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, *Das Staatsrecht des Deutschen Reiches* (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German states, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the executive department of our government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular states of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of Treaties and Conventions between the United States and Other Powers, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Em-[287]pire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the states composing the Empire. It cannot be said that any fixed rules have been established.

"Where a state has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various states which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States district court, on the application of a person accused of forgery committed in Bavaria, to be discharged on habeas corpus, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of *Re Thomas*, 12 Blatchf. 370, Fed. Cas. No. 13,887, in which the continuance of the extradition treaty with Bavaria was called in question, and Mr. Justice Blatchford, then District Judge, said:

"It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything

which indicates that then existing treaties between the several states composing the confederation called the German Empire, and foreign countries, were annulled, or to be considered as abrogated.

[288] "Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive *or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent, Com. 174. In the present case the mandate issued by the government of the United States shows that the convention in question is regarded as in force both by the United States and by the German Empire, represented by its envoy, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority representing the German Empire and also representing Bavaria."

We concur in the view that the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

Treaties of extradition are executory in their character, and fall within the rule laid down by Chief Justice Marshall in *Poser v. Neilson*, 2 Pet. 314, 7 L. ed. 435, thus: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department."

In *Doe ex dem. Clark v. Braden*, 16 How. 635, 14 L. ed. 1090, where it was contended that so much of the treaty of February 22, 1819, ceding Florida to the United States, as annulled a certain land grant, was void for want of power in the King of Spain to ratify such a provision, it was held that whether or not the King of Spain had power, according to the Constitution of Spain, to annul the grant, was a political, and not a judicial, question, and was decided when the treaty was made and ratified.

Mr. Chief Justice Taney said: "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its [289] provisions, unless *they violate the Consti- 184 U. S.

tution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered."

Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.

In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision. 1 Moore, Extradition, 21; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. *Holmes v. Jennison*, 14 Pet. 569, 10 L. ed. 593. Its exercise pertains to public policy and governmental administration, is devolved on the executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.

If it be assumed in the case before us—and the papers presented on the motion for a stay advise us that such is the fact—that the commissioner, on hearing, deemed the evidence sufficient to sustain the charges, and certified his findings and the testimony to the Secretary of State, and a warrant for the surrender of Terlinden on the proper requisition was duly issued, it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded had terminated by reason of the adoption of the Constitution of the German Empire, notwithstanding *the judgment of [290] both governments to the contrary.

The decisions of the executive department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of habeas corpus.

The District Court was right, and its final order is affirmed.

Mr. Justice Harlan did not hear the argument, and took no part in the decision of the case.

HUGULEY MANUFACTURING COMPANY *et al.*, *Appts.*,
v.

GALETON COTTON MILLS *et al.*

(See S. C. Reporter's ed. 290-296.)

Appeal from circuit court of appeals—final decree.

1. No right of appeal from a decree of the circuit court of appeals, which is made final by the act of Congress of March 3, 1891, chap. 517, § 6 (26 Stat. at L. 826), is given by the provision of that section that such case may be brought to the United States Supreme Court "by certiorari or otherwise," as, if some other order or writ may be resorted to, it must be *ejusdem generis* with certiorari.
2. A writ of certiorari to perfect the record on an appeal from the circuit court of appeals by supplying alleged omissions does not operate to bring the case before the United States Supreme Court, nor in itself to add any support to the appeal, which must stand or fall according as the act of Congress of March 3, 1891, chap. 517, § 6 (26 Stat. at L. 826), did or did not allow such appeal to be taken.

[No. 94.]

Argued January 15, 1902. Decided February 24, 1902.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Georgia directing a conveyance of property sold under foreclosure. *Dismissed.*

See same case below, 36 C. C. A. 236, 94 Fed. 269.

[291] Statement by Mr. Chief Justice **Fuller**: "This was a bill filed in the United States circuit court for the northern district of Georgia, January 21, 1891, by J. J. Robinson as trustee, who averred that he was "a citizen of and resided in the state of Alabama," "against the Alabama & Georgia Manufacturing Company, a corporation created under and by virtue of the laws of the state of Georgia, and a resident and citizen of said northern district of Georgia; and against the Huguley Manufacturing Company, a corporation created under the laws of said state of Georgia, and a resident and citizen of said state of Georgia and of the northern district of said state; and against W. T. Huguley, whom your orator avers to be a citizen of said state of Georgia and residing within the said northern district of Georgia."

The bill averred that on January 2, 1884, "the said Alabama & Georgia Manufacturing Company executed and delivered to said W. T. Huguley, W. C. Yancey, and your

orator, as trustees, a certain deed of trust, conveying to said persons named, and to orator, all the property of the said Alabama & Georgia Manufacturing Company upon the terms and upon the trusts therein stated for the purpose of securing certain negotiable bonds of said company in the principal sum of \$65,000, and interest thereon, which deed of trust was accepted by said trustees and duly recorded." A copy of the trust deed was attached and conveyed certain real estate in the state of Georgia and certain real estate in the state of Alabama as therein described.

It was further averred that the bonds were duly issued by *the Alabama & Georgia Manufacturing Company and sold or otherwise disposed of; that the company was insolvent and had ceased to do business; that under and by virtue of a decree in chancery of the superior court of Troup county, Georgia, all the property of the manufacturing company covered by the deed of trust had been sold and purchased by certain persons who afterwards conveyed the same to the Huguley Manufacturing Company, and that the last-named corporation was now in the possession of the same; that the sale was made subject in all respects to the rights and lien of the trust deed for the holders of the first-mortgage bonds; that W. T. Huguley, defendant herein, and named as one of the trustees for said bondholders, was interested in the purchase of said property, and in the property and assets of the Huguley Manufacturing Company, and adversely to complainant as trustee for said bondholders, and that the other trustee, W. C. Yancey, had departed this life since the execution and delivery of the deed of trust.

The bill then set up default on the part of the Alabama & Georgia Manufacturing Company in the payment of interest; the election of a majority of the bondholders to treat the whole of the principal sum named in the bonds as due; request of complainant to begin proceedings to secure the property pledged for the payment of the indebtedness, and which he deemed to "the best interest of the bondholders;" and prayed for an accounting, foreclosure, and sale of the property.

Defendants acknowledged service, and the two defendant companies filed a demurrer to the bill, which was subsequently overruled on hearing, Mr. Justice Lamar presiding. 48 Fed. 12. Answer was filed by these defendants and the bill taken as confessed as to W. P. Huguley. The cause subsequently went to final decree adjudging recovery on all the bonds and of foreclosure and sale, which decree was afterwards reversed by the circuit court of appeals for the fifth circuit, 6 C. C. A. 79, 13 U. S. App. 359, 56 Fed. 690, because all the bonds were not due, acceptance of interest on some of them having waived default, and the cause remanded. Pending the appeal the property was purchased for the bondholders under the decree and \$10,000 paid *into court [293] by the purchasers as required by the decree, who organized a company under the name

184 U. S.

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison*, T. & S. F. R. Co. 28 C. C. A. 481, and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

of the Galeton Cotton Mills, which corporation was placed in possession of the property and remained in such possession for a period of three years and six months. The decree of foreclosure having been vacated, the circuit court granted a petition on behalf of the Huguley Manufacturing Company to restore it to the possession of the property, on condition, however, that it pay into court the \$10,000 which had been paid in by the purchasers. The Huguley Manufacturing Company did not comply with this condition, and a second decree of foreclosure was entered adjudging that, out of a total of one hundred and thirty bonds, ninety were due when the bill was filed, and forty were not then due because of waiver of default, though now due; that the property was indivisible and could not be sold to satisfy part of the bonds only; and that the proceeds of sale should be proportionately distributed on all the bonds. Thereupon an appeal was taken to the circuit court of appeals, and the decree of the circuit court was affirmed. 19 C. C. A. 152, 30 U. S. App. 683, 72 Fed. 708.

A second foreclosure sale took place, and the property was again purchased for the bondholders, and this sale was confirmed June 25, 1896. Defendants filed a petition for an accounting of the rents and profits from the time of the first sale, and an amendment thereto, and a reference was made to a special master, who on November 2, 1897, filed his report in which he found the Galeton Cotton Mills liable for rents and profits in the sum of \$39,715.31. Exceptions were filed to the master's report by both parties. February 23, 1898, the exceptions of appellants were overruled and the exceptions of appellees sustained to the extent of reducing the master's finding to \$35,857.54, and a decree to that effect was entered February 28, 1898. Thereafter the circuit court entered a decree that the rents and profits should be used in reduction of the mortgage debt, and later a decree fixing the amount of the mortgage debt and costs and directing the manner of applying thereto the rents and profits and the amount of cash already received and reserving all questions of costs and expenses not therein disposed of. 89 Fed. 218. At the last foreclosure sale a balance was left due on [294] the *trust deed of \$33,414.21. September 22, 1898, the purchaser at the second sale petitioned for a final conveyance, and on October 15, 1898, a decree was entered directing the completion of the sale by a cash payment and conveyance. A motion was made to set aside this decree, which was overruled, whereupon an appeal was taken to the circuit court of appeals. The appeal was heard, and the decree of the circuit court was on May 16, 1899, affirmed. 36 C. C. A. 236, 94 Fed. 269. Application was made to this court for a certiorari, which was denied October 30, 1899. 175 U. S. 726, 44 L. ed. 339, 20 Sup. Ct. Rep. 1022. May 12, 1900, an appeal to this court was allowed by Pardee, J., in order to preserve any possible rights of the applicants, although he

184 U. S.

expressly stated that he seriously doubted the right of appeal. Appellees moved to dismiss the appeal, the consideration of which motion was postponed to the hearing on the merits.

Mr. John T. Morgan argued the cause and filed a brief for appellants:

The jurisdiction of the Supreme Court to hear and determine this cause by appeal, or on certiorari, or otherwise, and to reach all the decrees in the case in the circuit court, or in the circuit court of appeals, is complete, plenary, and supreme, without reference to any stage or condition that the case may be in because of the final or the interlocutory nature of those decrees.

Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

The allowance of an appeal removes the case into the appellate court in virtue of a right that cannot be denied arbitrarily. Mandamus will lie to enforce it.

Ex parte Jordan, 94 U. S. 248, 24 L. ed. 123.

The allowance of an appeal from the judgment of the circuit court of appeals places the record of that court and the record that supports it in the Supreme Court; and all mandates in cases appealed to the Supreme Court from the circuit court of appeals are sent directly to the circuit courts in which the case originated under the statute.

Texas P. R. Co. v. Anderson, 149 U. S. 239, 37 L. ed. 718, 13 Sup. Ct. Rep. 843.

If a decree of the circuit court that is not final in the cause is taken by appeal to the circuit court of appeals, that court should dismiss it; but if the appellate court proceeds to hear and determine the case on its merits, and affirms the decree of the circuit court, and issues its mandate to proceed in the cause according to its opinion therein rendered, there is a record in the court of appeals, and a decree that is erroneous on the face of the proceedings, from which the right of appeal to the Supreme Court is granted by the statute, unless that right is cut off by the finality of the decree of the circuit court of appeals.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39.

The appeal in this case from the decree of the circuit court of appeals, and the appeal on which that decree is based, were allowed without restriction, and present the whole case on both records for review by the Supreme Court.

Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397.

Messrs. J. L. McLaurin, F. L. Welles, Alexander C. King, John M. Chilton, and King & Spalding filed a brief for appellants on the merits.

Messrs. Edgar H. Farrar, Benjamin F. Jonas, Ernest B. Kruttschnitt, and John M. Chilton also filed a brief for appellants on the merits.

Mr. Louis D. Brandeis argued the cause, and, with **Mr. William H. Dunbar**, filed a brief for appellees:

It is the settled law of this court that jurisdiction must be made affirmatively to appear, and if the record fails to show jurisdiction the appeal will be dismissed.

Hunt v. Blackburn, 127 U. S. 774, 32 L. ed. 323, 8 Sup. Ct. Rep. 1395; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

The ground of original jurisdiction in the circuit court, for the purpose of determining the finality of a decision by the circuit court of appeals, depends upon the ground of jurisdiction shown by the plaintiff when he first brings his suit.

Colorado Cent. Consol. Min. Co. v. Turek, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

If, in the course of proceedings in a case in which original jurisdiction is taken by the circuit court on the ground wholly of diversity of citizenship, any question arises which brings the case within the provision of the act for a direct appeal to this court, the party aggrieved by the final judgment or decree of the circuit court may appeal direct to this court.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

He may also, none the less, as an alternative, appeal to the circuit court of appeals, and, if he does so, that court has jurisdiction to dispose of the appeal.

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

And its decision thereon is final, except as to questions certified by it, and on certiorari from this court.

Colorado Cent. Consol. Min. Co. v. Turek, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

This is in accordance with the general intention of the act, to distribute the appellate jurisdiction, and to permit an appeal to only one court in any case.

Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.

If the appellant desired, after his unsuccessful appeal to the circuit court of appeals, to take an appeal to this court on the ground that the case was one in which jurisdiction did not depend entirely on diversity of citizenship, it was his duty to make the existence of the ground of his appeal apparent, and if the record fails to show that there was such a ground of appeal the decision of the circuit court of appeals is final, and the appeal should be dismissed.

Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

***Mr. Chief Justice Fuller** delivered the [294] opinion of the court:

The act of March 3, 1891, chap. 517 (26 Stat. at L. 826), provides in § 6 that the circuit courts of appeals shall have appellate jurisdiction to review judgments and decrees of the circuit courts in all cases in which a direct appeal is not allowed by § 5 to this court, and that the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely on diversity of citizenship.

The jurisdiction referred to is the jurisdiction of the circuit court as originally invoked. *Colorado Cent. Consol. Min. Co. v. Turek*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, ante, 47, 22 Sup. Ct. Rep. 47.

*If, after the jurisdiction of the circuit [295] court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in § 5, then the case may be brought directly to this court, although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought here as of right. *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174. If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the Constitution, laws, or treaties of the United States, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then, if carried to the court of appeals, the decision of that court would not be made final, and appeal or writ of error would lie. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

The general intention of the act was to distribute the appellate jurisdiction and to permit an appeal to only one court. *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.

In this case appellants did not attempt to take an appeal directly to this court from the circuit court, nor could they have done so, since no question was so raised as to bring the case within either of the classes named in § 5. *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969. The ground on which the jurisdiction of the circuit court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals cannot be regarded otherwise than as made final by the statute.

The question before us is whether this appeal was properly granted and can be maintained. In all cases where the decree or judgment of the circuit court of appeals is made final by the statute, an appeal does not lie, but any such case may be brought here "by certiorari or otherwise." The latter words add nothing to our power, for if some other order or writ might be resorted to it would be *ejusdem generis* with certiorari. The writ is the equivalent of an appeal or writ of error as declared by the statute, and it is issued in the discretion of the court.

[296] The record filed in this case June 25, 1900, was entirely insufficient, *and appellants applied for certiorari to perfect it by bringing up the alleged lacking portions. We granted that application, and the omissions were supplied. This auxiliary writ did not operate to bring the case before us or in itself to add any support to the appeal, which must stand or fall according as the statute did or did not allow it to be taken. Many matters are urged, such as alleged lack of indispensable parties below and so on, as reasons why an appeal ought to lie, but our jurisdiction depends on the statute, and cannot be enlarged by the supposed hardship of particular cases. Finally, it is argued that a large part of the property dealt with by the decree is situated in the state of Alabama, and it is said that therefore the decrees of both courts are void for want of jurisdiction over the subject-matter.

As the circuit court had jurisdiction over the mortgagor company, the company claiming under it, and the surviving co-trustee of complainant, and the trust deed was made and executed in Georgia, where part of the property was situated, the courts below may have assumed that the case came within *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *International Bridge & Tramway Co. v. Holland*, 26 C. C. A. 469, 52 U. S. App. 240, 81 Fed. 422, and kindred cases.

But we need not discuss the validity of the decrees in this regard. If the point had been raised in the circuit court, and its decision would have justified an appeal directly to this court, no such appeal was taken. If its existence in the record justified a review of the decree of the circuit court of appeals, the proper course was to apply for a certiorari. That course was taken in this case, and the application was denied. In view of repeated and well-considered decisions of this court, some of which we have cited, we are unable to find any ground on which this appeal can be sustained.

Appeal dismissed.

**In re HUGULEY MANUFACTURING* [297] COMPANY and Alabama & Georgia Manufacturing Company, *Petitioners*.

(See S. C. Reporter's ed. 297-302.)

Prohibition—mandamus — other adequate remedies.

1. A writ of prohibition against proceedings in a circuit court of the United States will not be granted by the Supreme Court where the case is one in which a decision in the circuit court could be taken by appeal to the circuit court of appeals, and, after final decree, an appeal would lie to the Supreme Court in respect to the question of jurisdiction, if properly raised and certified.
2. A writ of mandamus will not be granted to compel the dismissal of a suit by the circuit court of the United States for want of jurisdiction, where the writ of prohibition is denied on the ground that there is an adequate remedy by appeal.

[—]

Submitted November 20, 1901. Decided February 24, 1902.

MOTION for leave to file a petition for a writ of prohibition and for a mandamus requiring the dismissal of a bill. *Denied.*

Statement by Mr. Chief Justice **Fuller**:

The Riverdale Cotton Mills, by leave of court, filed June 10, 1901, in the circuit court of the United States for the northern district of Georgia, a bill against the Alabama & Georgia Manufacturing Company and the Huguley Manufacturing Company, as also certain solicitors of said companies, as ancillary to the bill of foreclosure in that court, brought by Robinson, trustee, against said companies, the appeal in which has just been disposed of.

The bill averred that the defendant companies were corporations of Georgia, and if they had also been authorized under the laws of Alabama they had no place of business in that state, but only in Georgia; and that the only officers, directors, and stockholders they ever had were the officers, directors, and stockholders of the corporations

NOTE.—That a writ of prohibition cannot be made to serve the purpose of a writ of error or of review—see note to Walcott v. Wells (Nev.) 9 L. R. A. 59.

As to when mandamus is the proper remedy—see notes to McCluny v. Silliman, 4 L. ed. U. S. 263, and United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160.

On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to State ex rel. Fourth Nat. Bank v. Johnson (Wis.) 51 L. R. A. 33.

organized in Georgia; that as long as they had any property it was situated partly in Georgia and partly in Alabama, and was operated as one business from each of the offices of the corporations in Georgia; and that the property of the Alabama & Georgia Company was fully described in the trust deed, a copy of which was attached, being the trust deed foreclosed at the suit of Robinson, and the property of the Huguley Manufacturing Company was an equity *of redemption therein acquired after the execution and delivery of that trust deed. The bill then set forth the acquisition by the Huguley Company of the property, subject to the trust deed, by proceedings in the superior court of Troup county, Georgia; the filing by Robinson of the bill to foreclose the trust deed; the decree of foreclosure; the sale to representatives of the bondholders, and the transfer to the Galeton Cotton Mills; the reversal of that decree by the circuit court of appeals; the second decree and second sale; the confirmation of sale and deed to complainant, who paid all the purchase money; and the appeal thereupon to the circuit court of appeals, and the affirmance of the decree and proceedings. 36 C. C. A. 236, 94 Fed. 269. It was further averred that from this decree of affirmance an appeal was prosecuted May 16, 1899, to the Supreme Court of the United States, where it was still pending.

The bill further showed that thereafter the Huguley Manufacturing Company and the Alabama & Georgia Manufacturing Company filed in the chancery court of Chambers county, Alabama, their bill of complaint against the Riverdale Cotton Mills, the Galeton Cotton Mills, Robinson, trustee, Huguley, trustee, and the West Point Manufacturing Company, alleging that the Alabama & Georgia Manufacturing Company was an Alabama corporation; that all the property described in the trust deed was situated in Alabama, and that no sale of the property was ever made in Alabama, and that all judicial proceedings in the circuit court for the northern district of Georgia were null and void, so far as affected the title of the two companies to the part of the lands lying in Alabama; and it was sought to hold the Riverdale Cotton Mills, the Galeton Cotton Mills, and the West Point Manufacturing Company for the rents and profits of the property since May, 1892.

Complainant further averred that each and all of the claims to relief set up by these two companies in the Chambers chancery court were set up, or could have been set up, and were adjudicated in the proceedings had in the circuit court in the suit of Robinson, trustee, as aforesaid, as appeared from the record and proceedings in that case; and that all the substantial issues raised in the suit in Chambers' county had [299] been adjudged *and determined by the circuit court. Complainant alleged that a large part of the property described in the trust deed was situated in the state of Georgia, and another part in the state of Alabama, and that the circuit court acquired

and had full jurisdiction to order the sale of all the property described in the trust deed, and that neither the Huguley Manufacturing Company, the Alabama & Georgia Manufacturing Company, nor W. T. Huguley, who were defendants to the bill filed by Robinson, ever during the progress of the cause in the circuit court raised any issue as to the jurisdiction of that court to render a decree for the sale of all the lands; and complainant alleged that the property was in fact indivisible. Complainant reiterated that the same companies were seeking by the bill of complaint filed in Chambers county to again raise and have investigated by a court of equity the same identical matters and issues which had theretofore been passed upon and adjudicated by the circuit court in the suit of Robinson. Complainant invoked the jurisdiction of the circuit court as ancillary to the main suit instituted by Robinson to protect it against the violation of its rights by the prosecution of the bill of complaint in the chancery court of Chambers county, and prayed for an injunction and general relief.

The circuit court, on consideration of the bill, ordered defendants to show cause why an injunction should not issue as prayed for, and in the meantime granted a restraining order. The two defendant companies appeared and showed cause, setting up that they were corporations chartered under the laws of Alabama; that the Alabama & Georgia Manufacturing Company was a distinct and separate legal entity from the Alabama & Georgia Manufacturing Company incorporated under the laws of Georgia, and that it was the Georgia corporation, and not the Alabama corporation, that was made party defendant to the suit of Robinson; and they alleged, on information and belief, that the Huguley Manufacturing Company never was incorporated under the laws of Georgia. They insisted that in the proceedings in Alabama the decree of the circuit court in the foreclosure suit was not conclusive upon them, as the circuit court was without jurisdiction, and that *the circuit court had no [300] jurisdiction of this bill because it was an original, and not an ancillary, bill, and complainants and defendants were citizens of Georgia; and, further, that the foreclosure suit was pending in the Supreme Court of the United States. It was also averred that the circuit court was without jurisdiction to issue the injunction prayed, in view of § 720 of the Revised Statutes; and, further, because after filing the bill in Alabama all the defendants thereto, without pleading in abatement, had filed demurrers, pleas, and answers.

The response further set up that the circuit court was without jurisdiction of the original foreclosure suit, because the complainant therein and the Huguley Manufacturing Company were citizens of Alabama, and that the charter of the Alabama & Georgia Manufacturing Company in Georgia had expired by legal limitation before any sale of the property under the foreclosure proceedings. And it was further alleged that

the circuit court was without jurisdiction to sell the mortgaged property because it was all situated in the state of Alabama, or, if not, to sell that portion lying in the state of Alabama, and it was denied that the property in Alabama and Georgia were parts of an indivisible whole. Respondents asked that the rule might be discharged, and the bill dismissed.

Upon a hearing the circuit court granted an injunction as prayed until the further order of the court. 111 Fed. 431.

On November 20, 1901, the Huguley Manufacturing Company and the Alabama & Georgia Manufacturing Company submitted a motion for leave to file their petition for a writ of prohibition to restrain the circuit court of the United States for the northern district of Georgia from taking any further steps in the suit of the Riverdale Cotton Mills or in respect of the suit in Alabama, and for a mandamus requiring the circuit court to dismiss the bill of the Riverdale Cotton Mills. The petition which they asked leave to file averred that they were complainants in the chancery suit in Alabama filed for the purpose of redeeming the property in question, and stated that they were not parties to any litigation in the circuit court for the northern district of Georgia, but that they had been served with what purported to be process from that [301] court to "appear in the alleged ancillary proceedings. Petitioners charged that the circuit court had no jurisdiction over the original suit in Georgia, because the property was located in the state of Alabama; that the Alabama & Georgia Manufacturing Company of Alabama was not made a party to the suit in Georgia; that one of the trustees was not joined as complainant; that bondholders protesting against the foreclosure were not made parties; that the other bondholders were not made parties; that the Huguley Manufacturing Company was not given its day in court for redemption; and, in brief, reiterated the grounds presented in their response to the rule to show cause.

Mr. J. C. Welles submitted the cause for petitioners. Mr. John M. Chilton was with him on the brief:

The power to issue a writ of prohibition to a court which has no jurisdiction of the cause exists at common law, and is not merely statutory.

London v. Cox, L. R. 2 H. L. 239.

The power is an essential, inherent right of sovereignty, which, therefore, cannot be abandoned or destroyed.

Ibid.: *Worthington v. Jefferies*, 32 L. T. N. S. 607.

Therefore, on due reason shown, a superior court is judicially bound as a debt of justice,—*ex debito justitiæ*,—and not merely by virtue of, and in obedience to, a mandatory statute, to grant a writ of prohibition.

Ibid.: *Jacobs v. Brett*, 32 L. T. N. S. 523; *Reg. v. Twiss*, 20 L. T. N. S. 525.

Even in a court of admiralty the right 184 U. S.

and duty to issue a writ of prohibition does not depend on the merits of the case.

James v. London & S. W. R. Co. 26 L. T. N. S. 191.

And accordingly the merits are not considered in any case.

Hudson v. Tooth, 37 L. T. N. S. 465; *Mayar v. Cannon*, 24 L. T. N. S. 583.

It is manifest that in England the issuance of the writ is not confined to admiralty, nor is any reason there recognized why it should be so restricted.

Reg. v. Liverpool Recorder, 23 L. T. N. S. 813; *Robinson v. Emanuel*, 30 L. T. N. S. 500; *Cooke v. Gill*, 28 L. T. N. S. 33; *Bridge v. Branch*, 34 L. T. N. S. 905; *Reg. v. Local Government Board*, 48 L. T. N. S. 181.

Section 688; Rev. Stat., does not confine the prohibitory power of the Supreme Court to the admiralty jurisdiction of the district courts.

Ex parte Warmouth, 17 Wall. 64, 21 L. ed. 543; *Re Baiz*, 135 U. S. 404, 34 L. ed. 222, 10 Sup. Ct. Rep. 854; *Smith v. Whitney*, 116 U. S. 172, 29 L. ed. 602, 6 Sup. Ct. Rep. 570; *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149.

Mr. John M. Chilton filed a separate brief for petitioners:

While it was originally doubted whether this court possessed power to grant writs of prohibition except in admiralty proceedings, it is now settled that it has that power.

Ex parte City Bank, 3 How. 298, 11 L. ed. 603; *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149.

This court not only possesses the power, but the right to the writ cannot now be said to rest entirely in discretion, where it clearly appears that there has been an unlawful exercise of authority by the lower court, and the party applying has duly objected.

Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *Re Cooper*, 143 U. S. 473, 36 L. ed. 232, 12 Sup. Ct. Rep. 453; *Re Fassett*, 142 U. S. 479, 35 L. ed. 1087, 12 Sup. Ct. Rep. 295; *Re Morrison*, 147 U. S. 14, *sub nom. Morrison v. United States Dist. Ct.* 37 L. ed. 60, 13 Sup. Ct. Rep. 246; *Ex parte Bradley*, 7 Wall. 377, 19 L. ed. 219; High, Extr. Legal Rem. § 560, p. 616; Bacon, Abr. title *Mandamus*; *Ex parte Burr*, 9 Wheat. 530, 6 L. ed. 152; *Re Alix*, 166 U. S. 136, 41 L. ed. 948, 17 Sup. Ct. Rep. 522.

The writ will not be denied merely because it may appear that the lower court "acted upon the conviction that it possessed power or authority in the matter," for jurisdiction cannot be conferred by good intentions. This court may, however, in such cases, cause its opinion to be made known, with leave to the parties to apply further, should the lower court not conform to it.

Bronson v. La Crosse & M. R. Co. 1 Wall. 405, 17 L. ed. 616.

The wrongful assumption of power need

not have relation to the entire cause. The court having jurisdiction of the cause may still exceed its power in making some order or decree in its progress.

Ex parte Smith, 23 Ala. 94; *Ex parte Roundtree*, 51 Ala. 51.

The circuit court had no power to postpone the case to abide the decision of this court on the appeal cause. If this is true, it would follow that prohibition would be the proper remedy to compel the judge of the circuit court to vacate the order postponing the cause.

Ex parte Smith, 23 Ala. 94.

If it is not a question of power, but merely one of legal propriety, in this aspect of the case, mandamus, as distinguished from prohibition, would afford the proper remedy.

Ex parte Campbell (Ala.) 30 So. 521.

Mr. Alexander C. King also filed a brief for petitioners.

[301] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is firmly established that where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149. And the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted, as a general rule, where there is no other adequate remedy. *Re Atlantic City R. Co.* 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208.

And it may be added that it is also the general rule as to the writ of certiorari when sought as between private parties and on the ground that the proceedings below are void, that it will be granted or denied in the sound discretion of the court, and will be refused where there is a plain and adequate remedy by appeal or otherwise. *Re Tampa Suburban R. Co.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177.

[302] In this case there was, under the act of Congress of June 6, *1900 (31 Stat. at L. 660, chap. 803), a plain and adequate remedy by appeal to the circuit court of appeals for the fifth circuit from the interlocutory order granting an injunction. After a final decree an appeal to this court would lie in respect of the jurisdiction, if the question were properly raised and certified, or if issues were raised and decided bringing the case within § 5 of the act of March 3, 1891 [26 Stat. at L. 827, chap. 517], or to the circuit court of appeals. The case as presented is far from being one in which we should regard it as a proper exercise of our jurisdiction to interfere with the orderly progress of the suit below by the issue of either of the writs applied for. *Re New*

York & P. R. S. S. Co. 155 U. S. 523, 531, 39 L. ed. 246, 249, 15 Sup. Ct. Rep. 183.

The contention of counsel seems to go to the extent of insisting that the proceedings in the foreclosure suit were wholly void, and without force and effect as to all persons and for all purposes, and incapable of being made otherwise; and in declining to go into the subject at large we are not to be understood as concurring in that proposition.

Leave denied.

ALBERT H. WAITE, *Petitioner*,
v.
CITY OF SANTA CRUZ.

(See S. C. Reporter's ed. 302-329.)

Bonds—of city—estoppel by recitals—special legislation—classification of cities—jurisdiction of Federal court—action by transferee of bonds—uniting claims to make jurisdiction.

1. Recitals in refunding bonds which a city has authority to issue for its "outstanding indebtedness evidenced by bonds and warrants thereof," stating that these bonds are issued for that purpose, in conformity to the Constitution and statutes of the state, and that all which the law requires has been done to authorize their issue, estop the city, as against bona fide purchasers of such bonds, from contending that the original bonds for which the refunding bonds are issued did not constitute a part of the bonded indebtedness of the city, and that notice of that fact was given by the ordinance under which the elec-

NOTE.—On estoppel by recitals in negotiable bonds—see note to *Mercer County v. Hackett*, 17 L. ed. U. S. 548.

On the rights of bona fide purchasers of municipal bonds—see note to *Pickens Twp. v. Post*, 41 C. C. A. 6.

On municipal bonds generally—see notes to *Sutliff v. Lake County*, 37 L. ed. U. S. 145; *Harper County v. Rose*, 35 L. ed. U. S. 344; *Rich v. Meutz*, 33 L. ed. U. S. 1075, and *Citizens' Sav. & L. Asso. v. Perry County*, 39 L. ed. U. S. 585.

On special legislation—see notes to *Ayars's Appeal* (Pa.) 2 L. R. A. 577; *Re Washington Street* (Pa.) 7 L. R. A. 193; *Lankford v. Somerset County* (Md.) 11 L. R. A. 492, and *State ex rel. Terre Haute v. Kolsem* (Ind.) 14 L. R. A. 566.

As to officers de facto—see notes to *State v. Lewis* (N. C.) 11 L. R. A. 105; *State ex rel. Worrell v. Carr* (Ind.) 13 L. R. A. 177; *Hussey v. Smith*, 25 L. ed. U. S. 314; *Ball v. United States*, 35 L. ed. U. S. 377.

As to jurisdiction of United States circuit court as dependent upon amount—see *Auer v. Lombard*, 19 C. C. A. 72, and note; *Myers v. Murray, N. & Co.* (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see notes to *Roberts v. Lewis*, 36 L. ed. U. S. 579, and *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455.

As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & I. Co.* (C. C. W. D. Va.) 1 L. R. A. 108, and note; *Myers v. Murray, N. & Co.* (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

- tion authorizing this issue was held, since it specified that the indebtedness to be refunded included certain bonds issued by a water company which constituted a lien on the city waterworks, and had thereby become a part of the bonded indebtedness of the city.
2. Legislation for all cities of the state except those of the first class, such as that made by Cal. act March 15, 1883, as amended March 1, 1893, authorizing outstanding bonded indebtedness to be refunded on certain conditions, is not repugnant to constitutional restrictions upon special legislation.
 3. Bonds signed by one claiming to act as the mayor of a city, after his successor had qualified, but before he had entered upon the duties of his office, and during a period in which the outgoing mayor and the common council were continuing to hold meetings as city officials without any protest or question being made in respect to their right to do so, cannot be held invalid on the ground that they were not signed by the legal mayor, since it is sufficient in that respect if they are signed by the mayor *de facto*.
 4. A suit by a transferee of bonds and coupons "does not really and substantially involve a dispute or controversy within the jurisdiction" of a circuit court of the United States, within the meaning of the act of Congress of March 3, 1875, chap. 137, if the transfers to him are made for the purpose of collection only, and if the amount necessary to give jurisdiction to the court is made up by uniting in his hands the bonds or coupons of owners who separately held less than the jurisdictional amount.

[No. 39.]

Argued April 24, 25, 1901. Decided February 24, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision reversing a judgment of the Circuit Court against a city upon negotiable bonds and coupons. *Reversed.*

See same case below, 39 C. C. A. 106, 98 Fed. 387.

The facts are stated in the opinion.

Mr. **John F. Dillon** argued the cause, and, with Messrs. **Harry Hubbard** and **John M. Dillon**, filed a brief for petitioner:

The recital in the bonds in question, that they are "issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city," estops the city from showing, or attempting to show, that the bonds, or any part of them, were issued for any other purpose than that "of refunding the bonded indebtedness of said city;" and such recital is conclusive on this fact in favor of the bona fide holders of said bonds.

Evansville v. Dennett, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613; *Independent School Dist. v. Stone*, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. Rep. 84; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 363; *Graves v. Saline County*, 161 U. S. 359, 40 L. ed. 732, 16 Sup. Ct. Rep. 526; *Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390; *State* 184 U. S.

v. Wells, F. & Co. 15 Cal. 336; *Wesson v. Saline County*, 20 C. C. A. 227, 34 U. S. App. 680, 73 Fed. 917; *Marey v. Oswego Twp.* 92 U. S. 637, 23 L. ed. 748.

A bona fide holder is a purchaser for value without notice, or the successor of one who was such purchaser.

McClure v. Oxford Twp. 94 U. S. 429, 24 L. ed. 129.

As the previous holders of the bonds in suit were bona fide holders for value, the plaintiff can avail himself of such previous holders' position without showing that he himself has paid value.

Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391.

Officers of municipalities charged with the duty of issuing bonds have power to make recitals therein, and it is not necessary that the statute give express power to make recitals.

Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390; *Bernards Twp. v. Morrison*, 133 U. S. 523, 33 L. ed. 726, 10 Sup. Ct. Rep. 333.

No ordinance, notice of election, or any "record," is constructive notice as to any negotiable paper, unless a statute expressly so provides.

Burek v. Taylor, 152 U. S. 634, 38 L. ed. 578, 14 Sup. Ct. Rep. 696; 20 Am. & Eng. Enc. Law, p. 600; *Oleott v. Bynum*, 17 Wall. 44, 21 L. ed. 570; *Buell v. Irwin*, 24 Mich. 145; *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436; *Wade*, Notice, 2d ed. § 124; *St. John v. Conger*, 40 Ill. 535.

The purchaser of negotiable paper is not bound to take notice of any litigation pending, or any judgments which may have been previously rendered regarding such negotiable paper.

Warren County v. Marey, 97 U. S. 96, 24 L. ed. 977; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539. See also, to the same effect, *Orleans v. Platt*, 99 U. S. 676, 25 L. ed. 404; *Cass County v. Gillett*, 100 U. S. 585, 25 L. ed. 585; *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612; 1 Dill. Mun. Corp. 4th ed. § 514.

Actual bad faith on the bondholder's part must exist in order to affect him with constructive notice.

Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934; *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193. See also, to the same effect, *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318; *Wilson v. Wall*, 6 Wall. 83, 18 L. ed. 727.

The doctrine of constructive notice can never be invoked for the purpose of perpetrating a fraud.

Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 126; *Wilde v. Gibson*, 1 H. L. Cas. 605. See also *Gill v. Hardin*, 48 Ark. 412, 3 S. W. 519; *Stone v. Covell*, 29 Mich. 359; *Spencer v. Spencer*, 56 N. C. (3 Jones, Eq.) 404.

The mere negotiability of the bonds would cut off the defense that they were issued in part to refund the bonds of the water company.

State v. Wells, F. & Co. 15 Cal. 336.

A purchaser of negotiable bonds in the market is not bound to inquire whether the maker received payment or other consideration therefor when they were issued.

Fearing v. Clark, 16 Gray, 74, 77 Am. Dec. 394.

The mere fact that the bonds are negotiable is enough to prevent any such defense as that they were not sold in accordance with the provisions contained in the statute authorizing them.

Provident Life & T. Co. v. Mereer County, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. ed. 548.

The city as purchaser of the waterworks plant, having assumed and agreed to pay, as part of the purchase price, the water company mortgage and bonds, became primarily liable to pay such bonds, and they became part of the bonded indebtedness of the city.

Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818; *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683; *Alvord v. Spring Valley Gold Co.* 106 Cal. 547, 40 Pac. 27; *Weaver v. McKay*, 108 Cal. 546, 41 Pac. 450; *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Tulare County Bank v. Madden*, 109 Cal. 312, 41 Pac. 1092; *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494; *Jones, Mortg.* 5th ed. §§ 749 *et seq.*

In order that a grantee may be personally liable to pay the mortgage debt, it is not necessary that he should sign the deed or any obligation.

Roberts v. Fitzallen, 120 Cal. 482, 52 Pac. 818; *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683; *Alvord v. Spring Valley Gold Co.* 106 Cal. 547, 40 Pac. 27; *Weaver v. McKay*, 108 Cal. 546, 41 Pac. 450; *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Tulare County Bank v. Madden*, 109 Cal. 312, 41 Pac. 1092; *Jones, Mortg.* § 752.

Where it is sought to affect a bona fide purchaser for value of commercial paper with constructive notice, the question is not whether there were grounds of suspicion, or even gross negligence on his part, but whether he has acted in bad faith.

Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857; *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193. See also, to the same effect, *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318.

This is true even as respects non-negotiable property, like real estate.

Wilson v. Wall, 6 Wall. 83, 18 L. ed. 727.

The city is bound by its construction of the enabling act, concurred in by its city council and its qualified voters.

Van Hostrup v. Madison, 1 Wall. 291, 17 L. ed. 538.

The diverse citizenship of the parties sufficiently appears on the record in this action.

New Orleans v. Quinlan, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. Rep. 329; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

As the bonds and coupons are payable to bearer, it is no objection to the jurisdiction that they were assigned to plaintiff for collection only.

Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; *Bernards Twp. v. Stebbins*, 109 U. S. 341, 27 L. ed. 956, 3 Sup. Ct. Rep. 252.

The acts of *de facto* officers are valid.

Dill. Mun. Corp. 4th ed. § 276; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 1220.

Jeter was at least *de facto* mayor of the city of Santa Cruz at all the times in question.

State ex rel. Knewlton v. Williams, 5 Wis. 308, 68 Am. Dec. 65; *Carli v. Rhener*, 27 Minn. 292, 7 N. W. 139; *Magneau v. Fremont*, 30 Neb. 843, 9 L. R. A. 786, 47 N. W. 280; *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778; *Brown v. Lunt*, 37 Me. 423; *Petersilca v. Stone*, 119 Mass. 465, 20 Am. Rep. 335. See also *Atty. Gen. v. Crocker*, 138 Mass. 214; *Galbraith v. McFarland*, 3 Coldw. 267, 91 Am. Dec. 281; 5 Am. & Eng. Enc. Law, p. 105; *Jhons v. People*, 25 Mich. 499; *State ex rel. Day v. Buckland*, 23 Kan. 259; *Morton v. Lee*, 28 Kan. 286; *Wapello County v. Bigham*, 10 Iowa, 39, 74 Am. Dec. 370; *Re Manning*, 139 U. S. 504, 35 L. ed. 264, 11 Sup. Ct. Rep. 624; *Ball v. United States*, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761.

California holds the same doctrine held elsewhere as to the validity of acts of *de facto* officers.

People ex rel. Hoffman v. Hecht, 105 Cal. 621, 27 L. R. A. 203, 38 Pac. 941; *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *Buck v. Eureka*, 109 Cal. 504, 30 L. R. A. 409, 42 Pac. 243.

Mr. James G. Maguire argued the cause, and, with Messrs. John Garber and Carl E. Lindsay, filed a brief for respondent.

A municipality has no power to issue negotiable bonds, except upon statutory authority and subject to the restrictions and directions of the enabling act.

Aetna L. Ins. Co. v. Lyon County, 44 Fed. 329; *Young v. Clarendon Twp.* 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; *Concord v. Robinson*, 121 U. S. 165, 30 L. ed. 885, 7 Sup. Ct. Rep. 937; *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. ed. 1026, 6 Sup. Ct. Rep. 897.

It is well settled that, in the absence of express authority, given either by the Constitution or the statute, a municipality has no power to issue bonds, and that bonds issued by a municipality without such statutory or constitutional authority are absolutely void.

Wells v. Pontotoc County, 102 U. S. 625, 26 L. ed. 263; *Claiborne County v. Brooks*, 184 U. S.

111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; *Concord v. Robinson*, 121 U. S. 165, 30 L. ed. 885, 7 Sup. Ct. Rep. 937; *Kelley v. Milan*, 127 U. S. 139, 32 L. ed. 77, 8 Sup. Ct. Rep. 1101; *Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559; *Lehman v. San Diego*, 27 C. C. A. 668, 48 U. S. App. 681, 83 Fed. 669; *McCoy v. Briant*, 53 Cal. 247.

Any fair, reasonable doubt concerning the existence of the power is resolved by the court against the corporation, and the power is denied.

Dill. Mun. Corp. 4th ed. § 89; *Von Schmidt v. Widber*, 105 Cal. 157, 38 Pac. 682; *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361.

The rule of strict construction of corporate powers is applicable to grants of powers to municipal and public bodies, which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant.

Dill. Mun. Corp. 4th ed. § 91; *Von Schmidt v. Widber*, 105 Cal. 157, 38 Pac. 682.

Bonds issued in excess of the limit fixed by law are void.

Doon Dist. Twp. v. Cummins, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *East Oakland Twp. v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Lewis v. Shreveport*, 108 U. S. 282, 27 L. ed. 728, 2 Sup. Ct. Rep. 634; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *McPherson v. Foster Bros.* 43 Iowa, 48, 22 Am. Rep. 215; *North v. Platte County*, 29 Neb. 447, 45 N. W. 692; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Nesbit v. Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Lehman v. San Diego*, 27 C. C. A. 668, 48 U. S. App. 681, 83 Fed. 670; *Shaw v. Independent School Dist.* 23 C. C. A. 169, 40 U. S. App. 475, 77 Fed. 277.

Recitals in bonds do not cure this defect.

Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138; *Independent School Dist. v. Stone*, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. Rep. 84.

When the law confers no authority to issue bonds, the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value.

Hopper v. Covington, 118 U. S. 148, 30 L. ed. 190, 6 Sup. Ct. Rep. 1025; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *East Oakland Twp. v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 81, 5 Sup. Ct. Rep. 785; **184 U. S.**

Daviess County v. Dickinson, 117 U. S. 657, 29 L. ed. 1026, 6 Sup. Ct. Rep. 897; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; Dill. Mun. Corp. § 89.

Municipalities will not be estopped by recitals in bonds, unless the recitals relate to matters of fact which it may be fairly presumed that the officers of the municipality were left to determine.

Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *National Bank of Commerce v. Granada*, 4 C. C. A. 212, 10 U. S. App. 692, 54 Fed. 100.

Recitals cannot be relied upon as an estoppel where the facts recited are matters of public record, and are open to the inspection of everyone who is disposed to make inquiries.

Sutliff v. Lake County, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Nesbit v. Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Northern Nat. Bank v. Porter Twp.* 110 U. S. 608, 28 L. ed. 258, 4 Sup. Ct. Rep. 254; *Valley County v. McLean*, 49 U. S. App. 131, 79 Fed. 728; *Dudley v. Lake County*, 26 C. C. A. 82, 49 U. S. App. 336, 80 Fed. 672; *United States Trust Co. v. Mineral Ridge*, 44 C. C. A. 218, 104 Fed. 851.

Where the statutes of a state (as in California) provide that municipal corporations shall have power to make and publish from time to time ordinances providing for the method of binding them regarding the issue of bonds, the holder of negotiable bonds purporting to have been issued by such a corporation under the provisions of such statutes is bound to know, independently of the recitals in the bond, that there is such an ordinance in existence.

Hinkley v. Arkansas City, 16 C. C. A. 395, 32 U. S. App. 640, 69 Fed. 768. See also *Dudley v. Lake County*, 26 C. C. A. 82, 49 U. S. App. 336, 80 Fed. 672; *Valley County v. McLean*, 25 C. C. A. 174, 49 U. S. App. 131, 79 Fed. 728.

The bonds having been issued in part for an illegal purpose, and it being impossible to segregate or distinguish the valid from the invalid bonds, the whole issue is void.

Ætna L. Ins. Co. v. Lyon County, 44 Fed. 329; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; *Coffin v. Indianapolis*, 59 Fed. 221; *United States Trust Co. v. Mineral Ridge*, 44 C. C. A. 218, 104 Fed. 851.

The mayor and council must give and provide for the notice of election specified in the statute, and they must do it officially and by ordinance, as provided by the charter, for in no other way can they act or proceed.

Jersey City v. Central R. Co. 40 N. J. Eq. 419, 2 Atl. 262; *People v. Bailhache*, 52 Cal. 310; *Dey v. Jersey City*, 19 N. J. Eq. 416; *Schumm v. Scymour*, 24 N. J. Eq. 153; 15 Am. & Eng. Enc. Law, pp. 1028, 1029.

Stevenson v. Bay City, 26 Mich. 46; *Talcott Bros. v. Noel*, 107 Iowa, 470, 78 N. W. 39; *Lehman v. San Diego*, 27 C. C. A. 668, 48 U. S. App. 681, 83 Fed. 670; *Wesson v. Saline County*, 20 C. C. A. 227, 34 U. S. App. 680, 73 Fed. 919.

A statutory requirement that a certain fact shall be embodied in a resolution or ordinance is an express requirement that it be made a matter of public record open to the inspection of everyone.

Lehman v. San Diego, 27 C. C. A. 668, 48 U. S. App. 681, 83 Fed. 669; *Wesson v. Saline County*, 20 C. C. A. 227, 34 U. S. App. 680, 73 Fed. 919.

A statement made or fact appearing on the face of the bonds, whether required to be made by statute or not, prevents a purchaser from relying on recitals to the contrary of that fact, if true.

Chaffee County v. Potter, 142 U. S. 363, 35 L. ed. 1043, 12 Sup. Ct. Rep. 216; *McClure v. Oxford Twp.* 94 U. S. 429, 24 L. ed. 129.

Every person dealing in bonds is bound, at his peril, to inquire whether they were issued in the mode prescribed; and as the mode is the measure of the power, the bonds would be void in the hands of a holder for value without actual notice, if issued in any other mode.

Sutro v. Pettit, 74 Cal. 335, 16 Pac. 7; *McCoy v. Briant*, 53 Cal. 247.

Notwithstanding the recitals the municipality is not concluded as to any facts expressly required by statute to be made a matter of public record open to the inspection of everyone.

National L. Ins. Co. v. Mead, 13 S. D. 37, 48 L. R. A. 785, 82 N. W. 80, 13 S. D. 342, 83 N. W. 335.

Recitals or no recitals, and without regard to their character, the purchaser is by law, and without regard to the fact of ignorance or knowledge, held to know the official character of the signers and issuers of the bond.

See *Bissell v. Spring Valley Twp.* 110 U. S. 162, 28 L. ed. 105, 3 Sup. Ct. Rep. 555; *Brown v. Bon Homme County*, 1 S. D. 216, 46 N. W. 173.

Before these bonds were signed Jeter had ceased to be mayor, and Effe, from the moment he qualified, was mayor and in office, and Jeter, until he acquired some new and subsequent right or title, was a mere intruder and usurper, and had no right to sign these bonds.

State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; *La Pointe v. O'Malley*, 46 Wis. 64, 50 N. W. 521; *People ex rel. Evans v. Callaghan*, 83 Ill. 135; *Olson v. Treco County*, 8 Kan. App. 414, 54 Pac. 805; *State ex rel. Hugg v. Ivins*, 59 N. J. L. 139, 36 Atl. 685; *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184; *State ex rel. School Dist. v. Dorton*, 145 Mo. 304, 46 S. W. 950; *Hand v. Deady*, 79 Hun, 75, 29 N. Y. Supp. 633; *Woods v. Bristol*, 84 Me. 358, 24 Atl. 865; *McLean v. Valley County*, 74 Fed. 395.

To hold that the performance of an act

furnishes any evidence of authority to act would be begging the whole question.

State ex rel. Corey v. Curtis, 9 Nev. 341.

In the absence of statutory authority, a municipality has no power to assume the obligations of others, or to issue bonds; and bonds issued by a municipality without such statutory or constitutional authority are absolutely void.

Wells v. Pontotoc County, 102 U. S. 625, 26 L. ed. 122; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; *Concord v. Robinson*, 121 U. S. 165, 30 L. ed. 885, 7 Sup. Ct. Rep. 937; *Kelley v. Milan*, 127 U. S. 139, 32 L. ed. 77, 8 Sup. Ct. Rep. 1101; *Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559; *McCoy v. Briant*, 53 Cal. 241; *Sutro v. Pettit*, 74 Cal. 336, 16 Pac. 7.

The so-called refunding act is local and special because it excludes from its operation cities of the first class, while extending its privileges to all other classes of cities in the state of California.

Cal. Const. art. 4, § 25, subdiv. 33, p. 28; *Pasadena v. Stimson*, 91 Cal. 249, 27 Pac. 604; *Bruch v. Colombet*, 104 Cal. 351, 38 Pac. 45; *Darcy v. San José*, 104 Cal. 642, 38 Pac. 500; *Welsh v. Bramlet*, 98 Cal. 224, 33 Pac. 66; *Dougherty v. Austin*, 94 Cal. 604, 16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Farrell v. Sacramento*, 85 Cal. 408, 24 Pac. 868; *People ex rel. Graves v. McFadden*, 81 Cal. 499, 22 Pac. 851; *Earle v. San Francisco Bd. of Edu.* 55 Cal. 491; *Desmond v. Dunn*, 55 Cal. 242; *Miller v. Kister*, 68 Cal. 145, 8 Pac. 813; *People ex rel. Hassell v. Hoffman*, 60 How. Pr. 324; *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *State ex rel. Richards v. Hammer*, 42 N. J. L. 439; *Lodi Twp. v. State*, 51 N. J. L. 402, 6 L. R. A. 56, 18 Atl. 749; *People ex rel. McConville v. Hills*, 35 N. Y. 449; *People ex rel. Lee v. Chautauqua County*, 43 N. Y. 13; *Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800.

Purchasers of bonds issued by municipalities under the authority of a law which limits the amount of bonds to be issued, to a certain percentage of the assessment rolls, or to a given rate of taxation based on such rolls, are charged with notice of the assessment rolls and of the amount of bonds which can be validly issued, based on such assessment rolls.

Dixon County v. Field, 111 U. S. 183, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Sutliff v. Lake County*, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Francis v. Howard County*, 4 C. C. A. 460, 13 U. S. App. 126, 54 Fed. 487.

Mr. Jeter's signature to certain of the bonds after the expiration of his term was the act of a private citizen, and not of a public officer authorized by law to execute negotiable instruments of the municipality, and the bonds, under a familiar rule, are void even in the hands of purchasers for value.

Coler v. Cleburne, 131 U. S. 162, 33 L. ed. 146, 9 Sup. Ct. Rep. 720.

Official terms should not be extended beyond time clearly defined, but rather shortened by implication, if necessary.

People ex rel. Harris v. Brenham, 3 Cal. 477.

Mr. Jeter, at the time of the signing of the bond, on the afternoon of April 16, 1894, was not mayor *de facto* of the city of Santa Cruz.

State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; 5 Am. & Eng. Enc. Law, p. 96; *Brown v. Lunt*, 37 Me. 423; *Connolly v. Ashworth*, 98 Cal. 205, 33 Pac. 60; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211.

Upon the expiration of the term of office of any officer his power as such officer ceases, and any act performed by him thereafter as such officer is a nullity and has no force or effect, unless, indeed, he holds over under some color of right.

Trinity County v. McCammon, 25 Cal. 117; *Mechem*, Pub. Off. § 396; *Badger v. United States ex rel. Bolles*, 93 U. S. 599, 23 L. ed. 991; *People ex rel. Morton v. Tie-man*, 8 Abb. Pr. 359; *Vogel v. State ex rel. Land*, 107 Ind. 374, 8 N. E. 164; *Edison v. Almy*, 66 Mich. 329, 33 N. W. 509.

One who holds over after his term of office expires is an intruder, and he does not become an officer *de facto* until he has held for such a length of time that reputation and general acquiescence have established color of right.

Williams v. Boynton, 147 N. Y. 432, 42 N. E. 184; *State ex rel. Corey v. Curtis*, 9 Nev. 325; *Becker v. People ex rel. Wilson*, 156 Ill. 301, 40 N. E. 944; *Hughes v. Long*, 119 N. C. 52, 25 S. E. 743; *Den ex dem. Gil- liam v. Reddick*, 26 N. C. (4 Ired. L.) 368; *Doe ex dem. Burke v. Elliott*, 26 N. C. (4 Ired. L.) 355; *State v. Lewis*, 107 N. C. 967, 11 L. R. A. 105, 12 S. E. 457, 13 S. E. 247.

There can be no officer *de facto* where there is an officer *de jure* in possession of the office.

5 Am. & Eng. Enc. Law, p. 105; *Board- man v. Halliday*, 10 Paige, 223; *School Dist. No. 13 v. Smith*, 67 Vt. 568, 32 Atl. 484; *People ex rel. Evans v. Callaghan*, 83 Ill. 135; *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025.

Mr. Frederic R. Coudert, Jr., also argued the cause for respondent.

Mr. Frank J. Sullivan filed a brief as *amicus curiæ*:

All legislation is special which applies to a selected or designated class, even though it embraces the whole of the class, unless there appears some reason why its operation should be restricted.

Darcy v. San José, 104 Cal. 642, 38 Pac. 500; *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Earle v. San Francisco Bd. of Edu.* 55 Cal. 489; *Bruch v. Colombet*, 104 Cal. 347, 38 Pac. 45; *Ex parte Clancy*, 90 Cal. 553, 27 Pac. 411; *San Luis Obispo County v. Graves*, 84 Cal. 71, 23 Pac. 1032; *People v. Central P. R. Co.* 83 Cal. 394, 23 Pac. 303; *Miller v. Kister*, 68 Cal. 142, 8 184 U. S.

Pac. 813; *Omnibus R. Co. v. Baldwin*, 57 Cal. 160; *Desmond v. Dunn*, 55 Cal. 242; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Ex parte Jentsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *Walser v. Austin*, 104 Cal. 128, 37 Pac. 869; *Turner v. Siskiyou County*, 109 Cal. 332, 42 Pac. 434; *Denman v. Broderick*, 111 Cal. 96, 43 Pac. 516; *Marsh v. Hanly*, 111 Cal. 368, 43 Pac. 975; *Eaton v. Brown*, 96 Cal. 371, 17 L. R. A. 697, 31 Pac. 250; *Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081; *Rauer v. Williams*, 118 Cal. 401, 50 Pac. 691.

A statute purporting to confer upon all cities having a population of not less than 25,000 inhabitants the power of issuing bonds to fund their floating debt is a special law, and in violation of the constitutional amendment which forbids the passing of special laws to regulate the internal affairs of towns.

State, Anderson, Prosecutor, v. Trenton, 42 N. J. L. 486. To the same effect, see *State, Clark, Prosecutor, v. Cape May*, 50 N. J. L. 558, 14 Atl. 581; *Atchison v. Bartholow*, 4 Kan. 124; *State, Highstown, Pros- ecutor, v. Glenn*, 47 N. J. L. 105; *People ex rel. Miller v. Cooper*, 83 Ill. 585; *State, Alsbath, Prosecutor, v. Philbrick*, 50 N. J. L. 581, 15 Atl. 579; *Topcka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *State ex rel. Atty. Gen. v. Anderson*, 44 Ohio St. 247, 6 N. E. 571; *State v. Pugh*, 43 Ohio St. 98, 1 N. E. 439; *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *Scowden's Appeal*, 96 Pa. 422; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356.

An act to establish a license and excise department in certain cities containing more than 15,000 inhabitants, and in which the granting of licenses is not already vested in a board of excise, as in the court of com- mon pleas, is local and special, and there- fore unconstitutional.

State, Clossen, Prosecutor, v. Trenton License & Excise Board, 48 N. J. L. 438, 5 Atl. 323.

An act regulating the internal affairs of two cities has been declared unconstitution- al because it applied only to them, and could not apply to any others.

State ex rel. Richards v. Hammer, 42 N. J. L. 439.

Taking the statute and the face of the bond together, as he must, the purchaser is charged with knowledge that it was only bonds, and not warrants, that were attempt- ed to be refunded; that the election was called by ordinance, and that the ordinance recited and specified the particular bonds, and was made a public record accessible to all; and that there were like public records by reference to which he could ascertain whether the bonds recited were outstanding.

Sutliff v. Lake County, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Chaffee County v. Potter*, 142 U. S. 364, 35 L. ed. 1043, 12 Sup. Ct. Rep. 216; *McClure v. Ox- ford Twp.* 94 U. S. 429, 24 L. ed. 129.

It is the rule of the Federal courts to construe the statutes of a state according

to the rule of settled construction in that state, provided the Constitution or laws of the United States are not in any manner contravened.

Claiborne County v. Brooks, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489.

Under the statutes and laws of California, and by intendment and construction of law, a statutory requirement that a certain fact shall be embodied in a resolution or ordinance is an express requirement that it be made a matter of public record open to the inspection of everyone.

Wesson v. Saline County, 20 C. C. A. 227, 34 U. S. App. 680, 73 Fed. 919; *Lehman v. San Diego*, 27 C. C. A. 668, 48 U. S. App. 681, 83 Fed. 673.

A person dealing with a municipal corporation must determine for himself whether or not the proposed debt will cause the municipality to exceed the constitutional or statutory limitation.

Scott v. Davenport, 34 Iowa, 208; *Dixon County v. Field*, 111 U. S. 95, 28 L. ed. 364, 4 Sup. Ct. Rep. 315; *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Sutliff v. Lake County*, 147 U. S. 230, 235, 37 L. ed. 145, 149, 13 Sup. Ct. Rep. 318; *Marcy v. Oswego Twp.* 92 U. S. 637, 23 L. ed. 748; *Humboldt Twp. v. Long*, 92 U. S. 642, 23 L. ed. 752; *Doon Dist. County v. Cummins*, 142 U. S. 368, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; 15 Am. & Eng. Enc. Law, p. 1124.

The prohibition of indebtedness applies to all forms of debt over which the municipality has control, and includes both express and implied, as well as floating and bonded, indebtedness.

Litchfield v. Ballou, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Simonton, Municipal Bonds*, § 54.

It was obviously the intention of the legislature in submitting, and the people in adopting, the Constitution, to arbitrarily restrict the power of municipal corporations to contract debts to a limited per cent of their taxable property, and to require, when that limitation has been reached, that such corporations shall be prepared to pay for whatever value they may obtain, without the inconvenience of any further indebtedness for any purpose whatever.

Sackett v. New Albany, 88 Ind. 473, 45 Am. Rep. 467; *Simonton, Municipal Bonds*, § 55.

In construing these constitutional and statutory provisions, attention must be paid to their terms. Limitations imposed by the Constitution on the power of municipal corporations to contract debts should be construed with reference to existing facts, and with a view to the practical working of that instrument, and such a literal construction as would defeat the object to be attained should not be adopted.

Law v. People ex rel. Huck, 87 Ill. 383.

Statutory limitations are binding where the statute, the assessed valuation, and the public record of the debt referred to in them, disclose the entire absence of power to is-

sue bonds, of which facts all intending purchasers are bound to take notice.

Broadway Sav. Inst. v. Pelham, 83 Hun, 102; *Thompson v. Mamakating*, 37 Hun, 400, 106 N. Y. 674, 13 N. E. 937.

If it can be ascertained that the issue was in excess of the constitutional or statutory limitation, the bonds will be declared invalid, notwithstanding any recitals, unless the recitals, in express terms, state that the issue is not in excess of the constitutional or statutory limitation, and the amount of the issue is not ascertainable from the bonds themselves.

Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Quaker City Nat. Bank v. Nolan County*, 59 Fed. 660; *Sutliff v. Lake County*, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Francis v. Howard County*, 43 C. C. A. 460, 13 U. S. App. 126, 54 Fed. 487; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Nesbit v. Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71.

To create an estoppel as to overissue there must be in the bond a recital to the effect that the total amount of the issue does not exceed the limit prescribed by the laws or Constitution of the state.

Quaker City Nat. Bank v. Nolan County, 59 Fed. 660; *Millsaps v. Terrell*, 8 C. C. A. 557, 23 U. S. App. 208, 60 Fed. 193; *Francis v. Howard County*, 4 C. C. A. 460, 13 U. S. App. 126, 54 Fed. 487; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Sutliff v. Lake County*, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Chaffee County v. Potter*, 142 U. S. 355, 35 L. ed. 1040, 12 Sup. Ct. Rep. 216; *National L. Ins. Co. v. Huron Bd. of Edu.* 10 C. C. A. 637, 27 U. S. App. 244, 62 Fed. 778.

All overissued bonds are void.

Sutro v. Pettit, 74 Cal. 332, 16 Pac. 7; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98; *Simonton, Municipal Bonds*, § 238.

Equity will not grant relief to the holder of such bonds.

Litchfield v. Ballou, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71.

If the municipal corporation did not have the authority to do the work and make the public improvement, or if the money was not obtained for a public object which the municipality had authority to do, but was used for some purpose about which the municipality had no authority to act, then the holder cannot recover at all. The whole issue will be held invalid if the transaction is one and indivisible.

Simonton, Municipal Bonds, § 237; 15 Am. & Eng. Enc. Law, p. 1137; *Millerstown v. Frederick*, 114 Pa. 435, 7 Atl. 156; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71.

Not even ratification will make good bonds issued beyond the lawful limit.

Dariess County v. Dickinson, 117 U. S. 657, 29 L. ed. 1026, 6 Sup. Ct. Rep. 897; *McPherson v. Foster Bros.* 43 Iowa, 48, 22 Am. Rep. 215.

If a purchaser received any information of a defect in the bonds, that is sufficient of itself to put him on inquiry as a prudent man. No matter how this information is acquired, by agents or otherwise, it is fatal to the claim of being an innocent purchaser.

Burroughs, *Public Securities*, pp. 331, 360. See *Hopple v. Hipple*, 33 Ohio St. 116; *Harshman v. Bates County*, 92 U. S. 569, 23 L. ed. 747; *Bates County v. Winters*, 97 U. S. 85, 24 L. ed. 933; *McClure v. Oxford Twp.* 94 U. S. 429, 24 L. ed. 129.

[303] *Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in the name of Waite, a citizen of Massachusetts, against the city of Santa Cruz, a municipal corporation of California of the fifth class, to recover the principal and interest of certain negotiable bonds, nine in number, and *certain negotiable coupons thereof, 282 in number, issued April 16th, 1894, in the name of the defendant city.

[304] Each bond, signed by "Wm. T. Jeter, Mayor of the city of Santa Cruz," and attested by "O. J. Lincoln, City Clerk," contained these recitals:

"And for the payment of the principal sum [\$1,000] herein named, and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound, and its faith and credit and all the real and personal property of said city are hereby pledged, for the prompt payment of this bond and interest at maturity.

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act of the legislature of the state of California, entitled 'An Act to Amend an Act Entitled "An Act Authorizing the Common Council, Board of Trustees, or Other Governing Body of any Incorporated City and Town, Other than Cities of the First Class, to Refund its Indebtedness, Issue Bonds Therefor, and Provide for the Payment of the Same" (approved March 15, 1883),' approved March 1, 1893.

"And in pursuance of and in conformity with the Constitution of the state of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the 13th day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election

184 U. S.

had been canvassed, found, and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened and performed, in legal and due form, as required by law. This *bond ceases[305] to bear interest when due, unless presented for payment."

The parties having by written stipulation waived a jury, the case was determined in the circuit court upon a special finding of facts. The result was a judgment against the city for the full amount of the bonds and coupons held by the plaintiff, except as to three coupons transferred to him by the Northern Counties Investment Trust Company. 89 Fed. 619. That judgment was reversed in the circuit court of appeals with directions to enter judgment for the city. 39 C. C. A. 106, 98 Fed. 387. The case is here upon writ of certiorari granted upon the application of the plaintiff Waite.

The propositions advanced on behalf of the city are numerous, but most of them are involved in the general contention that there was a want of power in the city to issue the bonds in question, and that nothing occurred that could estop it from disputing its liability even to those who may have purchased them in good faith and for value.

The circumstances under which the bonds were executed should be first set forth. That being done, we will take up such of the questions raised by the assignments of error as are necessary to be determined.

On the 16th day of September, 1889, the city of Santa Cruz entered into a contract with certain persons doing business under the name of Coffin & Stanton, which recited that the former desired to acquire, and the latter desired to furnish, a waterworks system for the city,—the city agreeing to grant to Coffin & Stanton a franchise for the construction of waterworks in Santa Cruz, and that firm agreeing to construct or cause to be constructed a waterworks system in conformity with specifications theretofore made by the city engineer. The city agreed to purchase the waterworks after they were constructed, and pay for them the sum of \$320,000. It was also stipulated that Coffin & Stanton should cause to be organized a corporation to be known as the City Water Company of Santa Cruz, to which the above franchise should be assigned. It was further provided that the water company should execute a first mortgage upon all its properties, rights, titles, and franchises then owned or thereafter *acquired, for the[306] payment of bonds (not exceeding \$400,000 in amount, except as provided in the contract) to be issued to Coffin & Stanton as the work of construction progressed, they to make all necessary cash advances. The contract provided: "And when said water company shall have fully completed said waterworks, then said water company shall convey absolutely to said city of Santa Cruz all its property, rights, titles, and franchises to have and to hold forever, subject only to

the mortgage and to the deed of trust or escrow hereinbefore mentioned. . . . And said water company shall commence operation on the construction of said waterworks as soon as practicable, and shall have the whole completed within one year of such commencement."

Pursuant to the above agreement the city, by ordinance, granted to Coffin & Stanton a franchise and right of way to construct the waterworks, and such franchise and rights were assigned by them to the City Water Company, incorporated September 27th, 1889.

Under date of May 1st, 1890, the water company, pursuant to that agreement, executed a mortgage or deed of trust to secure the payment of 400 bonds of \$1,000 each. That was done in order to obtain money for the construction of the proposed waterworks.

Subsequently, March 29th, 1892, the water company executed a deed to the city, which recited that the waterworks has been fully completed to the satisfaction of the city and had been accepted by it. By that deed the water company conveyed its entire property, rights, power, privileges, and franchises to the city, to have and to hold the same, "subject, however, to said mortgage or deed of trust, and all the obligations thereby imposed, which bonds, mortgage, or deed of trust, and obligations, the party of the second part [the city] agrees to pay and perform."

When the act of March 1st, 1893, referred to in the bonds, was passed, as well as at the time the bonds were issued, the Constitution of California provided that "no county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any [307] purpose, exceeding *in any year the income and revenue provided for it for such year, without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." Art. 11, § 18.

The ordinance referred to in the bonds—the one of the 26th day of February, 1894 (No. 314), calling a special election of the qualified electors of the city to determine the question of refunding "the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same"—stated that "the outstanding indebtedness evidenced by bonds of said city," which "it is proposed to refund," consisted of (1) 450 bonds, of \$500 each, issued in 1889, the proceeds of which had been used "in the purchase and construction of the

city waterworks;" (2) 89 first-mortgage bonds of the water company, of date May 1st, 1890, "which said bonds outstanding were, at the time of the conveyance by the City Water Company to the city of Santa Cruz of the property known as the city waterworks, and now are, a valid lien and charge upon the property known as the city waterworks, and become thereby a part of the bonded indebtedness of the city;" and (3) 65 municipal improvement bonds of \$500 each, dated September 23d, 1897, and 26 municipal improvement bonds of \$250 each of like date.

The ordinance provided for an issue of 360 bonds of \$1,000 each, payable to bearer, and carrying 4 per cent interest, payable annually, and which should be of the character known as "serials."

The same ordinance provided for a special election on the question of refunding the above bonds, and prescribed the form of the refunding bonds. That form contained the same recitals, word for word, that appear in the extract from the bonds found *at the [308] beginning of this opinion. The ordinance thus concluded: "§ 12. If, upon the canvass of the returns of said election, it shall be found that two thirds of the voters thereat have voted in favor of refunding said indebtedness, issuing bonds therefor, and providing for the payment of the same, then and thereafter said indebtedness shall be refunded, bonds issued therefor, and provision made for the payment of the same in the manner herein and as by law provided."

On the same day the city council passed an ordinance, No. 315, which provided for notice of the special election so ordered, such notice to describe fully the indebtedness to be refunded. The required notice was given and contained the same description of the city indebtedness proposed to be refunded as was given in ordinance No. 314. The election was held on the day fixed by the ordinance and notice. The result was that 538 votes were cast in favor of, and 57 votes against, the proposed refunding of the city's indebtedness. So that more than two thirds of the qualified electors voting were in favor of refunding the then "bonded indebtedness of the said city," including the above 89 first-mortgage bonds issued by the water company and which the city had assumed to pay when it purchased and took the deed for the waterworks.

On the 26th day of March, 1894, the city passed ordinance No. 320, which provided for refunding the indebtedness and issuing bonds therefor in accordance with the will of the voters at the special election.

That ordinance provided that each bond should contain the same recitals as those set forth in ordinance No. 314 and in the above notice of the special election, as well as this further recital: "And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form and as required by law."

By the same ordinance provision was

made for giving notice by publication of the purpose of the mayor and common council to sell the bonds to the highest bidder, and inviting sealed bids from purchasers, and for levying and collecting an annual tax for forty years to pay such bonds and coupons, [309]—the moneys ^{so} collected to constitute a sinking fund for the payment of the principal.

In the finding of facts it was also stated that on April 11th, 1892, William T. Jeter was duly elected mayor of Santa Cruz, and J. Howard Bailey, J. F. Hoffman, E. G. Green, and F. W. Lucas, on the same day, members of the common council of the city. The persons so elected as mayor and members of the common council qualified for their respective offices within ten days after election, and entered upon the duties of their respective offices. Section 3 of the act of the legislature of California, entitled "An Act to Reincorporate the City of Santa Cruz," approved March 11th, 1876, provides that the mayor and common council of said city shall hold their offices for a term of two years, and until their successors are duly elected and qualified. On the 9th day of April, 1894, Robert Effey was duly elected mayor of defendant city to succeed William T. Jeter, and duly qualified as such between 11 o'clock A. M. and 2 o'clock P. M. of April 16th, 1894; and Henry G. Ensell, John Howard Bailey, J. D. Maher, and Frank K. Roberts were, on April 9th, 1894, elected members of the common council of the city all of them duly qualifying as such before the meeting of the council of the city held April 16, 1894. The persons so elected mayor and members of the common council on April 9th, 1894, with the exception of Bailey, who was re-elected councilman, did not actually enter upon their duties as officers until May 7th, 1894, and Jeter, Bailey, Hoffmann, Green, and Lucas continued to act publicly as mayor and members of the common council of the city until May 7th, 1894, without protest from any person, and held seven meetings of the council between and including the date of April 16th, 1894, and May 7th, 1894.

All of the bonds and coupons sued on were in the form and bore date and were signed and attested as alleged in the complaint, but some of them were signed by William T. Jeter on April 16th, 1894, after the qualification of his successor. Whether those sued on were among those signed by Jeter after the qualification of his successor does not appear.

On April 16th, 1894, to which date the common council of the city had regularly adjourned, Jeter, acting as mayor, and [310] Bailey, ^{Hoffmann}, Green, and Lucas being present and acting as the common council of the city, and no bids having been received for the purchase of the refunding bonds issued by the city under ordinance 320, the proposition of Coffin & Stanton to take all the bonds, dated February 27th, 1894, was accepted, upon the condition that they should furnish satisfactory security for the

faithful performance of the agreement contained in that proposition.

Jeter as mayor, and Lucas, Bailey, Hoffmann, and Green, as members of the common council, publicly met on April 23d, 1894, pursuant to adjournment of the common council, and, assuming to act as mayor and members of the common council of said defendant city, without protest or opposition from anyone, accepted and approved a bond presented by Coffin & Stanton for the faithful performance of their proposed agreement, and directed the clerk of the defendant city to deliver to them the above refunding bonds, and all of them were in accordance with such direction delivered to Coffin & Stanton on April 24th, 1894.

All of the nine bonds and coupons sued on matured April 15th, 1895, and no part of them has been paid.

Coffin & Stanton never complied with the agreement upon which the bonds and coupons were delivered to them, and the defendant city never received any consideration on account of the issuing of the bonds, other than the promise of Coffin & Stanton to assume the payment of the bonds mentioned in their agreement.

It thus appears that the construction of the waterworks was brought about by the agreement between the city and Coffin & Stanton, under which the city was to purchase such works when they were completed;

That the waterworks were completed and were accepted by the city, and the city agreed to assume and pay the outstanding bonds issued by the water company in order to provide money with which to construct the waterworks, such bonds being secured (as was provided for by the agreement between the city and Coffin & Stanton) by a first mortgage upon the franchise and property of the water company;

*That the city by ordinance proposed to [311] refund its indebtedness under the act of 1893, describing in such ordinance 89 of the above first-mortgage bonds of the water company which it had assumed to pay, and stating therein that those bonds were a valid lien and charge upon the property known as the city waterworks, and became thereby a part of the bonded indebtedness of the city;

That a special election was ordered to determine whether the qualified electors approved the proposed refunding;

That notice of such election was given, which described the bonds proposed to be refunded and which stated that the above 89 bonds had been assumed by the city as part of the purchase price of the waterworks, and were a valid lien upon such works;

That more than two thirds of the qualified voters approved the proposed refunding, including the above 89 first-mortgage bonds;

That the city directed that any refunding bonds issued should state, upon their face, by way of recital, that they were issued under and in pursuance of the above act of 1893, and in conformity with the Constitution of California, the ordinance of the city, and with a vote of more than two thirds

of all the qualified voters of the city at a special election duly and legally called, held and conducted as provided by the act of 1893; and,

That the above bonds should upon their face further certify and declare that all acts, conditions, and things required by law to be done precedent to and in the issue of the bonds had been properly done, happened, and performed, in legal and due form, as required by law.

The circuit court of appeals was of opinion that purchasers of the bonds were bound to take notice of the ordinances of the city, and that the entire issue of \$360,000 in refunding bonds was invalid by reason of its including the \$89,000 in bonds executed by the water company, the payment of which was assumed by the city. It reversed the judgment of the circuit court with directions to enter judgment for the city on the bonds.

1. The refunding act of March 1st, 1893, amendatory of the act approved March 15th, 1883, is as follows:

[312] “§ 1. That section one of the above entitled act is hereby amended to read as follows: ‘§ 1. That whenever any incorporated city or town, other than cities of the first class in this state, has an *outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, board of trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as “serials,” one fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed \$1,000, nor less than \$100; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of the treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed 6 per cent per annum, and may be payable semiannually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each

year, sufficient money to pay one fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.’

“§ 2. That section 2 of said act be amended so as to read as follows: ‘§ 2. Whenever sufficient money is in the funding fund, in the hands of the treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds (giving the number thereof), and if the same are not presented for redemption within thirty days after the first publication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the postoffice a copy of such notice, inclosed in a sealed envelope, with the postage paid thereon, addressed to the owner or owners of such bond or bonds, at the postoffice address of such owner or owners, as shown by the record thereof kept in the treasurer’s office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the treasurer shall proceed to cancel the same by indorsing on the face thereof the amount for which they are received, the word “canceled” and the date of cancelation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city or town, at least once a month, accompanying the same therewith by the bonds which have been taken up and canceled.’

“§ 3. That § 3 of said act be amended so as to read as follows: ‘§ 3. All moneys which shall remain in said funding fund after all outstanding bonds as were proposed to be refunded have been taken up and canceled, shall be paid into the general fund of such city or town, and become a part thereof.’

“§ 4. This act shall take effect and be in force immediately after its passage.”

One of the contentions of the city is that the words “outstanding indebtedness evidenced by bonds and warrants thereof,” in this act, do not embrace the 89 bonds executed by the water company. Those bonds, although not executed by the city, *certainly constituted a part of its outstanding indebtedness, for the reason that the city had assumed to pay them. Both the city authorities and the qualified electors so regarded the matter. The city’s assumption of the bonds imposed as much obligation upon it to pay them as if it had itself directly executed and issued them. It could not acquire complete ownership of the waterworks without paying for them, and it took a deed for the waterworks expressly subject to a valid

lien in favor of the water company's first-mortgage bonds, including the above \$9 bonds. In every substantial sense, therefore, these bonds were part of the city's outstanding bonded indebtedness. Such is the argument made in behalf of the plaintiff, and its force is recognized. But whether this view rests upon a sound construction of the act of 1893, we need not now say. That question is left open for determination when it must be decided, and our judgment is placed upon another ground, to be now stated.

2. The refunding bonds in suit, as we have seen, recited that they were issued under, in pursuance of, and in conformity with, the act of 1893, the Constitution of California, and the ordinances of the city of Santa Cruz, as well as in conformity with the vote of two thirds of all the qualified electors of the city, voting at a special election duly called, held, and conducted, as provided by the above act; also, that *all* acts, conditions, and things required by law to be done precedent to and in the issuing of the bonds had been properly done and performed, in legal and due form, as required by law. As between the city and a bona fide purchaser of such bonds, can the city be heard to say that the bonds were not of the class embraced by the words in the act of 1893, "outstanding indebtedness evidenced by the bonds and warrants thereof?" Is the city estopped to dispute the truth of the recitals in its refunding bonds, there being nothing in such recitals indicating or suggesting that they were not true?

The city contends that it is not thus estopped, because the ordinances under which the special election was held disclosed the fact that the \$9 first-mortgage bonds of the water company were included in the proposed refunding; that purchasers were bound to take notice of the provisions of [315] such ordinances; and *that the ordinances, being examined, would have disclosed the fact that the bonds, although assumed by the city, were executed by the water company, and not by the city. Let us see whether a purchaser of the bonds was bound to know what those ordinances contained.

The first case to which we will refer is that of *Hackett v. Ottawa*, 99 U. S. 86, 95, 25 L. ed. 363, 365. The municipal bonds sued on in that case were issued by the city of Ottawa, Illinois. They contained recitals to the effect that they were issued by virtue of the charter of the city empowering it to borrow money, issue bonds therefor, and pledge its credit for their payment, and in accordance with certain ordinances of which the titles and dates were given. The bonds stated upon their face that one of those ordinances, passed June 15th, 1869, was entitled "An Ordinance to Provide for a Loan for Municipal Purposes," and the other, "An Ordinance to Carry into Effect the Ordinance of June 15th, 1869, Entitled 'An Ordinance for a Loan for Municipal Purposes.'" The principal defense was that the recital as to a loan for municipal purposes was untrue; that the bonds were not issued for

municipal or corporate purposes, but as a simple donation to a private corporation whose business was in nowise connected with or under the control of the city; which facts, it was contended, appeared upon the faces of the ordinances themselves.

The Constitution of Illinois provided that counties, townships, school districts, cities, towns, and villages "may be vested with power to assess and collect taxes for corporate purposes." But this court did not deem it necessary to determine what were corporate purposes within the meaning of the Illinois Constitution, saying: "A direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois Constitution, we pass to another point, which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the city that the testator of plaintiff in error purchased the bonds before maturity for a valuable *consideration, without any [316] notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a bona fide holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the council to borrow

money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Marshall County v. Schenck*, 5 Wall. 772, 18 L. ed. 556. It *would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defense." The same principles were announced in *Ottawa v. First Nat. Bank*, 105 U. S. 342, 343, 26 L. ed. 1127.

A case directly in point is that of *Evansville v. Dennett*, 161 U. S. 434, 443, 40 L. ed. 760, 764, 16 Sup. Ct. Rep. 613, 617. That was an action on negotiable bonds payable to bearer and issued by the city of Evansville, Indiana, in payment of a subscription of stock in a railroad company. Each bond recited that it was issued in payment of such subscription, "made in pursuance of an act of the legislature of the state of Indiana, and ordinances of the city council of said city, passed in pursuance thereof." There were other negotiable bonds involved in that suit, which were issued by the city, each reciting that it was issued by virtue of the city's charter, by virtue of a certain act of assembly (its title and date being given), and by virtue of certain resolutions of the city council of named dates; and that the faith, credit, real estate, revenues, and all resources of the city were irrevocably pledged for the payment of principal and interest. It was contended in that case that the ordinances of the city, if examined, would show that the election held in the city upon the question of issuing the bonds was not legally held, and therefore that the bonds were issued without authority and were void. This court, upon a review of former decisions, said: "As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to [318] subscribe, and to *ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature."

The only other case to which we need refer upon this point is *Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 262, 274, 275, 43 L. ed. 689, 693, 698, 19 Sup. Ct. Rep. 390, 392, 397. That was a suit upon negotiable coupons attached to negotiable bonds executed by the board of commissioners of Gunnison county, Colorado, and which recited that they were issued "in exchange at par for valid floating indebtedness of the county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the general assembly of the state of Colorado entitled 'An Act to Enable the Several Counties of the State to Fund their Floating Indebtedness,' approved February 21, 1881; that 'all the requirements of law have been fully complied with by the proper officers in the issuing of this bond;' that the total amount of the issue did 'not exceed the limit prescribed by the Constitution of the state of Colorado;' and that such issue had been authorized by a vote of a majority of the duly qualified electors of the county, voting on the question at a general election duly held in the county on the 7th day of November, 1882."

The question presented was whether such recitals estopped the county from asserting against a bona fide holder for value, that the bonds created an indebtedness in excess of the limit prescribed by the Constitution of Colorado. The principal defense was that the purchaser of the bonds was bound to take notice of the orders and records of the county commissioners authorizing the issue of the refunding bonds, and that an examination of those orders would have disclosed the fact that the bonds were in excess of the limit prescribed by the Constitution of the state.

After a review of previous cases, namely, *Buchanan v. Litchfield*, 102 U. S. 278, 290, 292, 26 L. ed. 138, 140, 141; *Orleans v. Pratt*, 99 U. S. 676, 25 L. ed. 404; *Northern Nat. Bank v. Porter Twp.* 110 U. S. 608, 616, 619, 28 L. ed. 258, 261, 262, 4 Sup. Ct. Rep. 254; *Dixon County v. Field*, 111 U. S. 83, 92-94, 28 L. ed. 360, 363, 364, 4 Sup. Ct. Rep. 315; *Lake *County v. Graham*, 130 U. S. 674, 680, 683, 684, 32 L. ed. 1065, 1067, 1068, 9 Sup. Ct. Rep. 654; *Chaffee County v. Potter*, 142 U. S. 355, 363, 364, 366, 35 L. ed. 1040, 1043, 1044, 12 Sup. Ct. Rep. 216; and *Sulliff v. Lake County*, 147 U. S. 230, 235, 237, 238, 37 L. ed. 145, 149, 13 Sup. Ct. Rep. 318,—this court held that the *Gunnison Case* was controlled by the decision in *Chaffee County v. Potter*, which was a suit on coupons of negotiable municipal bonds that contained the same recitals as were made in the Gunnison county bonds. We said: "It was expressly decided in the *Chaffee County Case* that the statute under which the bonds there in suit (the bonds here in suit being of the same class), authorized the county commissioners to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the Constitution and the statute; and that the recital in the bond to the effect that such determination had

been made, and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule *Chaffee County v. Potter*, and upon the authority of that case, and without re-examining or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the county of Gunnison is estopped to question the recital in the bonds in question to the effect that they did not create a debt in excess of the constitutional limit, and were issued by virtue of and in conformity with the statute of 1881, and in full compliance with the requirements of law." Again: "It is insisted with much earnestness that the principles we have announced render it impossible for a state, by a constitutional provision, to guard against excessive municipal indebtedness. By no means. If a state constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in the open market in good faith. Indeed, it is entirely competent for a state to provide by statute that all obligations, in whatever form executed by a municipality existing under its [320] laws, shall be subject to any *defense that would be allowed in cases of non-negotiable instruments. But for reasons that everyone understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Applying to the present case the principles heretofore announced by this court, is there any escape from the conclusion that the city of Santa Cruz is estopped to dispute the truth of the recitals in the bonds in suit, which stated that they were issued in pursuance of the act of 1893 as well as in conformity with the Constitution of California authorizing it to incur indebtedness or liability with the assent of two thirds of the qualified voters at an election held for that purpose, and that all acts, conditions, and things required by law to be done precedent to issuing the bonds had been properly done and performed in due and lawful form as required by law? We think not.

The city of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under, and in pursuance of, and in conformity with, the act of 1893 and the Constitution of the

state. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds.

*The circuit court having found—and as [321] we think correctly—that the "assignors" of the plaintiff, that is, the parties who placed the bonds in his hands, were bona fide purchasers, without notice of anything affecting the truth of the recitals in them, our conclusion is that the city cannot escape liability by reason of the fact, disclosed by its ordinances, that the \$9 first-mortgage bonds of the water company assumed by the city were included in its refunding scheme.

3. It is said, however, that the act of 1893 was repugnant to the Constitution of California, in that it is a special law, relating to a subject concerning which that Constitution required all laws to be general. In *Los Angeles v. Teed*, 112 Cal. 319, 328, 329, 44 Pac. 580, 583, the validity of the act of 1883 and that of 1893 amendatory thereof having been questioned by counsel, the supreme court of California said: "On March 15th, 1883, an act was passed (Stat. 1883, p. 370) authorizing the governing body of every municipal corporation, other than cities of the first class, to fund or refund any indebtedness of the corporation by a vote of four fifths of their number. That act authorized the issue of bonds, to be exchanged for any existing indebtedness, or to be sold for money to be applied to the payment of such indebtedness. It is contended that this act violates the provisions of the Constitution against special legislation. But there can be no question that the act classifying municipal corporations is constitutional (*Pritchett v. Stanislaus County*, 73 Cal. 310, 14 Pac. 795), and that in matters pertaining to municipal organization the legislature may make different regulations for the different classes so created. *Pasadena v. Stimson*, 91 Cal. 249, 27 Pac. 604. The subject-matter of the act in question—the funding of municipal indebtedness—is 'peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population.' The act is, therefore, not obnoxious to that objection." Referring to the act of 1893, the court said: "It is contended that this act also is invalid, as special legislation; but

what we have said as to the act of 1883 on this question applies equally to this act." Nothing further need be said upon this question.

[322] *4. Another defense is that Jeter, who signed the bonds, was not the rightful mayor of Santa Cruz. The facts bearing upon this point have been heretofore stated and need not be repeated. The circuit court said:

"It is claimed by the defendant that, as it is not shown that the bonds sued on were signed by William T. Jeter before the qualification of his successor in the office of mayor, the plaintiff has failed to prove that the bonds were signed by an officer authorized to do so, and they must therefore be held void, even in the hands of bona fide purchasers, under the rule declared in *Coler v. Cleburne*, 131 U. S. 162, 33 L. ed. 146, 9 Sup. Ct. Rep. 720. That case is not authority for the proposition that the action of a *de facto* officer in signing bonds would not be as binding upon the municipality for which he assumes to act as that of an officer *de jure*; and it seems clear to me that if Jeter was the *de facto* mayor when he signed the bonds sued on, then such signing by him was a compliance with the ordinance requiring them to be signed by the mayor; and so, also, if he was *de facto* mayor, and those assuming to act as the common council of the defendant were *de facto* members of the common council at the time when he and they assumed as mayor and common council to accept the proposition of Coffin & Stanton in relation to the bonds, and directed their delivery to that firm, then such acts upon their part are to be treated, so far as concerns the public and third persons having an interest in what was done by them, as the acts of the *de jure* mayor and common council of the city. The rule that the acts of a *de facto* officer are valid as to the public and third persons is firmly established, although it is sometimes difficult to determine whether the evidence is such as to warrant a finding that a particular act or acts, the legality of which may be in issue in a given case, were those of a *de facto* officer. The contention of the defendant is that Jeter was not the *de facto* mayor at the time of the signing and delivery of the bonds, nor were the old members of the common council, who continued to act as such after the qualification of their successors, and until after the bonds were delivered to Coffin & Stanton, *de facto* members of the common council of defendant, after the qualification of their successors. Whether one

[323] was or was *not a *de facto* officer at the time when he assumed to perform duties belonging to a public office, is a mixed question of law and of fact. *State ex rel. Van Amringe v. Taylor*, 108 N. C. 196, 12 L. R. A. 202, 12 S. E. 1005; *United States v. Alexander*, 46 Fed. 728. And in passing upon the question presented by defendant's contention upon this point, it is well to first consider what facts are sufficient to constitute a *de facto* officer. A *de facto* officer may be defined as one whose title is not

good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer. Thus it is said in *Petersilea v. Stone*, 119 Mass. 468, 20 Am. Rep. 337: "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it, by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question."

After referring to *Jhons v. People*, 25 Mich. 503; *Atty. Gen. v. Crocker*, 138 Mass. 214; *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778; *State ex rel. Knowlton v. Williams*, 5 Wis. 308, 68 Am. Dec. 65, and *Magneau v. Fremont*, 30 Neb. 843, 9 L. R. A. 786, 47 N. W. 280, the circuit court said: "The foregoing cases sufficiently illustrate the principle upon which courts proceed in determining whether one who has assumed to act as a public officer was at the time an officer *de facto*, and it only remains to apply the rule which they establish to the facts which have been already stated as appearing in the present case, and in doing so there is but one conclusion that can be reached, and that is that Jeter was the *de facto* mayor of the city of Santa Cruz, on the 16th day of April, 1894, at the time when he signed the bonds in question, and he and the persons who *as-

We are entirely satisfied with the treatment of this question by the circuit court, and deem it unnecessary to make any additional observations.

5. All of the bonds and coupons sued on were duly transferred to the plaintiff before the commencement of this action. It is agreed that he had at the bringing of this action the legal title to all of them, although he paid no money consideration for the transfer, and that the bonds and coupons were transferred to him for collection only.

It is contended by the defendant that it does not appear that the circuit court had jurisdiction, since the citizenship of the persons who put the bonds in the plaintiff's hands for collection is not set forth.

Prior to the passage of the judiciary act of August 13th, 1888, chap. 866, 25 Stat. at L. 433, it was the settled rule that the holder of a negotiable instrument payable to

bearer was not an "assignee" thereof within the meaning of the judiciary act of 1789, chap. 20, or the act of March 3d, 1875, chap. 137, but was the holder in virtue of an original and direct promise moving from the maker to the bearer, and could sue without reference to the citizenship of the original or any intermediate holder. *Thompson v. Perrine*, 106 U. S. 589, 592, 593, 27 L. ed. 298, 300, 1 Sup. Ct. Rep. 564, 568.

The above act of 1888 did not change this rule, but it made some alteration of former statutes. Its 1st section excluded from the cognizance of any circuit or district court of the United States "any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 Stat. at L. 434, chap. 866.

The defendant, the city of Santa Cruz, is a corporation within the meaning of that section. *Loeb v. Columbia Twp.* 179 U. S. 472, 485, 45 L. ed. 280, 288, 21 Sup. Ct. Rep. [325] 174. *So that, in respect of the bonds and coupons here in suit—they being payable to bearer and having been made by a corporation—the complaint need not have disclosed the citizenship of any previous holder of the bonds. It shows—and nothing more was necessary so far as citizenship was concerned—a diversity of citizenship as between the holder of the legal title to the bonds and coupons and the defendant city.

But the act of 1888 did not repeal the 5th section of the act of March 3d, 1875, chap. 137 (*Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 339, 40 L. ed. 444, 449, 16 Sup. Ct. Rep. 307; *Lake County v. Dudley*, 173 U. S. 243, 251, 43 L. ed. 684, 688, 19 Sup. Ct. Rep. 398), which provides "that if, in any suit, commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." 18 Stat. at L. 470, 472.

Does the present case come within this provision of the act of 1875 in respect of any cause of action embraced in it? It does not, if the only objection to the jurisdiction of the circuit court is that the plaintiff was

invested with the legal title to the bonds and coupons simply for purposes of collection. But if the transfer was made for the purpose, in any way, of creating a case cognizable in the circuit court, of which it could not otherwise have taken cognizance, then the duty of this court is to take notice of that fact and give effect to the statute of 1875. *Metcalf v. Watertown*, 128 U. S. 586, 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173, and authorities there cited. The jurisdiction of the circuit court, it must be observed, depends equally on the citizenship of the parties and the value of the matter in dispute. If the transferrers of the plaintiff were citizens of states other than California, as they seem to have been, each could have sued in the circuit court, if the *amount in dispute [326] was sufficient; and therefore the transfers in such cases were not a fraud on the jurisdiction of the circuit court, so far as the question of diverse citizenship was concerned. But if the transfer enabled the plaintiff to embrace in his suit a claim or claims against the city of which the circuit court could not have entertained jurisdiction, at the suit of the transferrer, because of the insufficiency of the amount in dispute, then the act of 1875 would apply.

This question was presented and decided in *Bernards Twp. v. Stebbins*, 109 U. S. 341, 355, 356, 27 L. ed. 956, 962, 3 Sup. Ct. Rep. 252, 262, 263, which was an action on negotiable bonds brought in the Federal court sitting in New Jersey, the plaintiffs being citizens of New York and the defendant a municipal township of New Jersey. Referring to the decision in *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719, we said that it "establishes that the circuit court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same state as the defendant, or by reason of the insufficient value of their claims. The principle of that decision is equally applicable to suits in equity to assert equitable rights under such bonds." Again, in the same case: "It follows, that these bills should have been dismissed so far as regarded the bond for \$200, owned by a citizen of New York in the first case, and also as to all the bonds owned by citizens of New Jersey in either case. But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the circuit court."

The same view of the act of 1875 was taken in *Lake County v. Dudley*, 173 U. S. 243, 252, 43 L. ed. 684, 688, 19 Sup. Ct. Rep. 398,

401, which was an action upon coupons payable to bearer. This court said: "From the evidence in this cause of Dudley himself it is certain that he does not in fact own any of the coupons sued on, and that his [327] name, *with his consent, is used in order that the circuit court of the United States may acquire jurisdiction to render judgment for the amount of all the coupons in suit, a large part of which are really owned by citizens of Colorado, who, as between themselves and the board of commissioners of Lake county, could not invoke the jurisdiction of the Federal court, but must have sued, if they sued at all, in one of the courts of Colorado. It is true that some of the coupons in suit are owned by corporations of New Hampshire, who could themselves have sued in the circuit court of the United States. But if part of the coupons in question could not, by reason of the citizenship of the owners, have been sued on in that court, except by uniting the causes of action arising thereon with causes of action upon coupons owned by persons or corporations who might have sued in the circuit court of the United States, and if all the causes of action were thus united for the collusive purpose of making 'a case' cognizable by the Federal court as to every issue made in it, then the act of 1875 must be held to apply, and the trial court, on its own motion, should have dismissed the case without considering the merits."

Does the record show that the circuit court was without jurisdiction of some of the causes of action embraced by the complaint? We say "record," because this court will not reverse a judgment for want of jurisdiction in the circuit court, if its jurisdiction sufficiently appears either from the pleadings or from the record. *Pittsburgh, C. & St. L. R. Co. v. Ramsey*, 22 Wall. 322, 22 L. ed. 823; *Briges v. Sperry*, 95 U. S. 401, 24 L. ed. 390; *Robertson v. Cease*, 97 U. S. 646, 648, 24 L. ed. 1057, 1058. The complaint here shows diverse citizenship, as between the plaintiff and the defendant city, but the record reveals the fact that the plaintiff included in his suit a large number of claims owned by citizens of states other than California, but which, by reason of their small amount, could not have been sued on separately in the circuit court by the persons or corporations, the real owners, who put them in plaintiff's hands for collection.

Of this there can be no doubt. The entire issue of refunding bonds was 360, of \$1,000 each, numbered consecutively from 1 to 360. [328] They were of the character *known as "serials," each series consisting of 9 bonds. The first series included the bonds numbered from 1 to 9, both inclusive, and each succeeding series included the 9 bonds numbered consecutively after those embraced in the next preceding series. The bonds of the first series fell due April 15th, 1895, and were the only bonds that had become due

when the present action was brought. The remaining series were made payable in consecutive order on the 15th day of April in each succeeding calendar year thereafter until and including the year 1934. Now this suit is for the amount due on 9 of the 40 bonds of \$1,000 each, constituting the first series, and falling due April 16th, 1895, and 282 coupons of \$50 each, all which coupons, above the coupon of bond No. 40 of the first series, were attached to bonds that were not yet due. No owner of a \$50 coupon attached to a bond not due could have sued upon it in the circuit court. Each coupon of that amount was a complete instrument, capable of supporting a separate action, in the proper forum, without reference to the maturity or ownership of the bonds to which they were attached. *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886, and authorities there cited; *Elgin v. Marshall*, 106 U. S. 578, 27 L. ed. 249, 1 Sup. Ct. Rep. 484. No owner of coupons, aggregating less than \$2,000, could have sued in the circuit court by reason of the bonds to which they were attached (but which were not due) exceeding the jurisdictional amount. But when the several owners of \$50 coupons which were due, but which coupons were attached to bonds not due, put them all in the hands of the plaintiff for collection, the amount appeared to be sufficient for purposes of jurisdiction. Thus a case was made by which the circuit court was led to take cognizance of certain claims too small for its jurisdiction if they had been severally sued on by the real owners, although there was jurisdiction as to the parties who owned 8 of the 9 bonds in suit. It also appears that one of the transferrers of the plaintiff owned only 1 bond of a \$1,000. The value of the matter in dispute, as to him, was only the amount of that bond and 1 coupon of \$50.

We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the circuit *court [329] was without jurisdiction to render judgment upon any claim or claims, whether bonds or coupons, held by a single person, firm, or corporation against the city, and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims.

The specifications of errors assigned cover eighty pages of the elaborate brief of counsel for the city. They present many minor questions that are not discussed in this opinion. But what has been said embraces every point of substance or that requires consideration and disposes of the case upon its real merits.

The judgment of the Circuit Court of Appeals is reversed, with directions to the Circuit Court to set aside its judgment and enter such judgment as may be in conformity with this opinion.

Reversed.

L. S. CLARK, *Plff. in Err.*,
v.

CITY OF TITUSVILLE.

(See S. C. Reporter's ed. 329-334.)

Constitutional law—license tax—classification of merchants.

An ordinance imposing a license tax upon the merchants of a city, by which they are divided into classes according to the amount of their sales, each class including all whose sales range between a certain minimum and maximum amount, does not violate the equality clause of U. S. Const. 14th Amend., although the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio if the amounts of their sales differ.

[No. 91.]

*Argued and Submitted January 14, 1902.
Decided March 3, 1902.*

NOTE.—As to the validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note; and *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

Graduation of license fees according to extent of business.

It has been said to be unquestionably within the discretion of the taxing power to graduate the tax upon an occupation or vocation according to the extent of the business so taxed. *State v. Powell*, 100 N. C. 525, 6 S. E. 424.

So, a municipality has full power, under a charter authorizing it to license keepers of livery stables, to prescribe a rule that such license should be paid in proportion to the number of carriages kept for hire. *Howland v. Chicago*, 108 Ill. 500.

And a license tax imposed upon hotels is not unreasonable or oppressive because the amount paid is graduated by the number of rooms which may be devoted to the accommodation of the public. *St. Louis v. Bircher*, 7 Mo. App. 169.

So, under a charter provision authorizing the city council to license, tax, and regulate all such business and employments as the public good may require, an ordinance requiring a license for carrying on the business of selling goods, wares, and merchandise at a fixed place may graduate the amount or the fee according to the amount of sales or business done. *Ex parte Mount*, 66 Cal. 448, 6 Pac. 78.

A constitutional requirement that taxation be uniform does not invalidate a license fee imposed upon merchants or dealers in wines and liquors estimated upon the amount of their gross annual sales. *Williamsport v. Stearns*, 2 Pa. Dist. R. 351, 12 Pa. Co. Ct. 625; *Allentown v. Gross*, 132 Pa. 319, 19 Atl. 269.

And a tax upon vendors of merchandise, graduated according to the amount of annual sales, is not unconstitutional for want of uniformity, whether regarded as a tax on property or on the business of selling. *Knisely v. Cotterel*, 196 Pa. 614, 50 L. R. A. 86, 40 Atl. 861.

So, a license tax imposed by a municipality on merchants, the amount of which is graduated according to the amount of their monthly sales, is equal, and therefore not unconstitutional. 184 U. S.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a decision affirming a judgment sustaining the constitutionality of an ordinance imposing a license tax. *Affirmed.*

The facts are stated in the opinion.

Mr. Eugene Mackey argued the cause and filed a brief for plaintiff in error:

Licenses imposed under an ordinance which simply and solely levies a tax for the general revenues of the city, and provides for its collection, are not an exercise of the police power, but of the ordinary power of taxation.

Dill. Mun. Corp. p. 766; *Cooley, Const. Lim.* 201; *Beach, Pub. Corp.* § 386; *Tiedeman, Mun. Corp.* § 123; *State, North Hudson County R. Co., Prosecutors, v. Hoboken*, 41 N. J. L. 79; *St. Louis v. Marine Ins. Co.* 47 Mo. 163; *State, Benson, Prosecutor, v. Hoboken*, 33 N. J. L. 282; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

This ordinance of the city of Titusville,

tional as it applies uniformly to all persons in the same category. *Sacramento v. Crocker*, 16 Cal. 119.

Nor is a license tax dividing merchants into classes according to the amount of their gross sales, and graduating the tax accordingly, void for want of uniformity. *Williamsport v. Wenner*, 172 Pa. 173, 33 Atl. 544.

This same objection was made in the supreme court of Pennsylvania to the ordinance considered in *CLARK v. TITUSVILLE*, but was held not well taken, although it is plain that the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio if the amount of their sales differs. *Com. use of Titusville v. Clark*, 195 Pa. 634, 46 Atl. 286.

But a license fee imposed upon merchants, which is created by adopting the classification made by the appraisers of mercantile taxes, is void for want of uniformity, where the classification adopted exempts persons whose annual sales do not reach a certain amount. *Williamsport v. Stearns*, 2 Pa. Dist. R. 351, 12 Pa. Co. Ct. 625.

The individual liberty of the citizen guaranteed by the Pennsylvania and Federal Constitutions is not invaded by a statute taxing vendors of merchandise according to the amount of their annual sales. *Knisely v. Cotterel*, 196 Pa. 614, 50 L. R. A. 86, 40 Atl. 861.

So far as the Federal Constitution is concerned, the doctrine of this case is confirmed by the decision in *CLARK v. TITUSVILLE*, that such a license tax does not violate the equality clause of U. S. Const. Amend. 14, although the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio if the amount of their sales differs.

An ordinance imposing a license tax upon persons engaged in selling goods, wares, and merchandise is not unreasonable or unjust because it makes the amount of the tax depend upon the amount of receipts from the business transacted. *San Luis Obispo County v. Greenberg*, 120 Cal. 300, 52 Pac. 797.

No unconstitutional discrimination among persons engaged in the same class of business was made by N. C. Laws 1897, chap. 168, § 35, which imposed a license fee of \$10 on all hotels whose gross receipts were over \$1,000 and less than \$2,000, and one half of 1 per cent on hotels whose gross receipts exceeded \$2,000 per

being an act of taxation and not of regulation and police power, distinguishes the case at bar from *Gundling v. Chicago*, 177 U. S. 185, 44 L. ed. 727, 20 Sup. Ct. Rep. 633, which was an exercise of the police power.

This tax is not imposed upon the right to receive property from a decedent either as a legatee or heir, and therefore the rule in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, and kindred cases, does not apply.

A tax upon a business is a tax upon the article sold.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 278, 23 L. ed. 348.

The ordinance violates the 14th Amendment.

Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 722; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Cooley*, Taxn. pp. 2, 169, 243.

Mr. George Frank Brown submitted the cause for the defendant in error:

A license tax is not a property tax. A business tax is not a property tax, even though it be levied for general revenue purposes.

Morehouse v. Brigham, 41 La. Ann. 665, 6 So. 257; *Denver City R. Co. v. Denver*, 21 Colo. 350, 29 L. R. A. 608; 41 Pac. 826; *Davis v. Macon*, 64 Ga. 128, 37 Am. Rep. 60;

annum. Cobb. v. Durham County, 122 N. C. 307, 30 S. E. 338. The court said that there was no doubt that the general assembly might, in its discretion, impose as a license fee on the business of hotel keeping either a specific tax or one graduated according to the extent of the business done,—the gross receipts derived from the business,—and that such tax was uniform and consistent with the Constitution when it was equal on all persons in the same class.

So, a city authorized to license insurance companies may properly vary the amount charged therefor to correspond with the incomes of the different companies licensed. *Burlington v. Putnam Ins. Co.* 31 Iowa, 102.

And the amount of premiums received by an insurance company on business done within a municipality the previous year is a proper and fair standard by which to measure the license or franchise tax to do business in such municipality. *Fidelity Casualty Co. v. Louisville*, 20 Ky. L. Rep. 1785, 50 S. W. 35.

And a percentage on the gross receipts of a foreign insurance company doing business in a municipality may be properly taken as an equitable mode of ascertaining the amount of a license fee charged for the privilege of carrying on such business. *Walker v. Springfield*, 94 Ill. 364.

So, the amount of the gross receipts of a building and loan association within the state is a fair and just standard by which to measure the amount of a license or franchise tax on foreign building and loan associations. *Southern Bldg. & L. Assn. v. Norman*, 98 Ky. 294, 31 L. R. A. 41, 32 S. W. 952.

Nor can a citizen doing a general business at the place of his domicile escape payment of a license tax imposed upon merchants by the municipal government because the amount of his tax is arrived at by reference to his profits. *Ficklen v. Shelby County Taxing Dist.* 145 U.

Newton v. Atchison, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288; *Williamsport v. Wenner*, 172 Pa. 173, 33 Atl. 544; *Oil City v. Oil City Trust Co.* 151 Pa. 454, 25 Atl. 124. See also *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 164, sub nom. *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94.

The Constitution of the United States permits classification of subjects of taxation on a proper basis and in a proper manner. The only restraint imposed by the 14th Amendment is that unequal taxes may not be imposed upon property of the same kind, in the same class, in the same condition, and used for the same purpose.

Kentucky Railroad Tax Cases, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

Classification according to the amount of business done has been frequently recognized by the Federal courts.

Dow v. Beidelman, 125 U. S. 690, 31 L.

S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.

To the contrary are two Louisiana cases in which the effect of the requirement of La. Const. art. 118, of uniformity of taxation was considered.

New Orleans v. Home Mut. Ins. Co. 23 La. Ann. 449, is the first of these cases. Here a city ordinance fixing the amount of a license tax upon insurance companies upon the basis of the amount of premiums received by them was held to contravene this provision.

So, a license fee imposed by a parish upon retail liquor dealers, the amount of which is regulated by the amount of business done, one sum being charged when the business is more than a specified amount, and another when it is less, was, in *East Feliciana ex rel. Howell v. Gurth*, 26 La. Ann. 140, held to conflict with this constitutional provision.

To meet this and kindred decisions it was provided by La. Const. 1879, art. 206, that the general assembly shall graduate the amount of license taxes. This provision exempts them from the constitutional requirement of equality and uniformity. *State v. Liverpool, L. & G. Ins. Co.* 40 La. Ann. 463, 4 So. 504.

This provision, not indicating any standard of graduation, leaves it to the legislature to determine the method to be adopted in effecting it. *State v. Traders' Bank*, 41 La. Ann. 329, 6 So. 582; *New Orleans v. Pontchartrain R. Co.* 41 La. Ann. 519, 7 So. 83; *State v. Liverpool, L. & G. Ins. Co.* 40 La. Ann. 463, 4 So. 504; *Browne v. Selser*, 106 La. 691, 31 So. 290.

And the judiciary has no authority to interfere in the absence of any rule to guide its investigation and scrutiny. *State v. Traders' Bank*, 41 La. Ann. 329, 6 So. 582; *New Orleans v. Pontchartrain R. Co.* 41 La. Ann. 519, 7 So. 83.

Thus, the division by the general assembly

ed. 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 164, sub nom. *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 96.

It is not expected of city councils, nor of any other legislative body levying taxes, that they shall produce absolute equality in their measures.

Com. v. Delaware Division Canal Co. 123 Pa. 620, 2 L. R. A. 798, 16 Atl. 584.

The moment we concede the power to classify, we have disposed of the question of uniformity, for then all that is required by the Constitution is uniformity of taxes among the members of a class.

Com. v. Delaware Division Canal Co. 123 Pa. 623, 2 L. R. A. 798, 16 Atl. 584; *Kit-tanning Coal Co. v. Com.* 79 Pa. 105.

The equal protection of the laws only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.

Kentucky Railroad Tax Cases, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances

and conditions, both in the privilege conferred and the liabilities imposed.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

And it has no concern with the impolicy of a law.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.

The 14th Amendment was not intended to compel the state to conform to an iron rule of equal taxation.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663.

The only restraint imposed by the 14th Amendment is that unequal taxes may not be imposed upon property of the same kind, in the same class, in the same condition, and used for the same purpose.

Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

of companies and persons pursuing the business of insurance into different classes according to the amount of premiums collected, and the levying upon each class a different license tax, greater upon those receiving a larger amount than upon those receiving a less, is a sufficient graduation. *State v. Liverpool, L. & G. Ins. Co.* 40 La. Ann. 463, 4 So. 504.

And that a license law requires smaller insurance companies to pay a larger tax in proportion to their premiums than larger companies does not render it unconstitutional under that provision, there being no requirement that the tax shall be in proportion to the business done, though it may impugn its justice. *Ibid.*

A charter provision requiring rates of license for the transaction of business to be proportionate to the amount of business done, and that the license shall be discriminating, only requires that after the selection of a business as a subject for license the sum exacted from each person following that business shall be fixed by the amount of business done by each. *Ex parte Hurl*, 49 Cal. 557.

And a city council may provide that the license to be paid by laundrymen shall be in proportion to the number of persons employed by them under a city charter, which provides that licenses shall be discriminating and proportionate to the amount of the business done. *Ex parte Sisto Li Protti*, 68 Cal. 636, 10 Pac. 113.

A license tax on merchants is not a property tax, and therefore unconstitutional, because the amount thereof is graduated by the average amount of their stock. *Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288.

So, a license tax on peddlers by which they are divided into classes according to the value of goods carried by them, each class to pay a fixed amount, does not violate the requirement of the Pennsylvania Constitution that all taxes

be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. *New Castle v. Cutler*, 15 Pa. Super. Ct. 612.

And a license tax imposed by county ordinance upon persons engaged in raising, grazing, herding, or pasturing sheep, of \$50 for every 1,000 sheep, is not invalid as discriminating, special, unequal, or partial. *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888.

But a similar county ordinance was held invalid in *Cache County v. Jensen*, 21 Utah, 207, 61 Pac. 303, because, among other objectionable features, it was unjust and unequal in that by grading the tax at \$50 per thousand sheep it permitted one having 3,000, 4,000, or 5,000 sheep to pay the same sum as one who had 999 more, and compelled him to pay \$50 more than a person who had one less sheep.

But a license tax on retail merchants is not unequal and discriminating because it is so graded according to the amount of stock employed in the business that the owners of small stocks pay at a greater rate per \$100 of stock than larger dealers. *Saks v. Birmingham*, 120 Ala. 190, 24 So. 728.

And a license tax on merchants, graduated according to the average value of stock or capital in use by them, is not unequal and oppressive although an absolutely level rate is not imposed on each \$100 of valuation, and under it a merchant the average value of whose stock or capital does not exceed \$200 is taxed \$5, while another merchant engaged in the same business, who has stock of the average value of \$2,700, is compelled to pay a license tax of but \$30. *Re Martin*, 62 Kan. 638, 64 Pac. 43.

For an extended discussion of the limit of amount of license fees, see note to *State ex rel. Toi v. French* (Mont.) 30 L. R. A. 415.

[330] *Mr. Justice McKenna delivered the opinion of the court:

This case is here on error to the supreme court of the state of Pennsylvania. It involves the constitutionality of an ordinance of the city of Titusville imposing a license tax upon the merchants of the city. The particular contention is that the ordinance violates the equality prescribed by the 14th Amendment of the Constitution of the United States, in that it divides the merchants into arbitrary classes.

The trial court sustained the ordinance, and its judgment was affirmed by the supreme court upon the opinion delivered by the trial court.

The case was submitted upon a case stated in the nature of a special verdict, from which it appeared that the city was duly incorporated, and passed on June 25, 1888, the ordinance complained of. The provisions of the ordinance were set out, and it was stipulated that if the court should be of the opinion that the ordinance was valid a fine should be entered against the defendant (plaintiff in error) for the total of the taxes prescribed.

The ordinance imposes a license tax upon persons who carry on certain occupations in the city. Persons in different occupations pay different amounts, and persons in the same occupation are classified by maximum and minimum amount of sales. For instance, persons dealing in merchandise are classified as follows, and we quote from the opinion of the trial court:

Class.	Business.	Tax.
1...	Over \$60,000....	\$100.00
2...	\$50,000 to 60,000....	80.00
3...	40,000 to 50,000....	70.00
4...	30,000 to 40,000....	60.00
5...	20,000 to 30,000....	50.00
6...	10,000 to 20,000....	35.00
7...	5,000 to 10,000....	25.00
8...	2,500 to 5,000....	15.00
9...	1,000 to 2,500....	10.00
10...	1,000....	5.00

Wholesale.

[331]*1...	\$100,000 and upwards..	\$60.00
2...	60,000 to 100,000...	50.00
3...	50,000 to 60,000...	40.00
4...	40,000 to 50,000...	35.00
5...	30,000 to 40,000...	30.00
6...	20,000 to 30,000...	25.00
7...	10,000 to 20,000...	20.00
8...	5,000 to 10,000...	15.00
9...	2,500 to 5,000...	10.00
10...	2,500...	5.00

It is with this classification that we have immediate concern, because the plaintiff is a retail grocer. He was assessed in the sixth class in 1895, and in the seventh class in 1896.

The objection that plaintiff makes to the ordinance is that it classifies by amount or value with the result (1) that the lowest amount or value of property of a class "is required to pay the same amount of taxes with the highest amount or value of prop-

erty therein;" (2) that the differences are not in kind, but only in amount, or value, and that the taxes decrease in rate or ratio as the value of the class increases; (3) that the so-called classes are subdivisions of a class, and taxes are imposed upon such subdivisions without regard to a common ratio, either as between the several subdivisions, or as between the members of each of the subdivisions. These objections are but the expression of the effect of classification by amount, and have been made before and considered before by this court, and the judgment has been adverse to the contention of plaintiff in error. We do not think that it is necessary to review the cases or enter again into the reasoning upon which they were based.

Classification by amount came up for consideration and decision in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention, and attempts to limit its decision to the power of a state over inheritances, and to explain by that power, not only the taxes imposed, but the discriminations which were [332] claimed to have resulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion. The contentions of the parties in the case were extremely opposite. The appellee claimed that the power of the state could be exerted to the extent of making the state the heir of everybody; the appellant asserted a natural right of children to inherit. We expressed no opinion on either contention, but chiefly directed our consideration and decision to the alleged discriminating features of the law of Illinois. We said: "Our inquiry must be, not what will satisfy the provisions of the state Constitutions, but what will satisfy the rule of the Federal Constitution. The power of the states over successions may be as plenary in the abstract as appellee contends for; nevertheless it must be exerted within the limitations of that Constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows:

"On each and every \$100 of the clear market value of all property and at the same rate for any less amount on all estates of \$10,000 and less, \$3; on all estates over \$10,000 and not exceeding \$20,000, \$4; on all estates over \$20,000 and not exceeding \$50,000, \$5; and on all estates over \$50,000, \$6. Provided, that an estate in the above case, which may be valued at a less sum than \$500, shall not be subject to any duty or tax."

Manifestly, there was inequality between

the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the 14th Amendment of the Constitution of the United States; and the reasoning *by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said:

"If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount, but varies with the amounts arbitrarily fixed, and hence that an inheritance of \$10,000 or less pays 3 per cent, and that one over \$10,000 pays, not 3 per cent on \$10,000 and an increased percentage on the excess over \$10,000, but an increased percentage on the \$10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of \$10,001 by the deduction of the tax receives \$99.04 less than one who is given a legacy of \$10,000. But neither case can be said to be contrary to the rule of equality of the 14th Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their legality has never been questioned."

Plaintiff in error, however, contends that the tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and *is paid by him. But every tax has its final incidence on some individual. That effect, therefore, cannot be urged to destroy well-recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business, regulated by the amount of sales, and is not repugnant to the Constitution of the United States.

Judgment affirmed.

Mr. Justice Harlan did not hear the argument, and took no part in the decision.
184 U. S.

SIMON ROTHSCCHILD and Frank Rothschild, Copartners, Doing Business under the Firm Name and Style of S. Rothschild & Brother, *Plffs. in Err.*,

v.

ROBERT A. KNIGHT, Assignee in Insolvency of James McKeon.

(See S. C. Reporter's ed. 334-342.)

Appeal—error to state court—amendment of declaration—consent of counsel—attachment of debt to nonresident—proceedings in other state.

1. A Federal question is sufficiently raised in a state court for the purpose of review by the Supreme Court of the United States, although it was not raised in the court to which the writ of error was directed, and which entered the judgment after the case had been passed upon by the supreme court of the state, if the Federal question was raised in the supreme court.
2. The superior court of Massachusetts is the court to which a writ of error from the United States Supreme Court should issue for the review of a Federal question, after a rescript affirming its judgment has been sent to that court by the supreme court of the state.
3. The allowance of amendments to a declaration by consent of counsel cannot be deemed to deprive a party of property without due process of law, on the ground that counsel had no authority to give consent thereto.
4. Attachment of debts due to nonresident creditors at the place where the debtor resides, in accordance with the law of that state, does not deprive the creditor of property without due process of law.
5. The right to an attachment in an action to recover the value of goods which have been conveyed to the defendant in fraud of creditors is not to be denied on the ground that the action is not for a debt, but to recover a penalty.
6. The liability of a creditor to whom goods were delivered by a debtor in fraud of other creditors is not affected by judicial proceedings thereafter taken in another state to which the goods have since been carried.

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

As to what constitutes due process of law—see *Kuntz v. Sumpton* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to how far admissions and statements of attorney bind client—see note to *Turner v. Yates*, 14 L. ed. U. S. 824.

As to general authority of attorney—see note to *Union Bank v. Geary*, 8 L. ed. U. S. 60.

As to situs of debt for purpose of attachment or garnishment—see note to *King v. Cross*, 44 L. ed. U. S. 211.

whereby the creditor attaches the goods as property of the debtor.

[No. 108.]

Argued January 16, 17, 1902. Decided March 3, 1902.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment against defendant in an action for the value of goods conveyed in fraud of creditors. *Affirmed.*

See same case, Massachusetts supreme judicial court, 176 Mass. 48, 57 N. E. 337.

Statement by Mr. Justice **McKenna**:

James McKeon was a retail merchant in Springfield, Massachusetts, and became indebted to plaintiffs in error in the sum of about \$4,000.

[335] The indebtedness being overdue, Frank J. Rothschild, Jr., son of one of the plaintiffs in error, went to Springfield with full *power to collect the debt. When there, he received from McKeon a quantity of fur garments, part of McKeon's stock. The garments had not been purchased of plaintiffs in error, and when they were received by Rothschild, Jr., for plaintiffs in error he knew McKeon was insolvent.

The furs were sent to the railroad station in trunks, checked and taken to New York as the personal baggage of Rothschild, Jr. A receipted bill or list of the goods was delivered by McKeon to Rothschild, Jr. Subsequently, however, in New York it was testified that McKeon "tore from the bill the receipt and wrote on the bill the word abbreviation 'Memo.' to indicate that the goods were on memorandum or consignment, and the defendant said that he would write to his bookkeeper that night and have the entry in his books made to conform with the bill by writing in the word 'Memo.'"

This was done by the advice of the attorney of plaintiffs in error, and so stated by him in an affidavit filed in an action brought by plaintiffs in error in the supreme court of the city and county of New York against McKeon.

The advice was given, the attorney deposed, in order to make the transaction appear what it was stated in his presence to be: that is, for security only, and not for the sale of the goods; and he advised a suit by plaintiffs in error against McKeon and an attachment of the goods. The suit was subsequently brought and the goods attached.

On the 20th December, 1895, McKeon was adjudged an insolvent in Massachusetts, and the defendant in error was appointed his assignee, and as such he brought this action by trustee process in the superior court for Hampden county, Massachusetts, for the value of goods conveyed by McKeon to plaintiffs in error, on the ground that the conveyance was made in fraud of the insolvency laws of Massachusetts. The officer's return on the writ showed service on the trustees, but none on the plaintiffs in error.

574

The writ was duly entered on the first Monday in May, 1896, and a declaration for goods sold and delivered by McKeon to the plaintiffs in error was duly filed. Subsequently upon its being brought to the notice of the court that plaintiffs in error *were not [336] inhabitants of the commonwealth of Massachusetts, notice was ordered to be given to them by publication, and that the action be continued until such notice should be given. The notice was returnable on the first Monday in September, 1896, and was given as ordered, but no return or proof of it was made until July 6, 1899. On the 16th of September, 1896, plaintiffs in error (defendants in the action) appeared generally by their attorney, Charles C. Spillman, Esq., thereto duly authorized. On October 12, following, defendant in error (plaintiff) moved to amend his declaration, to which counsel for plaintiffs in error consented, and it was allowed. Plaintiffs in error filed an answer denying each and every allegation in the original and amended declaration. On June 21, 1897, the defendant in error again amended his declaration with the consent of E. N. Hill, Esq., who was then acting as counsel for plaintiffs in error, having been retained generally by plaintiffs in error, though his written appearance was not entered until June 26. By virtue of his general authority he could consent to the allowance of amendments. He conducted the case for plaintiffs in error.

The amendment added two counts to the declaration, charging the conveyance to plaintiffs in error by McKeon as having been made to prevent the property from coming to his assignee in insolvency, in fraud of the laws of the state relating to insolvent debtors.

The jury rendered a verdict against the plaintiffs in error for the sum of \$6,420, and they moved for a new trial by their attorney, E. N. Hill. On the 31st of July, 1897, plaintiffs in error "alleged sundry exceptions to the opinions and rulings of the court, which, being found conformable to the truth, were allowed and signed by the presiding judge, and the questions were transmitted to the supreme judicial court for consideration."

The bill of exceptions contained the evidence, and concluded as follows:

"Upon this evidence the defendants asked the court to rule that there was no evidence to warrant the finding that McKeon intended to prefer the defendants, or intended to prevent this property from coming into the possession of the assignee or *from being distributed according to the laws relating to insolvency, and that the action could not be maintained. The court refused so to rule and the defendants duly excepted. [337]

"And the defendants being aggrieved by these rulings and refusals to rule, and having excepted thereto, after verdict against them, pray that their exceptions and their exceptions to the admission of testimony as hereinbefore stated be allowed."

On the 15th of February, 1898, the motion for a new trial was denied, and on the

184 U. S.

28th of February, 1899, a rescript was received from the supreme judicial court overruling the exceptions of plaintiffs in error.

On the 6th of March, 1899, judgment was entered against plaintiffs in error "for the sum of \$7,071.63, damages, and costs of suit, taxed at \$91.07, and that execution therefor issue against the goods, effects, and credits of the said defendants in the hands and possession of the said trustees, Smith & Murray and Houston & Henderson, who were by the court adjudged to be trustees" of plaintiffs in error.

On May 12, 1899, plaintiffs in error filed an assignment of errors under the state practice as follows:

"1. That the record discloses that there was no valid and effectual attachment of the goods, estate, or effects of the plaintiffs in error upon the writ, which is the necessary foundation of the jurisdiction of said superior court to support any proceeding against an unserved, absent defendant.

"2. That the record discloses that the action was an attempt to obtain jurisdiction over these nonresident plaintiffs in error by means of trusteeing a debt due them, and said attempt was an infringement of the rights of the plaintiffs in error as guaranteed by the Constitution of the United States.

"3. That the record discloses that neither the plaintiffs in error nor either of them were voluntarily before said superior court, and the record fails to show any service upon them, either personally or by publication as ordered by said court.

"4. That the record discloses that the judgment, if allowed to stand, will deprive [338] these plaintiffs in error of their property, contrary to the provisions of the 14th Amendment to the Constitution of the United States.

"10. That the record discloses that the various amendments to the declaration of the defendants in error converted the action into one for the recovery of a penalty, and that such attempt is an infringement of the rights, privileges, and immunities of the plaintiffs in error, guaranteed by the 14th Amendment to the Constitution of the United States.

"11. That the record discloses that there were counts in the declaration of the defendants in error, which under the laws of this commonwealth involved a penalty, and that a judgment on said counts would be conclusive on these plaintiffs in error as to their liability therefor, and would, without further trial, subject their rights to such penalty, and that such attempt to obtain jurisdiction over the persons or property of these plaintiffs in error, by the trustee process served on a debtor in this state, for the purpose of fixing upon them a liability for such penalty, is contrary to the provisions of the 14th Amendment to the Constitution of the United States."

The assignments of error were subsequently amended by adding the following:

"16. That the record discloses that the

judgment, if allowed to stand, will impair the obligation of contracts, contrary to the Constitution of the United States.

"17. That the record discloses that the superior court did not give full faith and credit to the judicial proceedings of the courts of New York, as required by the Constitution of the United States."

On the 7th of July, 1899, the defendant in error filed his plea and traverse. A hearing was subsequently had before a single justice to establish the plea and traverse, who, a doubt being suggested as to his authority to dispose of the case, after finding the facts, reported the case to the full court. The case was heard by the supreme court, and on May 15, 1900, a rescript was sent to the superior court affirming the judgment. 176 Mass. 48, 57 N. E. 337. This writ of error was then sued out and allowed by the chief justice of the superior court.

Mr. Harry J. Jaquith argued the cause, and, with Mr. Thomas J. Barry, filed a brief for plaintiffs in error:

This court has held that a Federal question was raised in time when first raised in a petition in error to the state supreme court.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023.

This court has taken judicial notice that in Massachusetts the record remains with the superior court, the highest court, after pronouncing its judgment, returning the record to it.

Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265.

And this court has just affirmed as correct a procedure exactly similar to that taken in this case.

McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

A decision of a state court that its proceedings or the provisions of a statute constitute "due process of law" is not decisive upon this court.

Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105.

Nor is it decisive in any case in which the contention turns upon general, rather than strictly local, law.

Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

The prohibitions of the 14th Amendment "refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities."

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The powers of such instrumentalities "cannot be exercised with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land."

Blake v. McClung, 172 U. S. 254, 43 L. ed. 437, 19 Sup. Ct. Rep. 165.

A state insolvency law cannot be given extraterritorial effect; if it is construed to

interfere with the contracts of nonresidents, it is unconstitutional and void.

Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; *Baldwin v. Hale*, 1 Wall. 223, 17 L. ed. 531; *Gilman v. Lockwood*, 4 Wall. 409, 18 L. ed. 432; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Savoie v. Marsh*, 10 Met. 594, 43 Am. Dec. 451; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529.

An action for a penalty is not such a "personal action"—that is, transitory—as may be brought against an absent defendant under Mass. Pub. Stat. chap. 164. A penalty means punishment, and involves jurisdiction over the culprit before it can be inflicted.

Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165.

The fact that an agent of the defendants below was in the state of Massachusetts cannot be imputed to them to show an intent. The only cases found to that effect are where all the parties were bound by the law. In this case the defendants owed no allegiance to the law.

Sage v. Wynkoop, 16 Nat. Bankr. Reg. 363, Fed. Cas. No. 12,215; *Vogle v. Lathrop*, 4 Brewst. (Pa.) 253, Fed. Cas. No. 16,985; *Mayer v. Hermann*, 10 Blatchf. 256, Fed. Cas. No. 9,344; *Graham v. Stark*, 3 Ben. 520, Fed. Cas. No. 5,676; *Wight v. Murlow*, 8 Ben. 52, Fed. Cas. No. 17,629; *Sartwell v. North*, 151 Mass. 142, 23 N. E. 853; *Bush v. Moore*, 133 Mass. 198; *Rogers v. Palmer*, 102 U. S. 263, 26 L. ed. 164.

The law of Massachusetts involved being a nullity so far as nonresidents' obligations to it are concerned, proceedings founded upon it do not constitute due process of law, are fatally defective, and the question may be raised at any time.

Capron v. Van Noorden, 2 Cranch, 126, 2 L. ed. 229; *Striker v. Mott*, 6 Wend. 465; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Voorhees v. Jackson ex dem. Bank of United States*, 10 Pet. 473, 9 L. ed. 499; *United States v. Arredondo*, 6 Pet. 709, 8 L. ed. 554; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872.

Waiver cannot cure such proceedings.

Chase v. Palmer, 25 Me. 341; *Atty. Gen. v. Moliter*, 26 Mich. 444; *Union P. R. Co. v. Ogilvy*, 18 Neb. 639, 26 N. W. 464; *Collins v. Keller*, 58 N. J. L. 429, 34 Atl. 753; *Musselman's Appeal*, 101 Pa. 169; *School Dist. No. 28 v. Stocker*, 42 N. J. L. 115; *Whitehurst v. Pettipher*, 105 N. C. 40, 11 S. E. 369; *Lamson v. Worcester*, 58 Vt. 381, 4 Atl. 145; *Poindexter v. Burwell*, 82 Va. 507; *Carlisle v. Weston*, 21 Pick. 535; *Osgood v. Thurston*, 23 Pick. 110; *Mastick v. San Francisco City & County Super. Ct.* 94 Cal. 347, 29 Pac. 869; *Tootle v. French*, 2 Idaho, 746, 25 Pac. 1091; *Way v. Way*, 64 Ill. 406; *Richards v. Lake Shore & M. S. R. Co.* 124 Ill. 516, 16 N. E. 909; *Chicago & A. R. Co. v. Sutton*, 130 Ind. 405, 30 N. E. 291; *McCoy v. Able*, 131 Ind. 419, 30 N. E. 528; *Orcutt v. Hanson*, 71 Iowa, 514, 32 N. W.

482; *Re Gregory*, 13 Misc. 363, 35 N. Y. Supp. 105.

Where by reason of a Federal law the state court has no jurisdiction of the cause of action, jurisdiction cannot be given by waiver or filing a bond. It is a case of want of jurisdiction of the subject-matter.

Hamilton v. Merrill, 37 Ohio St. 682.

The cause of action must arise under laws which bound the defendants below.

D'Arey v. Ketchum, 11 How. 165, 13 L. ed. 648.

Notice and hearing alone do not constitute due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Debts contracted and payable in New York were not subject to the trustee process of the state of Massachusetts.

Wabash R. Co. v. Tourville, 179 U. S. 322, 45 L. ed. 210, 21 Sup. Ct. Rep. 113.

A state can only separate the situs of a credit from a nonresident owner when the debt is either contracted or payable in the state where the garnishment is made.

Ibid.

It being uncertain upon what ground the verdict was found, the proceedings do not constitute due process of law, and are void under the provisions of the 14th Amendment to the Constitution of the United States.

Rindge v. Green, 52 Vt. 204; *Steen v. Norton*, 45 Wis. 412; *Holmes v. Doane*, 9 Cush. 135; *Whiting v. Cook*, 8 Allen, 63; *York v. Johnson*, 116 Mass. 482; *Peterson v. Patrick*, 126 Mass. 395; *Clapp v. Campbell*, 124 Mass. 50.

The supreme court of Massachusetts has recently held to the common-law rule in this respect.

Kilberg v. Berry, 166 Mass. 488, 44 L. ed. 603.

In order to have the proceedings in a state court held due process of law, they must be founded upon reasonable rules or laws; and the reasonableness of those rules or statutes is a matter for the determination of this court upon the facts.

Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

An attorney by virtue of his employment can only prosecute or defend the cause of action for which he was retained.

Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; *Sartwell v. North*, 144 Mass. 188, 10 N. E. 824.

The lack of authority may be set up after a trial upon the merits.

Wright v. Andrews, 130 Mass. 149; *Graham v. Spence*, 14 Fed. 603.

Neither a statute, nor a changed judicial construction of it or of the common law, can be retroactive so as to increase the liability or scope of, or to diminish the rights under, a contract entered into prior to it.

Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520.

By the prior decisions of the supreme

court of Massachusetts an attorney at law had not, by reason of his employment, authority to act for his principal, except in the cause for which he was retained. He could control the remedy, but could not prosecute or defend a suit for another cause.

Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; *Sartwell v. North*, 144 Mass. 188, 10 N. E. 824.

The authority assumed by the state court to change the party and the place of performance without the consent of the non-resident other party is an impairment of the obligation of a contract, and is repugnant to art. 1, § 10, of the Constitution of the United States.

Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom. Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179.

The trustee process operates as a species of compulsory statute assignment.

Strong v. Smith, 1 Met. 476; *McCarty v. The City of New Bedford*, 4 Fed. 818; *Atlantic & P. R. Co. v. Hopkins*, 94 U. S. 13, 24 L. ed. 48.

A discharge of that nature can only operate where the law is made by authority common to the creditor and debtor in all respects, where both are citizens or subjects.

Watson v. Bourne, 10 Mass. 337, 6 Am. Dec. 129; *Baker v. Wheaton*, 5 Mass. 509, 4 Am. Dec. 71.

The insolvency law of Massachusetts is void so far as by construction of the supreme court of the state it seeks to draw to it the contracts of nonresidents who do not voluntarily appear in the insolvency court and submit to its jurisdiction, and so far as it seeks to hold nonresidents liable to its penalties for collecting or securing the money due them from insolvent citizens of Massachusetts.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Gilman v. Lockwood*, 4 Wall. 409, 18 L. ed. 432; *Baldwin v. Hale*, 1 Wall. 223, 17 L. ed. 531; *Savoie v. Marsh*, 10 Met. 594, 43 Am. Dec. 451; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

The common-law rights of nonresidents cannot be taken away by local legislation, and in construing these rights the Federal courts are not bound by state decisions.

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

In the matter of the restoration of the title to the merchandise to McKeon in New York, if any crime or offense was committed it must be tried in the courts of New York; if any liabilities were created they must be determined by the law of New York.

Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 223; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *M'Intyre v. Parks*, 3 Met. 207.

The judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced.

184 U. S.

Hampton v. M'Connel, 3 Wheat. 234, 4 L. ed. 378; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

Until the insolvency court of the state of Massachusetts took possession of McKeon's goods he could ship them to anyone within or without the state, and, being lawfully in another state, the jurisdiction of Massachusetts over them was devested, and the laws of that other state alone governed the further acquisition of title to them, and the judicial sale of them carried with it a title clear of all liability for their value, as to the whole world.

Green v. Van Buskirk, 5 Wall. 307, 18 L. ed. 599, 7 Wall. 139, 19 L. ed. 109.

Mr. Charles M. Rice argued the cause, and, with Mr. Robert A. Knight, filed a brief for defendant in error:

No Federal questions were raised until after the final judgment in the superior court of Massachusetts, and such questions could not, after said final judgments, be then raised for the first time, so as to authorize this court to review the decision of said superior court.

Turner v. Richardson, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Scudder v. Coler*, 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *California Nat. Bank v. Thomas*, 171 U. S. 441, 43 L. ed. 231, 19 Sup. Ct. Rep. 4; *Fowler v. Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *Texas & P. R. Co. v. Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

In order to give this court jurisdiction of this writ of error to the superior court of Massachusetts, it must appear affirmatively that a Federal question was presented for decision by said superior court.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Fowler v. Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435.

This court, for the purpose of examining the case, will depend solely upon the true record of the superior court of the state of Massachusetts, and anything not properly a part of this record will not be considered.

Warfield v. Chaffe, 91 U. S. 690, 23 L. ed. 383; *Redfield v. Ystalyfera Iron Co.* 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep.

570; *Struthers v. Drexel*, 122 U. S. 487, 30 L. ed. 1216, 7 Sup. Ct. Rep. 1293; *Red River Cattle Co. v. Sully*, 144 U. S. 209, 36 L. ed. 407, 12 Sup. Ct. Rep. 809; *United States v. Taylor*, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479. And see *Ocean Ins. Co. v. Polleys*, 13 Pet. 157, 10 L. ed. 105; *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. ed. 261; *Fisher v. Cockerell*, 5 Pet. 248, 8 L. ed. 114; Spear, Federal Judiciary, pp. 547, 548.

But even if said assignment of errors could be taken into consideration, the errors set forth, so far as they relate to Federal questions, are in too general a form to properly raise a Federal question.

Clark v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

The authority exercised by the highest court of the state of Massachusetts in hearing and determining the case in question is not the kind of authority which is referred to in § 709 of the Revised Statutes, which provides in what cases a writ of error will lie from this court to a state court.

Snow v. United States, 118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059; *Bethell v. Demarct*, 10 Wall. 537, 19 L. ed. 1007.

An attachment in due form, by trustee process, of debts due the plaintiffs in error from debtors residing in Massachusetts, gave jurisdiction to the superior court to render judgment.

Rothschild v. Knight, 176 Mass. 48, 57 N. E. 337; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; *King v. Cross*, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705.

And it made no difference that the attachment was by trustee process.

King v. Cross, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Ocean Ins. Co. v. Portsmouth Marine R. Co.* 3 Met. 420; *Folger v. Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747; Story, Conf. Laws, 7th ed. § 592a.

The general voluntary appearance of plaintiffs in error by duly authorized attorneys who made answer and contested the case at all stages until judgment was rendered gave jurisdiction to the superior court, without reference to service.

Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Wright v. Andrews*, 130 Mass. 149; *Loomis v. Wadhams*, 8 Gray. 557; *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Hazard v. Wason*, 152 Mass. 268, 25 N. E. 465; *Gleason v. Dodd*, 4 Met. 333; *Pierce v. Equitable L. Assur. Soc.* 145 Mass. 56, 12 N. E. 856.

In order to show that they were not voluntarily before the superior court, it would have been necessary for the plaintiffs in error to show that they limited the authority of the attorney who appeared for them, or instructed him to appear specially.

Wright v. Andrews, 130 Mass. 149.

This court will not consider any questions of procedure with relation to the question whether there was or was not "due process of law." The opinion of the Massachusetts supreme court will be taken as conclusive on these points.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934.

For the above reasons, it can hardly be held that plaintiffs in error have been deprived of their property "without due process of law," and also because it appears, in the present case, that they had a full and fair trial in the superior court of Massachusetts, and in the supreme court on exceptions, and afterwards again in the supreme court of Massachusetts on writ of error.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478.

This court will not review a "judgment" of the highest court of a state because it might impair the obligation of contract.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54. And see *Arrowsmith v. Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

The contract should appear in the record, if there is any contract, the impairment of the obligation of which could be questioned under the assignment of error.

Red River Cattle Co. v. Sully, 144 U. S. 209, 36 L. ed. 407, 12 Sup. Ct. Rep. 809; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

There were no pre-existing contracts to be impaired by the insolvency statute; and they must have been pre-existing, or else the provision as to impairment of obligation does not apply.

Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. Rep. 958; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. Rep. 134; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *Mississippi & M. R. Co. v. McClure*, 10 Wall. 511, 19 L. ed. 997.

Massachusetts could pass an insolvent law, provided it did not "impair the obligation of existing contracts."

Brown v. Smart, 145 U. S. 457, 36 L. ed. 775, 12 Sup. Ct. Rep. 958; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16

Sup. Ct. Rep. 80; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. Rep. 134.

By the "obligation of a contract" is meant, in the Constitution, the means which, at the time of its creation, the law affords for its enforcement.

Louisiana ex rel. Nelson v. Police Jury, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. Rep. 648.

It was proper to attach credits due non-residents.

King v. Cross, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Rothschild v. Knight*, 176 Mass. 48, 57 N. E. 337.

The action in question was not for the recovery of a "penalty," but to recover the value of goods conveyed in fraud of the laws relating to insolvency.

Rothschild v. Knight, 176 Mass. 48, 57 N. E. 337.

This court will follow the above adjudication of the Massachusetts supreme court, that no penalty was involved in the suit under said statute.

Knight v. United States Land Asso. 142 U. S. 185, 35 L. ed. 983, 12 Sup. Ct. Rep. 258.

Had there been evidence in due form that any new York judicial proceedings existed which constituted a defense for plaintiffs in error, it would, even if such judicial proceedings were shown, in all cases have been necessary to show that such proceedings took place in a court having jurisdiction of the case and the parties, in order to entitle them to full faith and credit here.

Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 288, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Folger v. Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747; *Carleton v. Bickford*, 13 Gray, 591, 74 Am. Dec. 652.

[339] *Mr. Justice McKenna delivered the opinion of the court:

A motion is made to dismiss the writ of error upon the ground that no Federal question was raised in the superior court. Federal questions were raised, however, on writ of error to the supreme court, and that, we think, was a sufficient claim. *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Arrowsmith v. Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

The objection that the writ of error should have been directed to the supreme court, and not to the superior court, is answered by *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

The constitutional questions raised by plaintiffs in error are (1) that they have been deprived of their property without due process of law; (2) that if the judgment be allowed to stand it will impair the obliga-

tion of contracts, contrary to the Constitution of the United States; (3) that full faith and credit was not given to certain judicial proceedings had in the supreme court of the state of New York.

(1) (2) These grounds may be considered together. To sustain them plaintiffs in error assert the invalidity of certain Public Statutes of Massachusetts, viz., chapter 164, relating to absent defendants; chapter 183, relating to the trustee process; and chapter 157, relating to insolvency.

The sections in regard to insolvency are inserted in the margin.†

*The provisions relating to trustee process [340] are as follows:

"Sec. 21. When a person who is summoned as trustee has goods, effects, or credits of the defendant intrusted or deposited in his hands or possession, such goods, effects, and credits shall be thereby attached and held to respond to the final judgment in the suit, in like manner as goods or estate attached by the ordinary process, except as hereinafter provided."

"Sec. 25. Any money or other things due to the defendant may be attached, as herein mentioned, before it has become payable, if

†The sections of the insolvency laws of Massachusetts, under which the action was originally brought in the superior court of Massachusetts, are §§ 96 and 98 of chapter 157 of the Massachusetts Public Statutes, and are as follows:

"Sec. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void; and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

"Sec. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer, or other conveyance of any description, of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or delay the operation and effect of, or to evade any of said provisions, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the insolvency. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of such cause of belief."

it is due absolutely and without any contingency; but the trustee shall not be compelled to pay or deliver it before the time appointed by the contract."

[341] It is difficult to state the argument made to support the contention of plaintiffs in error. It rests ultimately on a claim of immunity from suit in Massachusetts and a claim of immunity from attachment of debts due plaintiffs in error from citizens of *Massachusetts. Argumentatively, it is said that the action originally brought did not justify trustee process, and that the amendments subsequently made to the declaration were not authorized, though consented to by counsel who appeared in and conducted the case. We do not assent to either proposition.

To what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide, and the power of counsel certainly extends to consenting to amendments authorized by the laws of the state. Indeed, it would be novel to hold that the court could not have granted the amendments, even against the opposition of counsel, without violating the Constitution of the United States. And the contention that the debts due to plaintiffs in error by certain citizens in Massachusetts were not subject to attachment in that state because their situs was in New York cannot be maintained. We decided adversely to the proposition in *Chicago, R. I. & P. R. Co. v. Strum*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. That case was followed and applied in *King v. Cross*, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131, and we are satisfied with the reasoning of both cases.

But it is urged that the transaction between McKeon and the agent of the plaintiffs in error did not constitute a debt, but was in the nature of an offense to which a penalty was incident, and to the commission of the offense an intent was necessary, and that the intent of the agent of plaintiffs in error could not be ascribed to them. The supreme court of the state, however, decided that "the action is not for the recovery of a penalty, but to recover the value of goods conveyed in fraud of the laws relating to insolvency, and it properly might be commenced by trustee process. Pub. Stat. chap. 157, §§ 96-98, chap. 135, § 1."

We need only add that the law would be of little value if its prohibition did not apply to nonresident creditors, whether acting directly or through an agent. That the conveyance to plaintiffs in error was made to give a fraudulent preference must necessarily have been found as a fact by the jury, and such finding we accept.

[342] (3) No record was introduced in evidence of the judicial proceedings to which, it is claimed, faith and credit were not given. The only evidence in regard to the proceedings consisted of *the affidavit already referred to, and an affidavit of like import made by S. Rothschild, one of the plaintiffs in error. The affidavits were introduced by defendants in error. On behalf of plaintiffs in error Frank J. Rothschild testified as fol-

lows: "These goods (meaning the goods received from McKeon) were attached by Simon Rothschild & Bro., and were sold by order of the sheriff. We bought them, that is, Simon Rothschild & Bro. bought them, at the sheriff's sale."

Assuming, but not deciding, that such evidence was sufficient, and that a record properly authenticated was not necessary to give the plaintiffs in error the benefit of the Constitution and statutory provisions, the proceedings, notwithstanding, did not constitute a defense to the action. The preference given by McKeon to plaintiffs in error was consummated in Massachusetts. Therefore the proceedings had in New York were immaterial.

Finding no error in the record, judgment is affirmed.

GEORGE SCHUERMAN, D. E. Dumas,
and J. R. Beaton, *Appts.*,
v.

TERRITORY OF ARIZONA.

(See S. C. Reporter's ed. 342-354.)

Funding bonds—validity of—date of issue—authority of loan commissioners—act of majority—territorial distinguished from congressional authority.

1. Funding bonds issued by Arizona in place of county bonds, under the act of Congress of June 6, 1896 (29 Stat. at L. 262, chap. 339), are not invalid because the county, after requesting their issue, withdrew the request before the bonds were issued, since the request or consent of the county was not requisite to their issue under the statute.
2. The authority of the territory of Arizona to issue funding bonds under the act of Congress of June 6, 1896 (29 Stat. at L. 262, chap. 339), which provides that certain indebtedness "may be founded . . . until January 1, 1897," is not limited to the issuance of the funding bonds before that date, but is limited to the issue of such bonds for indebtedness that had accrued prior to that date.
3. The board of loan commissioners created under Ariz. Rev. Stat. 1887, § 2039, though that statute was amended and approved by the act of Congress of June 25, 1890 (26 Stat. at L. 175), derive their authority from the territory, and not from Congress, and they are therefore subject to the general provision of Ariz. Rev. Stat. § 2932, subd. 2, which provides for action by a majority of three or more public officers to whom a joint authority is given.

[No. 151.]

Submitted January 28, 1902. Decided March 3, 1902.

A PPEAL from the Supreme Court of the Territory of Arizona to review a decision affirming a judgment granting a man-lamus to compel the levy of a tax for payment of interest on funding bonds. *Affirmed.*

See same case below (Ariz.) 60 Pac. 895.
184 U. S.

[343] *Statement by Mr. Justice **Peckham**:

This is an appeal by the defendants below from a judgment of the supreme court of the territory of Arizona affirming a judgment of the district court granting a mandamus. Upon the trial of the case certain facts were agreed upon, in substance, that the defendants were the supervisors of the county of Yavapai, and that prior to the year 1890 the county of Yavapai had issued what were known as railroad bonds in aid of the Prescott & Arizona Central Railroad Company, upon which there was due on the 17th of September, 1897, \$260,218.80, and on that day they were received in exchange by the board of loan commissioners, who thereupon issued 258 funding bonds of the territory, each of the denomination of \$1,000, and bearing interest at the rate of 5 per centum per annum, payable semiannually. On the 18th of November, 1896, the board of supervisors of defendant county requested the board of loan commissioners to fund the bonds issued for the aid of the railroad company, but the board subsequently and on December 5, 1896, rescinded such request before it had been acted upon, and on the 17th of September, 1897, the holders of the bonds requested the board of loan commissioners to refund the same, which they did upon such demand. The statement of facts then continues as follows:

"5. At the meeting of said board of loan commissioners at which said bonds were funded, only two members of said board were present or acted; the third member of said board of loan commissioners was at the time of said meeting absent from the territory of Arizona, and took no part in the funding of said bonds, and was not in any manner consulted with relation thereto.

"6. On January 15, 1898, there became due and payable as interest on the 258 territorial funding bonds issued in exchange for the bonds of said Yavapai county as aforesaid, the sum of \$4,288.33 according to the tenor of said territorial funding bonds, and thereafter on the 15th days of July and January of each year there became due and payable as interest on said territorial funding bonds, according to the tenor thereof, the sum of \$6,450.00, payable at the office of the territorial treasurer of the territory of Arizona.

[344] *"7. In compliance with the terms and conditions of said territorial funding bonds the territorial treasurer of said territory of Arizona has paid all the interest thereon at the times when the same became due and payable, amounting in all at the date hereof to the sum of \$23,638.33, and has taken up and canceled interest coupons attached to said bonds to that amount.

"9. Save as aforesaid, no demand was ever made by the board of supervisors of said Yavapai county for the funding of said P. & A. C. Railroad bonds, and no notice was ever given to said board of supervisors at or about the time of the funding that said bonds had been funded.

"10. For the year 1899 the territorial board of equalization of said territory, at

its annual session for that year, levied the sum of 37 cents on each \$100 of valuation of the taxable property in said Yavapai county, for the purpose of paying interest on the funded indebtedness of said county of Yavapai; including the interest on the territorial funding bonds aforesaid maturing in the year 1900, and the territorial auditor duly certified the levy of said tax to the board of supervisors of said Yavapai county, that the defendants, comprising the board of supervisors of said county, failed and neglected to levy said tax of 37 cents on the \$100, but only levied the sum of 6 cents on the \$100 for the purpose of paying interest on the funded indebtedness of said county; said sum of 6 cents on the \$100 was sufficient to pay the interest on all the funded indebtedness of said county other than the territorial funding bonds issued in lieu of said P. & A. C. Railroad bonds as aforesaid, but was insufficient to pay the interest on said territorial funding bonds or any part thereof.

"11. The above-mentioned P. & A. C. Railroad bonds were originally issued by the county of Yavapai in aid of the construction of the Prescott & Arizona Central Railroad, a line of railway running from Prescott Junction or Seligman to Prescott, Arizona, and were granted and issued as a subsidy to the corporation building and owning said railroad."

The county having refused to levy any taxes for the purpose of collecting money to pay any of the interest maturing on the *bonds of the territory given in exchange for [345] the bonds issued by the county, this proceeding was undertaken to compel the board of supervisors to levy a tax in accordance with the provisions of the statute, for the purpose of paying the interest which had been paid by the territory on the bonds.

Mr. Reese M. Ling submitted the cause for appellants.

Mr. C. F. Ainsworth submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

***Mr. Justice Peckham**, after stating the [345] above facts, delivered the opinion of the court:

It is claimed on the part of the defendants below that the railroad bonds for which the territorial bonds were given were invalid when issued, and it is only by reason of the passage of the act of June 6, 1896 (29 Stat. at L. 262, chap. 339), that any action could be sustained to enforce their payment. That act has been held to be within the power of Congress to pass, and that by it the bonds therein described were made valid. *Utter v. Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183.

Three grounds are now urged why the judgments of the lower courts should be reversed. They are:

(1) That the railroad bonds were illegally funded, without any demand having been made by the board of supervisors of Yava-

pai county upon the territorial loan commission for such funding.

(2) That said bonds were funded after January 1, 1897, and at a time when the board of loan commissioners were by the terms of the statute without power to fund them.

(3) That the bonds were improperly and illegally funded at a meeting of the board of loan commissioners of the territory of Arizona, at which only two members of the said board were present, the third member being absent from the territory and not in any manner consulted with reference to such funding.

[346] (1) In regard to the first ground, the supreme court of the territory has held that it was not necessary that a demand should be made by the municipal authorities, but that the *holders of the bonds could themselves make it by virtue of § 7 of the territorial funding act of Arizona, approved March 19, 1891. The 7th section of that act reads as follows:

"Sec. 7. Any person holding bonds, warrants, or other evidence of indebtedness of the territory, or any county, municipality, or school district within the territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at not less than their face or par value, and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

Where a holder of bonds had made the demand it was held sufficient under that section. *Bravin v. Tombstone* (Ariz.) 56 Pac. 719; *Yavapai County v. McCord* (Ariz.) 59 Pac. 99.

This construction of the territorial act by the supreme court of Arizona we think was correct, and that it was not necessary in order to obtain a refunding of the bonds that the demand for the same must be made by the municipal authorities.

(2) It appears from the records that the bonds were funded after January 1, 1897, and it is objected that there was no power on the part of the board of loan commissioners to fund such bonds after that date.

The act of Congress under which this question arises was approved June 6, 1896 (29 Stat. at L. 262, chap. 339), and is set forth in the margin.†

[347] *The supreme court of Arizona has decided

†Chap. 339. An Act Amending and Extending the Provisions of an Act of Congress Entitled "An Act Approving with Amendments the Funding Act of Arizona," Approved June Twenty-fifth, Eighteen Hundred and Ninety, and the Act Amendatory Thereof and Supplemental Thereto Approved August Third, Eighteen Hundred and Ninety-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the acts of Congress approved June twenty-fifth, eighteen hundred and ninety, and August third, eighteen hundred and ninety-four, authorizing the funding of certain indebtedness of the territory of Arizona, are hereby amended and

this contention against the defendants upon the authority of its previous decisions in *Gage v. McCord* (Ariz.) 51 Pac. 977, decided in 1898, which was approved in *Yavapai County v. McCord* (Ariz.) 59 Pac. 99, decided in November, 1899. In the first-mentioned case the following is that portion of the opinion which discusses this particular objection:

"Stress is put upon the clause 'until January first, eighteen hundred and ninety-seven,' found in § 1 of the act, as bearing out the view that the purpose and intent of Congress was to limit the time within which the loan commissioners might act, and to require the completion of the work of funding, by the sale and disposition of bonds and the liquidation of the indebtedness allowed by this and prior acts to be funded. *by January 1, 1897. Even were we re-[348] stricted to the more literal meaning of the words used in construing remedial statutes of this kind, the narrow and circumscribed view thus taken of the statute can hardly be justified if regard be had to the whole of the statute, including the plain purpose of the act as expressed in its title. In the latter, it is clearly stated to be an amendment of previous statutes, and the extension and enlargement of their provisions. Again, an analysis of the body of the act bears out the view that, instead of the purpose being to limit or restrict the exercise of any powers, rights, or privileges previously granted, the legislative will was to add to, extend, and enlarge these. The 1st section contains two general provisions—one authorizing the amendment and extension of the congressional acts approved, respectively, June 25, 1890, and August 3, 1894, so as to include in their provisions 'all outstanding obligations' of the territory; the other directing the funding of all outstanding bonds, warrants, and other evidences of indebtedness of the territory, as well as of the counties, municipalities, and school districts thereof, which had been authorized by legislative enactments, and which bore a higher rate of interest than is authorized by the funding law, and which had been sold or exchanged in good faith. The 2d section likewise has reference to two classes of indebtedness, both of which are recognized obviously so as to confirm, approve, validate, and effectually fix their status as binding obligations upon the territory.

"The acts of June 25, 1890, and August 3,

extended so as to authorize the funding of all outstanding obligations of said territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June twenty-fifth, eighteen hundred and ninety, until January first, eighteen hundred and ninety-seven, and all outstanding bonds, warrants and other evidences of indebtedness of the territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June twenty-fifth, eighteen hundred and ninety, and which said bonds, warrants, and other evidences of indebtedness have been sold

1894, being referred to, we must therefore consider the act of June 6, 1896, *in pari materia* with the former. The former act confirmed and approved, with amendments, chapter 1, title 31, Rev. Stat., passed by the territorial legislature March 10, 1887. These amendments had reference to the rate of interest, the time bonds issued for funding purposes should run, and as to what indebtedness might be funded; the act being amended in this particular to include county, municipal, and school indebtedness. Congress added to the legislative enactment a provision that in effect validated a class of obligations otherwise invalid, because incurred in violation of the organic law of the territory, *as found in the 'Harrison act,' and provided for the funding of all the then existing and outstanding indebtedness, and that which might thereafter be evidenced by warrants issued for the necessary and current expenses of carrying on territorial, county, municipal, and school government for the year ending December 31, 1890, and added to the foregoing the declaration that thereafter no warrants, certificates, or other evidences of indebtedness should be allowed to issue or be legal when the same is in excess of the limit prescribed by the Harrison act. The act of August 3, 1894, provided 'that an act entitled "An Act Approving, with Amendments, the Funding Act of Arizona," approved June twenty-fifth, eighteen hundred and ninety, and paragraph twenty-two hundred and fifty-two (§ 15) of said act, be and the same is hereby amended by adding thereto as follows: "Provided, further, however, that the present outstanding warrants, certificates, and other evidences of indebtedness issued subsequent to December thirty-first, eighteen hundred and ninety, for the necessary and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the years ending December thirty-first, eighteen hundred and ninety-four, and December thirty-first, eighteen hundred and ninety-five, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue, or to be legal where the same is in excess of the limit prescribed by the Harrison act."' It is to be noted that, in both the acts referred to, the only limitation imposed had reference to the class of obligations which were permitted to be funded, and did not in any

manner restrict the territorial officers in the method of their procedure previously prescribed by the territorial law, or limit the time within which the acts of funding, by the sale and disposition of bonds, might lawfully be done. Bearing in mind the remedial character of this legislation, and reading the act of June 6, 1896, in the light of the previous congressional enactments upon the same subject-matter, we construe the former act to express only what obviously appears to be the congressional intent, *viz.*, *to extend and enlarge the class of obligations which may be funded, and not to limit the time within which the board of loan commissioners might complete the acts of funding indebtedness, which has expressly been recognized by Congress as fundable. We therefore read § 1 of this act as authorizing the funding of all obligations of the territory which existed and were outstanding prior to January 1, 1897, and not as limiting the sale and disposition of bonds for funding purposes by the loan commissioners to the absurdly short period of six months for the successful accomplishment of the funding of the varied class of obligations validated and recognized by the act as fundable, and which necessarily amounted to large sums. It is not to be assumed that Congress would in one breath grant liberal and generous concessions, and in the next breath take away their practical benefits by the imposition of a seemingly unreasonable and unnecessary restriction, and thus defeat its own purpose and intent. It is to be noted that no contention is made that any of the indebtedness proposed to be funded by the sale and disposition of the bonds in question has been incurred since January 1, 1897, but the sole contention is as to the time within which the funding of the territorial indebtedness as limited by law may be done."

We are disposed to agree with the conclusions arrived at by the territorial supreme court. While it may be said that by the strict letter of the statute of 1896 there could be no funding of a bond after January 1, 1897, although the bond had been issued long prior to that date and represented an indebtedness of the county, which was provided for by the act of 1896, yet taking into consideration the series of acts which have been passed and the provisions made therein relating to the funding of the indebtedness of the territory and of the various counties and other municipal divisions therein, we

or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded, with the interest thereon, which has accrued and may accrue until funded into the lower interest-bearing bonds, as provided by this act.

Sec. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto approved August third, eighteen hundred and ninety-four, are hereby declared to be valid and legal for the purposes for which they were is-

sued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, approved, and validated, and may be funded, as in this act provided, until January first, eighteen hundred and ninety-seven: *Provided*, That nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid, and authorized to be funded.

Approved June 6, 1896.

think the intent of Congress was to provide that there should be no funding of bonds or other indebtedness which arose subsequently to January 1, 1897, the date named in the statute, and that date was named as the limit of the indebtedness that could be refunded, and the statute was not intended to limit the mere process of exchanging one bond [351] for the other to the time specified. *There was no special reason for a limitation of time for the mechanical exchange of bonds under the statute, so long as the time was limited which applied to the indebtedness to be recognized.

Although bonds executed by many counties in favor of railroads had been held invalid because the acts of the legislature of Arizona permitting the counties to issue such bonds were violations of the restrictions imposed upon the territorial legislature by Congress (*Lewis v. Pima County*, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 22), yet the legislative assembly of the territory of Arizona had adopted a memorial asking Congress to pass such curative legislation in regard to such bonds as would protect the bondholders, when such bonds had been issued under the authority of the acts of the territorial legislature. A copy of the memorial is to be found in the report of the case of *Utter v. Franklin*, 172 U. S. 416, 421, 43 L. ed. 498, 500, 17 Sup. Ct. Rep. 183.

It was, therefore, the desire of the territory of Arizona to have the bonds validated, and that they should be paid, and to pay them. We think it quite plain that the 2d section of the Federal statute of June 6, 1896, was passed in response to the request of the legislature of Arizona. When these bonds were validated by such statute it would seem hardly reasonable that the short period of six months from June 6, 1896, to January 1, 1897, should be given, not alone for their presentation and exchange, but also for all the indebtedness mentioned in that act; while, on the contrary, having made all such bonds valid, it would seem to be quite reasonable that the limitation of time provided for in the Federal act referred to the character of indebtedness which was to be limited, and not to the particular time when the bonds were actually to be exchanged.

It is to be noted that by the acts prior to that of June 6, 1896, there was no limit whatever placed upon the time for the board of loan commissioners to act upon the funding of the indebtedness of the territory, but the limitation was in regard to the time when the debts which were to be refunded were created. The only limit named in the act of Congress of June 25, 1890 (26 Stat. at L. 175, chap. 614), was as to the date when the indebtedness was created. Section 7 of the territorial act of March 19, 1891, [352] it *will be perceived, did not limit the date of refunding but did limit the indebtedness to that which was existing or outstanding on December 31, 1890. By the act of Congress approved August 3, 1894 (28 Stat. at L. 224, chap. 200), the time for the creation of debts of the territory which might be

funded was extended from December 1, 1890, to December 31, 1895, which was over a year beyond the date of the passage of the act, but the time of refunding was not limited.

In none of these acts, as stated, was there any limitation as to the time of refunding, but the limitation in each was in regard to the indebtedness which was to be refunded. Upon consideration of all the circumstances existing when the various acts of Congress were passed, we are inclined to concur with the supreme court of Arizona on the construction it has placed upon the act of Congress of 1896. While we admit that it is against the strict letter of the statute, we think the construction adopted is within its clear meaning and intention.

(3) The last objection raised to the validity of the funding is that the bonds were improperly and illegally funded at a meeting of the board of loan commissioners of the territory of Arizona, at which only two members of the board were present, the third member being absent from the territory, and not in any manner consulted with reference to the funding.

There is a statute of Arizona (Rev. Stat. § 2932, subdiv. 2) which reads as follows: "All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."

The objection is made that the loan commissioners of Arizona obtained their authority from the act of Congress, and not from the territorial legislature, and hence the statute above referred to does not apply. The territory of Arizona passed an act in 1887 known as the Revised Statutes, in which was "Title XXXI. Funding." That act, by § 2039, created the governor of the territory, together with the territorial auditor and the territorial secretary, and their successors in office, a board of commissioners to be styled the "Loan Commissioners of the *Territory of Arizona," who should have and [353] exercise the powers and perform the duties provided for in the act, which gave them power to provide for the payment of the existing territorial indebtedness and such future indebtedness as might be authorized by law, and granted them power to issue negotiable coupon bonds of the territory under the conditions named in the act. This act was somewhat amended and then approved by Congress June 25, 1890 (26 Stat. at L. 175, chap. 614). The powers of the commissioners have been extended from time to time. It is claimed that the power vested in them came from Congress instead of the territorial legislature, and that therefore the statute relating to the exercise of powers given to a board of public officers does not apply.

We think that the territorial statute, although approved by Congress, is the foundation for the appointment of the loan commissioners, and that the body thus created

comes directly within the provisions of the Arizona statute just referred to. Upon this subject it was said by the supreme court of Arizona as follows:

"There is no provision in the funding act of 1887, as amended by Congress in 1890, that the commissioners should jointly act, but the board was treated as a unit. The funding act is not a strictly congressional act: it is a territorial act, passed by the legislature of the territory and embodied in the Revised Statutes of 1887. For the purpose of assuring the validity of the act, and of placing any issuance of bonds under it beyond dispute, the act was presented to Congress for its affirmative approval, which it gave with some few amendments, generally verbal in their nature and evidently for the purpose of making the act more specific. The title of the act passed by Congress clearly carries out that view, for the first provision of that act is 'that the act of the Revised Statutes of Arizona of 1887, known as "Title XXXI. Funding," be and is hereby amended so as to read as follows: And that as amended the same is hereby approved and confirmed, subject to future territorial legislation.' The act being a territorial act, and the commission being the creation of the Territory, is directly affected by § 2932, *supra*."

[354] The record does not show that the absent commissioner had *not been notified to attend the meeting at which the bonds were funded. It is not to be presumed that notice of the intended meeting was not given. Under the provisions of the territorial act, the proceedings of the board of loan commissioners were legal.

We think the three objections made by the appellants are untenable, and the judgment of the Supreme Court of Arizona was right, and must be affirmed.

SKANEATELES WATERWORKS COMPANY, Plffs. in Err., v.

VILLAGE OF SKANEATELES, E. Norman Leslie, as President of Said Village, et al.

(See S. C. Reporter's ed. 354-368.)

Waterworks—implied contract of village to purchase—restrictions on right to build municipal waterworks.

An implied contract that a village will not construct its own waterworks, or provide itself therewith otherwise than by purchase or condemnation of the works of an incorporated water company, after the expiration of a contract for the supply of water by such company for a term of years, does not arise from the consent of the village to the incorporation of the company and its construction of waterworks under a franchise that is not exclusive and which does not require the village to take water of that company, where

the statutes give the village merely the right, without imposing upon it any express liability, to condemn such waterworks, and also preclude the village from making an express contract for a water supply for more than five years without a vote of the electors.

[No. 134.]

Argued January 24, 27, 1902. Decided March 3, 1902.

IN ERROR to the Supreme Court of the State of New York to review a judgment in favor of a village in a suit to restrain it from constructing a waterworks system. *Affirmed.*

See same case below, in New York Court of Appeals, 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562, and in New York Supreme Court, 33 App. Div. 642, 53 N. Y. Supp. 1115.

Statement by Mr. Justice Peckham:

*This is a writ of error to the supreme [355] court of the state of New York, the record having been remitted to that court from the court of appeals after the hearing of an appeal to the latter court and an affirmance by it of the judgment appealed from. 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562.

The action was brought by the water company to restrain the village of Skaneateles and the individual defendants, its officers, from proceeding further with the construction of a waterworks system, or from doing anything in furtherance of the construction or operation of any system of waterworks for that village. The plaintiff claimed that the village ordinance under which the proposed action on the part of the village was taken was void as impairing the obligation of a contract between plaintiff and the village; also, that its action, if continued, would result in the taking of plaintiff's property without due process of law; that the action of the defendant, if permitted, would result in the taking of private property for public use without compensation; and that such legislation denied to plaintiff the equal protection of the laws.

The defendants answered denying the contentions of plaintiff, and the case was referred to a referee for trial, who, after hearing the parties, reported that the defendants were entitled to judgment, dismissing the complaint upon the merits, with costs, and judgment was thereupon entered which was affirmed by the appellate division of the supreme court of the state and upon appeal by the court of appeals.

*As matters of fact the referee in his re- [356] port found that the plaintiff was a domestic corporation organized under the act of 1873, chap. 737, and the several acts amendatory thereof; that the village of Skaneateles was a municipal corporation and the individual defendants were respectively the president, water commissioners, and trustees of the village. On April 5, 1887, the village granted a franchise to the plaintiff to maintain and operate within the village of Skaneateles a system of waterworks for furnishing the village and its inhabitants pure and wholesome

NOTE.—On the exclusiveness of franchise granted to water companies—see note to *Re Barre Water Co.* (Vt.) 9 L. R. A. 195.
184 U. S.

water upon the terms and conditions stated in the franchise. The plaintiff constructed the waterworks under this franchise and completed it about the year 1889 and put the same in operation; that the system was a complete and adequate one, no complaint having been made that the water furnished by the plaintiff was not pure and wholesome, or that it had been inadequate for the purposes for which the system was erected. Prior to this time the village of Skaneateles was not supplied with water by any company or corporation, nor did it possess any system of its own; that since its incorporation, and for the purpose of carrying on its works, the plaintiff had encumbered its property by mortgages to secure the payment of bonds issued by it, which bonds were outstanding at the time of the trial. After the erection and completion of the waterworks and on February 1, 1891, the plaintiff and defendants entered into a contract for the supply of water and the erection of hydrants and for the payment of certain compensation therefor by the defendants; that such contract was limited by its terms to the period of five years from February 1, 1891, and that it has not been renewed since the time of its expiration on February 1, 1896; that after such time, without any proceeding to vacate or annul the franchise of the plaintiff, or to dissolve the corporation, the defendant Leslie, as president of the village, appointed some of the other defendants to be water commissioners of the village, having in contemplation the purpose of constructing for said village a waterworks system of its own; that the persons so appointed commissioners entered upon the performance of their duties, called a meeting of the electors of the village, who voted in

[357] favor of municipal ownership of the waterworks, and after such election the water commissioners issued or caused to be issued bonds of the village to the amount of \$30,000, which they sold for the purpose of obtaining money to construct a waterworks system of its own; that the board of water commissioners of the village have entered into a contract for the construction of waterworks for said village, and have expended thereon about the sum of \$24,000, and the works are substantially completed; that all of the proceedings were taken without instituting any proceeding to condemn the property of the plaintiff herein, although the plaintiff offered to participate in a proceeding looking towards the condemnation of its property; that the works of the plaintiff were constructed at large expense and its property rights and franchise mortgaged to secure its bonds which had been issued, and the income of the plaintiff from the operation of its plant had been insufficient to meet its outgoing expenses, and will be insufficient to meet its outgoing expenses when it shall cease to furnish water to the village of Skaneateles.

As conclusions of law the referee held:

(1) That the village of Skaneateles was not required to institute proceedings to condemn the property of the plaintiff before

commencing the construction of a waterworks system for the use of the village.

(2) That the consent of the village of Skaneateles to the organization of the plaintiff as a waterworks company, and the making of a contract by the village of Skaneateles with the plaintiff for the supply of pure and wholesome water, did not vest in plaintiff the exclusive right to furnish said village with water, or prevent the village from granting to another corporation the right to supply water within the said village, or the village from constructing and maintaining a waterworks system to supply itself with water.

(3) That subsequently to February 1, 1896, no contractual relations existed between the plaintiff and the village of Skaneateles, and the village was not under legal obligation to enter into any contract with the plaintiff after that date, or to continue to take water from the plaintiff; but was entitled to construct and maintain a waterworks system of its own.

* (4) That the defendants were entitled to [358] judgment dismissing the complaint upon the merits with costs, and judgment was ordered accordingly.

Though not, perhaps, material upon the legal rights of the parties, yet it is seen from correspondence found in the record that prior to the expiration of the contract in February, 1896, the company gave notice to the village that it intended to increase its rents for hydrants, etc., to \$50, which sum was \$10 per hydrant more than it was entitled to under the franchise granted it, and \$20 more than the sum named in the expiring contract. The village authorities refused to pay the increase, and the water company, on learning it had under its franchise the right to charge but \$40 per hydrant, reduced its demand, but the parties failed to agree, and the contract expired. After its expiration the company notified the village that the hydrants had been closed and that there must be no interference with them, even in case of fire. Both parties became somewhat excited, it would seem, and it resulted in the village taking proceedings under chapter 181 of the Laws of 1875, and its amendments, for erecting and operating waterworks of its own.

Mr. Charles A. Hawley argued the cause, and, with Mr. George Barrow, filed a brief for plaintiff in error:

The grantor of a franchise agrees that it will do nothing repugnant to its grant.

Sinking Fund Cases, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Fletcher v. Peck*, 6 Cranch, 87, 137, 3 L. ed. 162. 178; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692.

In the grant of a franchise is the implied agreement on the part of the state that the grantee shall forever enjoy the rights granted, unless there are words of limitation.

Dartmouth College v. Woodward, 4 184 U. S.

Wheat. 518, 4 L. ed. 629; *Fletcher v. Peek*, 6 Cranch, 87, 137, 3 L. ed. 162, 178.

All corporations, in the absence of express restrictions, have the implied power to do all acts that may be necessary to enable them to exercise the powers expressly conferred, and to accomplish the objects for which they were created.

Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 385, 33 L. ed. 161, 9 Sup. Ct. Rep. 770; *Fort Worth City Co. v. Smith Bridge Co.* 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; 7 Am. & Eng. Enc. Law, p. 699; *Pearshall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787.

Contracts may be created without express words, *i. e.*, by the acts of the parties; and these contracts are as much within the protection of the contract clause of the Federal Constitution as any other contracts.

Fisk v. Police Jury, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329.

Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract.

Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977.

Franchises of the character under consideration are contracts.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

When a municipality makes a contract, or enters into contractual relations with another, it may make itself liable upon implied contracts, or covenants, just as individuals and private corporations may, if within the scope of their powers, to be deduced by inference from authorized corporate acts, without either vote, deed, or writing.

Dill. Mun. Corp. 4th ed. § 459; 15 Am. & Eng. Enc. Law, p. 1081; *New York v. Second Ave. R. Co.* 32 N. Y. 261.

When the government, possessing the power of choosing whether it will itself engage in the performance of a public duty, or contract with a private corporation, makes choice of the private corporation, it agrees with such private corporation to waive its own right.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 693.

The defendant municipality, as the owner and operator of a system of waterworks, is not in any sense the competitor or rival of the plaintiff.

White v. Meadville, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 693.

The reserved power of the legislature to alter or amend cannot be resorted to, to enable the grantor to take back for its own uses and purposes the rights and privileges which it granted.

184 U. S.

Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98; *Sinking Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496.

A repeal of the charter of a corporation does not carry with it the destruction of a franchise granted to the corporation.

People v. O'Brien, 111 N. Y. 40, 2 L. R. A. 255, 18 N. E. 692; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961.

The prohibition of the 14th Amendment against depriving a person of his property without due process of law is a restriction on every branch of government, and applies to the acts of a political subdivision of the state under a delegation of the authority of its legislature.

Chicago, B. & Q. R. Co. v. Chicago, 166 L. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Corporations are protected equally with natural persons.

Smyth v. Ames. 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The property of the plaintiff when, in 1896, under delegated authority, the defendant village organized a board of water commissioners, consisted first of its franchise.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 26, 22 Sup. Ct. Rep. 26.

Such franchise was not the exclusive privilege of supplying the village and its inhabitants with water, but it was the privilege of supplying the village and its inhabitants on equal terms with all other corporations and individuals. This right or privilege of equality in the service to be rendered was an "essential attribute" of the plaintiff's property; and to deprive one of an essential attribute of his property without due process of law is as much within the constitutional inhibition as depriving him of the property itself.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Wynehamer v. People*, 13 N. Y. 378; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48. See also *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128.

The question turns in part upon a consideration of the question whether the laws operate on the plaintiff and defendant alike.

Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Story, Const. § 1935.

And whether the plaintiff is exempted from the exercise of the unequal or arbitrary power of the government.

Ibid.; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.

"Due process of law" does not mean merely an act of the legislature.

Dorman v. State, 34 Ala. 216.

The guaranty of the equal protection of the laws relates as well to corporations as to natural persons.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

And it is a denial of the equal protection of the laws to discriminate in legislation between different corporations and natural persons engaged in the same business.

Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; *San Matco County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 733.

Under this act the property taken under the guise of taxes is taken under the exercise of the power of eminent domain, and not under the power of taxation.

People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

By operation of the law which the village itself made "the law of the state," the plaintiff was deprived of its right to consider the defendant even a possible patron. In other words, it was deprived of its franchise,—the privilege which had been granted to it of supplying the defendant,—which was its property.

Gulf & S. I. R. Co. v. Heeces, 183 U. S. 66, ante, 86, 22 Sup. Ct. Rep. 26.

Messrs. M. F. Dillon and William G. Tracy argued the cause and filed a brief for defendants in error:

The rule is fully established that public grants are to be construed against the grantee; that acts granting franchises to corporations are to be construed strictly according to their terms; that the party accepting the franchise takes nothing by implication against the power making the grant, or against other corporations or individuals; that the only contract on the part of the grantor is that it will not do any act, or refrain from doing any act, other than to allow the exercise of the franchise.

Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L. R. A. 516, 22 N. E. 381; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983, Affirmed in 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Warsaw Waterworks Co. v. Warsaw*, 16 App. Div. 502, 44 N. Y. Supp. 870, 161 N. Y. 176, 55 N. E. 486; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Colby University v. Canandaigua*, 69 Fed. 671; *Auburn & C. Pl. Road Co. v. Douglass*, 9 N. Y. 444.

A municipality cannot, without express legislative authority, grant exclusive rights.

Dill. Mun. Corp. 4th ed. §§ 692-696; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 19.

A municipal corporation can bind itself by contract only so far as it is authorized to do so by statute. It cannot enter into an agreement to take water forever from a water corporation, unless authorized to do so by the legislature. It cannot curtail by contract the right to exercise the powers vested in its legislative board.

Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L. R. A. 516, 22 N. E. 381.

Municipal corporations have no power as parties to make contracts which shall control or embarrass their legislative powers and duties.

New York v. Second Ave. R. Co. 32 N. Y. 261.

The remedy against unwise or unjust modes of taxation is to be sought from the legislative department of the government, and not from the judiciary.

People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; *People v. Home Ins. Co.* 92 N. Y. 347.

It is only where a tax law transcends the legislative power that the courts can interfere.

People ex rel. Panama R. Co. v. New York Tax Comrs. 104 N. Y. 250, 10 N. E. 437.

The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded.

Re Van Antwerp, 56 N. Y. 265.

The two clauses of the Constitution which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation, have no application to the exercise of the taxing power.

People ex rel. Crowell v. Lawrence, 41 N. Y. 140; *Howell v. Buffalo*, 37 N. Y. 270.

It is a part of the legitimate exercise of the state power of taxation to ascertain, subject to no judicial review, the public burdens to be borne, and the persons or classes of persons who are to bear them.

Brewster v. Syracuse, 19 N. Y. 118.

The legislature has power to authorize the condemnation of any property for a public use.

West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535.

This includes franchises of every description, whether exclusive or not, and it is not apparent how the exercise of such power is unconstitutional upon the ground that it deprives water corporations of the equal protection of the laws.

Cooley, Const. Lim. 5th ed. § 341.

*Mr. Justice **Peckham**, after making the [358] above statement of facts, delivered the opinion of the court:

The power of this court to review the judgment of the New York court of appeals is limited to a consideration of the question

whether any right of the plaintiff's protected by the Federal Constitution has been denied by the judgment. Whether the plaintiff is entitled to relief under the facts disclosed in the record upon general principles of equitable jurisdiction is not a matter for us to inquire into so long as the question does not involve the constitutional rights of the plaintiff.

[359] *The claim is made that the ordinance adopted by the authorities of the village of Skaneateles in 1896, providing in substance for the erection and operation of a water system by the village, which ordinance was passed pursuant to an authority of the legislature under the act, chapter 181 of the Laws of 1875, and amendments (giving authority to cities and villages to build their own waterworks), impaired the obligations of the contract existing between the village and the company. The contract to which reference is made is not the one which was entered into in 1891 between these parties for the term of five years, because that contract was fully carried out and had expired by its own limitation in February, 1896, but it is the contract which the plaintiff in error claims was implied by reason of its organization and incorporation in 1887, in pursuance of an application made to, and with the consent of, the village authorities, and under the provisions of chapter 737 of the Laws of New York of 1873, and the acts amendatory thereof. It is said the village at the time of plaintiff's incorporation had the election to do the work itself under the above act of 1875, or to confer upon a private company like the plaintiff, under the act of 1873, the right to do it, and when with these two different methods for obtaining a supply of water the village chose that which called for a supply by a private company, it impliedly contracted that it would not itself thereafter take the other method for obtaining such supply, unless it bought the plant of the company or condemned it under the provisions of the act of 1875. This, it is said, was implied in the grant made by the village. Sections 1, 2, 3, 4, and 5 of the act of 1873, under which the plaintiff was incorporated, are set forth in the margin.†

†Chap. 737, Laws of 1873.

Sec. 1. Any number of persons not less than seven may hereafter organize in any town or village of this state a waterworks company, under the provisions of this act.

Sec. 2. Whenever any persons to the number of seven or more shall organize for the purpose of forming a waterworks company in any of the towns or villages in this state, they shall present to the town or village authorities an application, setting forth the persons who propose to form said company, the proposed capital stock thereof, the proposed number and character of the shares of such capital stock, and the name or names of the streams, ponds, springs, lakes, or other sources and their locations, from which water is to be supplied. Such applications shall be signed by the persons who propose to form said company, and shall contain a request that the said town or village authorities shall consider the application of said com-

pany to supply said town or village of this state, or the inhabitants thereof, with pure and wholesome water. Upon the presentation of such application, the authorities of any town or village, which authorities are for the purposes of this act defined to consist for incorporated villages and towns, the board of trustees and supervisor, and for all other towns, the supervisor, justices of the peace, town clerk, and commissioner of highways. Said authorities shall within thirty days of the presentation of said application determine by a vote of a majority of the authorities of said town or village, whether said application shall be granted; and the authorities of any town or village in this state are hereby authorized and empowered to make such determination, and when the same shall be made, to sign a certificate to that effect, and immediately transmit the same to the persons making such application or either of them. Duplicate certificates of such determination shall be filed in the office of the clerk of said town or village, and in the office of the county clerk of the county in which said town or village granting such application shall be situated. The persons named in such application shall thereupon meet and organize as a waterworks company under such corporate name as they may select. They shall file in the office of the secretary of state a certificate of such organization. Said certificate shall contain the name of the corporation, the names of the members of said corporation and their residences, the amount of capital stock, the location of the office of said company. Such certificate shall be subscribed and sworn to by the president of said corporation, and shall be attested by the secretary thereof. Upon the filing of said certificate said waterworks company shall be known and deemed a body corporate, and shall be capable of suing and being sued by the corporate name which they shall have selected, in any of the courts of this state. The capital stock of said company shall be paid in the manner and within the time provided by the "Act to Authorize the Formation of Corporations for Manufacturing, Mechanical, or Chemical Purposes," passed February 17th, 1848, and the several amendments thereto, and the stockholders of said companies shall be personally liable for the debts of said companies in the same manner and to the same extent as is provided by said act and the amendments thereto.

Sec. 3. Said corporation shall have power to take and hold real estate for the purpose of their corporation, and may have, hold, and occupy any of the waters of this state; provided, however, that nothing herein contained shall be deemed to infringe upon any private right which shall not have been the subject of an agreement and lease or purchase by said corporation. Provided, that said company shall have no power to take or use water from any of the canals of this state or any canal reservoirs as feeders or any streams which have been taken by the state for the purpose of supplying the canals with waters.

Sec. 4. Any corporation organized under the provisions of this act may, and they are hereby authorized and empowered, to lay their water pipes in any streets or avenues or public places, in any streets or avenues of an adjoining town or village, to the town or village where their application shall have been granted.

Sec. 5. Said corporations are authorized and empowered to supply the authorities or inhabitants of any town or village where they may have organized with pure and wholesome water, at such rates and cost to consumers as they shall agree upon.

- [360] *Under the act of 1875, chap. 181, the village was authorized to erect and operate its own works. Provision was made in the act in detail for the organization of a board of water commissioners and the building of waterworks, the mode of paying for the same, and other matters connected with the supply of water. That part of the 22d section of the act, in *regard to the taking of the property of a private company, is set forth in the margin.†
- [361]

Pursuant to the provisions of the act of 1873, certain persons on July 5, 1887, applied to the village authorities for permission to organize a water company to supply the village with pure and wholesome water, and on that day the authorities granted the request. On August 1, 1887, a certificate was duly filed in the office of the secretary of state at Albany, by which the corporation was formed under the name of the Skaneateles Waterworks Company. Subsequently

[362] to the incorporation of *the plaintiff it built the waterworks and entered into a contract with the village authorities to supply water to the village for five years from February 1, 1891.

It would seem to be clear, under the decisions of this court, that the plaintiff in applying to the village and filing its certificate with the secretary of state under the act of 1873 acquired no contract right, expressed or implied, to any exclusive privilege of using the streets of the village for supplying it with water. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 696, 41 L. ed. 1163, 1168, 17 Sup. Ct. Rep. 718; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 13, 43 L. ed. 341, 347, 19 Sup. Ct. Rep. 77. The court of appeals of New York held to the same effect in regard to a provision in the charter of Syracuse relating to the rights of a water company, the provision being similar to the charter here involved. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 516, 22 N. E. 381, decided in 1889; also *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983, affirmed in this court, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718. Indeed, this proposition is conceded by counsel for the plaintiff, and it

admits that the village, notwithstanding its grant to the plaintiff, possessed the power to grant to any other individual company the same kind of privilege it had already granted to plaintiff. But it denies the right of the village to avail itself of the authority to itself build and operate the works, given under the act of 1875, unless the plaintiff's plant be taken by purchase or condemnation.

Having before it the above act of 1873, amended in 1877, the court of appeals, in *People, ex rel. Mills Waterworks Co. v. Forrest*, 97 N. Y. 97, 100, decided in 1884, said that "the state authorized the formation of waterworks companies in its towns and villages (Laws of 1877, chap. 171), but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed."

It is true that by chapter 566 of the Laws of 1890 it was provided that the water companies "shall supply the authorities or inhabitants of any town or village . . . [through which the conduits or mains of such corporation may pass] with *pure and [363] wholesome water at reasonable rates and cost;" and the act provided that contracts might be made therefor. But there was no provision making it incumbent upon the municipal authorities to take water from any such company.

By virtue of its incorporation under this act of 1873 the plaintiff secured simply the right to be a corporation and the authority to lay its water pipes in any of the streets and avenues or public streets of the village of Skaneateles. The village, however, as stated, was under no obligation to take water from the company. That was a matter for subsequent contract between the parties. Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, after the termination of the contract the plaintiff and defendant were empowered to make, there should be no right in the defendant to build its own system of waterworks under the statute of 1875, unless it purchased or condemned the property of the plaintiff.

There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed.

It is not amiss to here recall the situation at the time plaintiff became incorporated, in 1887, under the act of 1873. That act provided for the organization and incorporation of water companies which might furnish water to cities, villages, and towns of the state. There was also the act of 1875

184 U. S.

†Part of Sec. 22, Chap. 181, Laws of 1875.

Sec. 22. "Whenever any corporation shall have been organized under the laws of this state for the purpose of supplying the inhabitants of any village with water, and it shall become or be deemed necessary by the board of water commissioners herein authorized to be created, that the rights, privileges, grants, and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created shall have the power, and it shall be their duty, to make, or cause to be made, a thorough examination of the works, rights, privileges and properties owned or held by such corporations, or any of them, and if such commissioners shall determine that said works, rights, privileges, and properties are necessary for the purposes of this act, they shall have the right to make application to the supreme court. . . ." The section then provides for taking the property by condemnation.

(chapter 181) and its amendments, granting to the village authorities the right to erect and operate a water system of their own. There was the further statutory provision (chapter 120 of the Laws of 1879, relating to the municipality, and chapter 422 of the Laws of 1885, relating to a water company), that the contracts to be entered into between the water companies and the municipal authorities should not extend beyond five years, [364] unless *there was a vote of the electors authorizing a contract for a longer period, but in no case longer than thirty years. Now, while the parties are prohibited from contracting for more than five years without a vote of the electors, which was not taken, how can it be said that when they contracted only for the time permitted by the legislature, there was nevertheless an implied contract that the village would never avail itself of the right provided by statute, without purchasing or condemning the property of the plaintiff? No such condition is stated in any statute. We cannot see any solid foundation for the claim that there was a final and conclusive election of methods by the village, out of which sprang the implied contract contended for, when the legislature at that very time prohibited a contract for more than five years. It would seem in the nature of things that the election of methods was for no longer a time than the law permitted a contract to be made under the method chosen by the village. After the expiration of that time we cannot see why the parties were not in the same condition as to their respective rights that they were in before the contract for the five years was made. Otherwise, we have the anomalous condition that the village may grant, unconditionally, the franchise to supply it with water, to another private company, while ceasing and refusing to take from the old company, and yet it cannot erect its own water system (unless it purchases or condemns the plant of the plaintiff), because it chose to enter into a contract with plaintiff for a supply of water by it for five years, although the contract has expired by its own limitation and the parties are under no legal obligation to renew it. We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years' contract, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract never to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase. We cannot see the logic of such contention.

The very fact that the taking of the plant [365] of a private existing *company was not made a condition for the exercise of the authority to build, granted the village by the act of 1875, shows there was no implied contract to take such property. The right to build was specifically given to the village under the act of 1785, whether any private company existed or not, and that right to
184 U. S.

build was nowhere in the statute conditioned upon a taking by the village of the plant of the private company. The act recognized the fact that there might be an existing private company, and the 22d section gave the village authority to take it, but did not compel it. It, therefore, authorized the village to build and operate its works without taking the plant of the private company. Both these acts were in existence when the plaintiff was incorporated under the act of 1873, and it took the chance of the village thereafter availing itself of the act of 1875 to build and operate, unconditionally, its own plant.

When the contract for the five years had expired we look in vain for anything in either of the statutes of 1873 or 1875 upon which to base the implied contract contended for. The court below, after careful consideration of the statute of 1875, came to the conclusion that there was nothing in the language of the 22d or any other section thereof compelling the village to purchase or condemn the plant of the company, and that no contract could be implied therefrom. Chief Judge Parker, in his opinion in this case, 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562, at page 162, L. R. A. p. 689, N. E. p. 563, says:

"On the other hand, the appellant urges that the statute authorizing villages to supply themselves with water, and permitting the acquisition of the works of any private corporation that may be supplying such municipalities with water, also makes it the duty of the water commissioners to acquire the property of the existing corporation or corporations. But after a very careful examination of the statute it seems to us very clear that this is not so. It is probable that the legislature mistakenly assumed that such authorities would not act unjustly or oppressively, but would recognize the property rights of others. Be that as it may, the right to determine whether the property of an existing waterworks corporation should be taken *or not is clearly submitted [366] to the determination of the local authorities. The refusal of the defendant, therefore, to acquire the plaintiff's property by proceedings *in invitum* does not tend to support the plaintiff's claim for an injunction. The defendant has done precisely what the statute authorizes, and all that remains for the court to determine is whether the act was within the legislative power, or void because in contravention of the organic law."

The judge then proceeded to discuss that question, and held that the action of the village was legal. We concur in this view. The language too plainly leaves it to the discretion and judgment of the water commissioners, to permit of any other construction. Not being bound by the statute to take the property of the plaintiff as a condition of building its own plant, there is, as we have said, no implication of a contract to do that which the statute itself does not direct.

Reference was made on the argument to two Pennsylvania cases, decided by the su-

preme court of that state. They are *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 693, and *Metzger v. Beaver Falls*, 178 Pa. 1, 35 Atl. 1134. They decide what is the proper construction to be given certain statutes of that state relating to municipal corporations, and to water companies formed to supply them with water. The actions were brought by taxpayers of the municipalities to restrain the latter from erecting works of their own to supply water. The court held that under the powers given to the municipalities by those statutes, they had not the right to erect such works unless they took the plant of the water companies then operating such plant. They did not hold there was any implied contract on the part of the municipalities that they would so take the plant, or that to operate works of their own without doing so would be a taking of the property without due process of law or without making compensation, or that it would be a denial of the equal protection of the laws. The cases were maintained on equitable principles and in favor of taxpayers who were complainants, and there was no question of contract between the city and the water company upon the basis of which the actions were permitted to stand. It was a simple question of the powers granted to the *parties by the different statutes. The court said that although the city was not bound to become the owner of the works, it had no power to destroy their value by duplicating them at the expense of the taxpayers. A taxpayer was the plaintiff. The court decided no Federal question in either case. The statutes of New York are somewhat different, and the state court has come to the conclusion that under them the village was not bound to take the plant of the plaintiff. We agree in the view that there was no implied contract to take the property of plaintiff, even though the village should subsequently to the expiration of the written contract erect its own water system.

It is also plain that as there was no contract, such as is claimed by the plaintiff, the action of the village has not resulted in the taking of any of the property of the plaintiff without due process of law or without compensation. It has not taken any of the property of the plaintiff in any aspect of the case. Its action may have seriously impaired the value of the plaintiff's property, but it has taken none of it, and such decrease in value, caused by the village exercising its right to build and operate its own plant, furnishes, under the facts in this case, no foundation for the plaintiff's claim. *Lehigh Water Co. v. Easton*, 121 U. S. 388, 390, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

In *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, the land of the plaintiff had been overflowed by water under a claim of right under a statute, and it was held that such continuous overflow and user amounted to a taking of the plaintiff's property.

This is not such a case. The property of the plaintiff remains wholly untouched. Its value has decreased because the village no

longer takes water from it, and the inhabitants will probably also take their supply from the village works, but the plaintiff's property has not been taken, as that term is understood in constitutional law. What the village ought to do in the moral aspect of the case is, of course, not a question for us to determine.

The court of appeals has held in this case that the provisions in the statute for the taxation of the property of the company in common with other owners of property to pay the obligations *incurred in the construction of the works by the village, and all discriminating taxation of the patrons of the company, are invalid. See also *Warsaw Waterworks Co. v. Warsaw*, 161 N. Y. 176, 55 N. E. 486. The plaintiff is therefore freed from the obligations imposed by those provisions. [368]

The views above expressed show that there was no such contract as claimed by the plaintiff, and consequently no impairment of the obligations of any contract, and there has been no taking of plaintiff's property, nor has it been denied by the state the equal protection of the laws. *The judgment of the Court of Appeals of New York is right, and must therefore be affirmed.*

CITY OF DETROIT, William C. Maybury, Mayor, and Charles Flowers, Corporation Counsel, Appts.,

v.

DETROIT CITIZENS' STREET RAILWAY COMPANY.

(See S. C. Reporter's ed. 368-399.)

Equity—remedy at law—street railways—contract rights as to rates—reduction of rates by ordinance—statutes—object expressed in title—validity of ordinance extending franchise beyond corporate life—reserved power to reduce rates.

1. The defense that complainant in a bill to restrain the enforcement of municipal ordinances reducing street railway fares as

NOTE.—On the jurisdiction of equity where remedy at law exists—see notes to *Meldrum v. Meldrum* (Colo.) 11 L. R. A. 65, *Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co.* (N. J. Eq.) 6 L. R. A. 855, and *Tyler v. Savage*, 36 L. ed. U. S. 83.

On jurisdiction of equity to prevent multiplicity of suits—see notes to *Fuller v. Detroit F. & M. Ins. Co.* (C. C. N. D. Ill.) 1 L. R. A. 801, and *Corinth v. Locke* (Vt.) 11 L. R. A. 207.

As to when the object of an act is expressed in its title—see notes to *Titusville Iron Works v. Keystone Oil Co.* (Pa.) 1 L. R. A. 332; *People ex rel. Hart v. McElroy* (Mich.) 2 L. R. A. 609; *Astor v. New York Arcade R. Co.* (N. Y.) 2 L. R. A. 789, and *Evansville v. State ex rel. Blend* (Ind.) 4 L. R. A. 93.

Contract exemptions from legislative power to fix tolls, rates, or prices.

Two cases have held that the right to fix and regulate the charges of common carriers is so

Impairing contract obligations has a plain and adequate remedy at law will not be recognized on appeal, where from the averments of the bill it appears that the enforcement of such ordinances might result in a multiplicity of suits or in harassing or expensive litigation, and might impair complainant's ability to renew or extend its mortgage indebtedness, or so reduce its income as seriously to imperil its solvency,—especially if no objection was taken to the jurisdiction of a court of equity over the subject-matter at any stage of the litigation, or insisted upon at the hearing before the appellate court.

2. A state legislature, unless prohibited by constitutional provisions, may authorize a municipal corporation to contract with a street railway company as to rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract.
3. Binding agreements relative to rates of fare between a municipality and street railways

organized either under the Michigan tram railway act as amended in 1861, or under the street railway act of 1867, which cannot be altered without consent of both parties, were expressly authorized by § 20 of the latter act, declaring that street railway rates shall be established by agreement between the company and the corporate authorities, the provisions of which section were by § 29 made applicable to all street railway corporations already organized and in operation.

4. An ordinance adopted under legislative authority, which provides that the rate of fare to be charged by a street railway company shall not exceed 5 cents, gives the company, when accepted by it, a contract right to charge that rate, which cannot be reduced by the city without the consent of the company under the right to prescribe from time to time rules and regulations for the running and operation of the road.
5. No permission to municipal authorities to reduce street railway fares without the con-

clearly a governmental power, a matter of internal police, that the legislature cannot irrevocably give the right to charge certain fixed rates so as to preclude future legislatures from interfering with such rates. *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.* 25 W. Va. 324; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434.

So, in *Griffin v. Goldshoro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319, the court said that water rates prescribed in a charter granted by the legislature since the adoption of the North Carolina Constitution of 1868 would be subject to revocation, and would be subject to such revocation independently of the provision of that Constitution.

And in *Dillon v. Erie R. Co.* 19 Misc. 116, 43 N. Y. Supp. 320, the court said that if the legislature had undertaken to preclude its successors from regulating the tolls and charges of a railroad company and its successors in interest it was open to serious question whether such act in that respect would be operative; and that the legislature had no power to divest the state of its police power.

A contrary doctrine has been maintained in a number of cases. Thus, in *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L. R. A. 274, 76 N. W. 635, it was held that the legislature may confer upon a railroad company the exclusive power to fix within a certain limit its rates for the transportation of passengers and freight, and that a subsequent attempt by the legislature to fix such rates was invalid as an impairment of the obligation of the contract.

So, a provision in a statute changing the charter of a railroad company giving it the power to fix rates, and declaring that it shall not be subject to future legislation until ten years afterward, was held to exempt the company from a subsequent act of the legislature prohibiting a charge for transportation to exceed a charge made for any shorter distance. *Sloan v. Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397.

And a railroad company organized under the Ohio act of 1848, which has not relinquished its privilege under that act, is held not subject to reduction of its rates by the legislature unless it has realized a net profit on its capital for the ten years next preceding the passage of the statute. *Iron R. Co. v. Lawrence Furnace Co.* 29 Ohio St. 208, 49 Ohio St. 102, 30 N. E. 616.

But the validity of a reduction in such a case does not depend on the actual realization by the company of 10 per cent future profits, but the legislature must exercise its deliberate judgment in regard to such probable future profits, 184 U. S.

and a subsequent change in the condition and affairs of the company will not take it out of the operation of a statute. *Iron R. Co. v. Lawrence Furnace Co.* 49 Ohio St. 102, 30 N. E. 616.

Questions of the relinquishment or transfer of a charter right of exemption from legislative control of rates were involved, and the power to create such a contract exemption assumed, in *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Shields v. State*, 26 Ohio St. 86; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 367, 15 Sup. Ct. Rep. 484, Affirming 54 Ark. 101, 11 L. R. A. 452, 15 S. W. 18; *Pittsburgh, C. & St. L. R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543; *Stone v. New Orleans & N. E. R. Co.* 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. Rep. 349, 391; *Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 460, 72 N. W. 328, Reversed in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Matthews v. Corporation Comrs.* 97 Fed. 400; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

A change of the tolls to be charged by a boom company for rafting logs was sustained in *Machias Boom v. Sullivan*, 85 Me. 343, 27 Atl. 189; but here the charter of the company expressly reserved to the legislature the power of revision or alteration of the tolls.

Municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract not to regulate rates. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *DETROIT V. DETROIT CITIZENS' STREET R. CO.*

The power of a city to contract with a gas company for the period of ten years under Ohio Rev. Stat. § 2489, is upheld in *Foster v. Findlay*, 5 Ohio C. C. 455; *Toledo v. Northwestern Ohio Natural Gas Co.* 5 Ohio C. C. 557; *Manhattan Trust Co. v. Dayton*, 8 C. C. A. 140, 16 U. S. App. 588, 59 Fed. 327.

And an ordinance accepted by a gas company fixing the maximum price of gas was held to be a contract which was protected against an attempt of the city to reduce the price, in *State ex rel. St. Louis v. Laclede Gaslight Co.* 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, and this regulation of the price of gas was held not to constitute such a police governmental power that it could not be bartered away.

So, an ordinance accepted by a gas company, which provides for furnishing gas upon such terms as the common council and gas company may thereafter determine, was, in *Toledo v. Northwestern Ohio Natural Gas Co.* 6 Ohio N.

sent of the company below the rate at which they were fixed in compliance with the Michigan street railway act of 1867, § 20, which declares that such rates shall be established by agreement between the parties, can be implied from the further provision of that section that the rates of fare agreed upon shall not be increased without the consent of the city authorities.

6. No right to reduce street railway fares established by agreement between a city and the railway company subsequent to the amendment of March 27, 1867, to § 34 of the Michigan tram railway act, so long as by such reduction rights or franchises already granted were not destroyed or impaired, or the company deprived of granted rights of construction and operation, was given such city by the provision of that amendment forbidding municipal authorities from making any regulations or conditions which would have that effect, as such provision, being a general one, does not limit the express authority of the

municipality, previously conferred by § 20 of the Michigan street railway act, to bind itself by an agreement fixing street railway fares.

7. The provision of an act entitled "An Act to Provide for the Formation of Street Railways," making such act applicable to corporations of like character already organized and in operation, is within the general object of such act as expressed in its title.
8. An ordinance renewing, upon additional conditions, the consent of a municipality to the construction and operation of a street railway through the city streets, is not invalid because by such ordinance the term of consent is extended beyond the then limit of the corporate life of such company.
9. A reservation, in an ordinance granting a street railway franchise, of the right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, does not include the right

P. 531, held to be a contract which was protected against an attempt by the city to reduce the price by an ordinance passed under a subsequent statute authorizing the common council to regulate the price of gas by ordinance.

And an ordinance accepted by a street railway company, prescribing the rate of fare to be collected, is a contract which will be protected against an attempt by the city to reduce the rates. *Cleveland City R. Co. v. Cleveland*, 94 Fed. 385.

And in *DETROIT v. DETROIT CITIZENS' STREET R. Co.* an ordinance adopted under legislative authority, which provided that the rate of fare to be charged by a street railway company shall not exceed 5 cents, was held to give the company, when accepted by it, a contract right to charge that rate, which could not be reduced by the city without the consent of the company, under the right to prescribe from time to time rules and regulations for the running and operation of the road.

So, an explicit contract of a municipality with certain persons, granting them an exclusive privilege of supplying water, and an "unrestrained right to establish such rates for the supply of water to private persons as they may deem expedient, provided that such rates be general," was upheld as valid, notwithstanding a subsequent adoption of a constitution, and subsequent legislation under it, providing for the regulation of water rates, in *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339. And a corporation which had succeeded to the rights of the original parties to the contract was protected in it.

In several cases general power to fix tolls, given by a charter, has been held to constitute an irrevocable contract. Thus, express power in the charter of a railroad company to demand such tolls as they think reasonable, provided they do not exceed a specified maximum, was held, in *Philadelphia, W. & B. R. Co. v. Bowers*, 4 Howst. (Del.) 506, to constitute a contract which could not be changed by subsequent legislation, if there was no reservation of power to alter the charter.

So, an exclusive power to fix passenger and freight rates, which cannot be impaired by subsequent legislation requiring the issuance of "family mileage tickets," was conferred upon the Michigan Central Railroad Company by the provision of its charter that it shall be lawful for the company to fix the tolls and charges for the transportation of property and persons, subject only to a limitation as to passengers of 3 cents a mile; and such right is not qualified by

subsequent provisions empowering the company to charge such rates as shall be lawfully established by its by-laws, and to pass any necessary by-laws not conflicting with the state or Federal Constitution. *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L. R. A. 274, 76 N. W. 635.

And the Mississippi railroad commission has no power to fix the rates to be charged by a railroad company whose charter empowers it to charge its own rates within certain limits; but such commission has the right to see that the company keeps within the limits of its charter rights, and for that purpose is entitled to demand the same reports from it as from other railroad companies. *Mississippi Railroad Commission v. Gulf & S. I. R. Co.* 78 Miss. 750, 29 So. 789.

So, in *Louisville & N. R. Co. v. McChord*, 103 Fed. 216, Reversed in 183 U. S. 483, *ante*, 289, 22 Sup. Ct. Rep. 165, the court thought that where a railroad charter fixed the maximum rates which the company might charge this provision might not be changed without its consent.

In *Central Trust Co. v. Citizens' Street R. Co.* 81 Fed. 1, a provision in a general incorporation act empowering street railway directors to make by-laws regulating fares was held to exempt a street railway company organized under that act from any subsequent attempt of the legislature to reduce such rates in any other way than by a valid amendment of such act according to the terms of the provision therein that "this act may be amended or repealed at the discretion of the legislature."

In another case, however, arising under the same act, the supreme court of Indiana thought that the right of the legislature to regulate the fare upon street railroads organized under that act did not depend upon the reservation of the right to amend or repeal, and said: "That power would exist even if the right to amend or repeal the act had not been reserved. In order to exempt a common carrier from legislative control over its rates of fare it must appear that the exemption was made in its charter by clear and unmistakable language inconsistent with the exercise of such power of the legislature." *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80.

On rehearing, however, the court rested its decision upon the ground that the subsequent regulation was a valid amendment of the general incorporation act under the reserved right to amend or repeal, taking issue on this point with the decision in *Central Trust Co. v. Citizens' Street R. Co.* 82 Fed. 1, *supra*, and said that,

on the part of the city at its own pleasure to reduce the rates of fare agreed upon in such ordinance.

[No. 152.]

Argued November 4, 5, 1901. Decided March 3, 1902.

A PPEAL from the Circuit Court of the United States for the Eastern District of Michigan to review a decree perpetually enjoining the enforcement of municipal ordinances reducing street railway rates of fare. *Affirmed.*

Statement by Mr. Justice **Peckham**:

[369] *The bill in this suit was filed by the railway company for the purpose of obtaining an injunction to restrain the city of Detroit and the individual defendants from enforcing certain ordinances of the common coun-

such being the case, it was not material whether the legislature would have had the power to regulate the fare upon street railways organized under that act if that provision had been omitted.

A provision in a railroad charter that the company may from time to time fix, regulate, and receive the toll and charges to be received was declared to create a valid and binding contract which cannot be impaired by subsequent legislation as to rates, in the case of *Farmers' Loan, etc., Co. v. Stone* (Miss.) 18 Cent. L. J. 472.

But this decision was reversed by the Supreme Court of the United States holding that such a charter provision did not constitute a contract, but left the state free, within the limits of its general authority, to declare what shall be deemed reasonable. *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

A charter giving a railroad company power to adopt such tariff of charges as it might think proper, and alter and change the same at pleasure, was held by the circuit court of the United States, in *Illinois C. R. Co. v. Stone*, 20 Fed. 468, to constitute a contract which would be impaired by any legislative interference with its rates. The court distinguished the case from those arising in Illinois, Iowa, and Wisconsin on the ground that in the latter states the Constitutions reserved the right to the legislatures to fix rates of charges for transportation, and that there was no such constitutional reservation of power in Mississippi. The court also held that the state was attempting to regulate interstate commerce by its attempted regulation of rates. But this decision also was reversed in *Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348.

So a statute authorizing a board of directors to establish rates of toll for railroad business from time to time, and also providing that the company's tolls shall not be repugnant to the Constitution and laws of the state, does not prevent the legislature from providing for the fixing of maximum rates by railroad commissioners on the ground that the former statute was a contract the obligation of which would be impaired by the later statute. *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247.

And subsequent legislation, whereby a limit is prescribed for railroad rates, does not impair the obligation of any contract created by a provision in a railroad charter giving the company power "from time to time to fix, regulate, and receive the tolls and charges . . .

184 U. S.

oil of the city, adopted in 1899, reducing the rates of fare on the various city railways of the complainant and providing for transfers of passengers from one route to another on payment of one fare of 5 cents, on the ground that such ordinances were violations of the Federal Constitution, because they impaired the obligation of contracts theretofore entered into between the city and the various predecessors *of the complainant. [370] The circuit court granted a decree perpetually enjoining the defendants as prayed for, and they have appealed therefrom to this court.

As further ground for equitable jurisdiction, the complainant, after setting up in the bill its alleged contracts with the city, and the attempted violation thereof by the latter, made the following averments:

"Your orator further shows unto the court

to be received for transportation of property and persons," without prescribing any limit for such tolls. *Dillon v. Erie R. Co.* 19 Misc. 116, 43 N. Y. Supp. 320.

The exemption of railroad rates from state regulation by virtue of a charter provision must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state. *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80.

A charter provision giving a railroad company power to charge such sums for transportation of persons and property as shall seem desirable, or it shall deem reasonable, does not preclude the authority of the legislature to provide by law for a maximum of charges that it may lawfully make. *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102, *Affirming Peik v. Chicago & N. W. R. Co.* 6 Biss. 177, Fed. Cas. No. 11,138.

Likewise, where a grant of power to the directors of a railroad company to make by-laws, rules, and regulations for the management of its affairs is made subject to the laws of the state, it does not exempt the company from the operation of laws subsequently enacted within the scope of legislative power for the regulation of the business. *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348.

So, the mere general provision in a railroad company's charter that it may make all needful rules, regulations, and by-laws touching the rates of toll does not constitute an irrevocable contract with the company that it shall have the right for all future time to prescribe its rates of toll free from legislative control. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Again, the power of legislative regulation of railroad rates is held, in *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832, not to be taken away by a charter provision that a railroad company shall have power to establish by-laws, rules, and regulations such as may be deemed expedient and necessary, provided they are not repugnant to the Constitution and laws of the United States or of the state, and to establish such rates of toll as they shall by their by-laws determine. It is held that such by-laws must not be repugnant to the

595

that as owner and lessee it is now engaged in the operation of upwards of 135 miles of street railways in the streets of the city of Detroit; that in such operation it has in use upwards of 400 street cars, which are propelled by electricity, and has in its employ, engaged in such operation, upwards of 1,000 men as motormen and conductors; that it carries an average of — thousand passengers per day over the lines owned and operated by it; that under and by virtue of the provisions of said ordinances, Exhibits A, B, C, D, and E, and the obligation of your orator to carry such passengers as may offer themselves for carriage, it will be subjected to innumerable demands upon the part of the traveling public to sell to such persons as may make such demands tickets in accordance with the provisions of said ordinances, Exhibits A, B, C, D, and E, and to

issue as provided and required thereby, and to accept and carry such passengers and transfer the same at the rates of fare fixed by said ordinances; that on your orator's refusal to comply with such demands and requests your orator may be subjected to numerous actions at law by persons so refused, and to annoyance, litigation, and loss by reason thereof; that the said city of Detroit will seek and now seeks and threatens and intends by such power and authority as it may possess, and by vexatious legal proceedings, to compel your orator to comply with the provisions of said ordinances, Exhibits A, B, C, D, and E, and as a result your orator will be put to great loss, damage, hindrance, and annoyance in the transaction of its business, which it is entitled to carry on without such suits, litigation, actions, annoyance, hindrance, loss, and damage.

laws of the state, and the establishment of rates by such by-laws is subject to the legislative power to regulate them.

A charter giving a railroad company the exclusive right of transportation over its railroad, provided the charge shall not exceed a sum specified, does not make the provision as to rates a contract. *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694.

Charter power to demand such sums as the corporation may deem reasonable for carrying freight and passengers, provided they are reasonable, does not preclude the legislature from afterwards fixing the maximum of charges, even if there is no reserved power to alter or repeal the charter. *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.* 25 W. Va. 324.

A general railroad law providing that a company organized under it may charge and receive such reasonable rates as may from time to time be fixed by the company or prescribed by law does not constitute any contract with the corporation fixing the rates of charges so as to deprive the legislature of the power to regulate. *Minneapolis Eastern R. Co. v. Minnesota*, 134 U. S. 467, 33 L. ed. 985, 3 Inters. Com. Rep. 224, 10 Sup. Ct. Rep. 473.

An implied restriction that the corporation in fixing the rates of toll shall make them reasonable is held to exist in a charter giving the corporation power to fix its own rates. Therefore, the legislature has the same power to say what are reasonable maximum charges as if the charter was silent on that point. *Ruggles v. People*, 91 Ill. 256; *Illinois C. R. Co. v. People*, 95 Ill. 313.

So, the contract right of a gas company by its charter to charge and collect reasonable rates is not impaired by a delegation of authority to the city to fix reasonable prices for gas. *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829.

A railroad company cannot claim that by the mere force of its legal organization and the construction of its road it has any implied contract exemption to charge reasonable rates for its services, and to differ rates when competition exists from rates applicable where there is no competition, which cannot be impaired by a constitutional enactment prohibiting railroad companies from charging more for a shorter than for a longer haul, except by permission of the railroad commission in special cases after investigation; as it must be deemed to have accepted its charter subject to the general right of the state to regulate and control the grant in the interest of the public. *Louisiana & N. R. Co. v. Kentucky*, 183 U. S. 503, *ante*, 298, 22 Sup. Ct. Rep. 95.

596

But the right to charge a reasonable rate for all gas furnished by a corporation chartered with the right to manufacture and sell gas is a right that is implied, and forms part of the charter contract. *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. 952.

A corporation formed under a general law declaring that it may have power to collect and receive such tolls or freights as it may prescribe has a vested and contract right to charge a reasonable compensation, but not an absolute right to fix its own rates and fares. The legislature may limit the same to what is reasonable, but cannot require the corporation to accept less than a reasonable compensation. *Ex parte Koehler*, 11 Sawy. 37, 23 Fed. 529; *Wells, F. & Co. v. Oregon R. & Nav. Co.* 8 Sawy. 600, 15 Fed. 561.

These cases were followed in *State v. Southern P. Co.* 23 Or. 424, 31 Pac. 960, where the same provision was held not to constitute a contract between the state and a railroad company formed under that act, the obligation of which could not be impaired by subsequent legislation.

An ordinance fixing the price of gas to be charged by a gas company was held void, and an injunction against its enforcement was granted, in *Cleveland Gaslight & Coke Co. v. Cleveland*, 71 Fed. 610, on the ground that there was an implied charter right to charge a reasonable price, and that the ordinance fixed the price below what was reasonable or what the gas could be made for without loss.

A provision of a railroad charter that the rates shall be fixed by the directors providing they do not exceed a specified maximum was held in *Hamilton v. Keith*, 5 Bush, 458, to constitute a contract which could not be constitutionally changed by subsequent legislation.

But, overruling *Hamilton v. Keith*, a Kentucky statute regulating the tolls to be charged on bridges was sustained in *Com. v. Covington & C. Bridge Co.* 14 Ky. L. Rep. 836, 21 S. W. 1042, the court holding that a charter provision of the bridge company that its rates might be fixed by its directors, but not to exceed a certain amount, did not constitute a contract. This case was reversed by the Supreme Court of the United States (154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087) on the ground that the bridge traffic was interstate commerce and beyond the power of the state to regulate. But the decision on the question of the contract right was not touched by the Federal court. The doctrine of that case was affirmed in *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L. R. A. 177, 34 S. W. 518, where a charter specification of rates which

184 U. S.

"That, in full reliance upon its right to charge the full rates of fare fixed by the various contracts and grants hereinbefore referred *to, and for the purpose of procuring such money as it was necessary that it should have for the construction, maintenance, repairing and reconstruction, and operation of the various lines of railway hereinbefore described, it issued its bonds and borrowed thereon the money so needed; that your orator and its predecessors and lessors have issued for the purposes aforesaid bonds amounting in the aggregate to \$8,200,000, payable in gold coin, with semi-annual interest at the rate of 5 per cent per annum; that many of said bonds mature and will be due and payable within the next three years, and it will be necessary for your orator to borrow a considerable amount of money to assist in the payment and retire-

ment of said bonds, by the issue of bonds of the same character; that all of said bonds outstanding are secured by mortgages given at various dates, by the terms of which all of the property, rights, privileges, and franchises of your orator, its lessors and predecessors, including the franchises or rights fixed by the said various contracts and grants to charge the rates of fare therein named, together with all the tolls, fares, issues, earnings, and profits arising therefrom, have been mortgaged to trustees therein named for the use and benefit and security of the holders of such bonds; that said bonds have been sold to parties purchasing the same in the full faith and belief that your orator, its lessors and predecessors and grantors, had the right to charge the full rates of fare fixed by the various contracts and grants without any right upon

it shall be lawful for a turnpike company to charge, subject to a certain increase or decrease if necessary to keep the company's dividends within certain limits, was held not to constitute an irrevocable contract between the state and the corporation, but to be merely an indication that such rates are supposed to be reasonable without precluding the subsequent exercise of legislative power to change the rates.

So, an ordinance granting an exclusive franchise to a water company with the right to use the public streets, and fixing the rates to be charged to individual consumers during the existence of the franchise, does not give a contract right to charge such rates for the whole period of the franchise, as such a provision is simply a declaration that at the time such rates are reasonable, and does not amount to a stipulation that those rates shall remain unchanged during the term of the franchise. *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, Affirmed in 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490.

But a reservation by a city in a contract to reconstruct its waterworks and operate them for thirty years, of the right to regulate rates provided they be not reduced below the then existing rates, must, if valid, be deemed a limitation upon the right of the city as a municipality to regulate water rates, which will preclude it from reducing the rates by ordinance during the term below that standard, and not a mere granting back by the grantee, of the right of the city in its proprietary capacity only. *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

And the city cannot so reduce such rates by ordinance, even after the expiration of the term, without impairing the obligation of the contract, where it fails to pay or tender to the water company the value of the improvements as required by the contract, and insists that the company shall continue to keep the works in repair, make requisite extensions, and furnish water free for public uses as therein provided; but until it makes such payments or tender all the covenants and provisions of the contract remain in force. *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 711.

A statute amending the charter of a turnpike company, and changing its rates of toll, does not constitute a contract with the company so as to prevent subsequent changes of the rates. *Covington & L. Turnp. Road Co. v. Sanford*, 14 Ky. L. Rep. 689, 20 S. W. 1031, Reversed on other grounds in 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

A provision that a plank-road company may

collect the same tolls and enjoy the same privileges granted to other companies by general law does not fix the company's rates according to the general law as it then exists, but makes it subject to changes thereof which apply to other companies. *Snell v. Chicago*, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532.

A statute regulating the rates of a railroad company is within the reserve power to alter its charter. *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829; *American Coal Co. v. Consolidation Coal Co.* 46 Md. 15; *Shields v. State*, 26 Ohio St. 86, Affirmed in 95 U. S. 319, 24 L. ed. 357; *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 245, 19 S. W. 839.

And the legislature under the power reserved in a railroad charter to "at any time hereafter alter, modify, or repeal this act" has the right to fix the rate of fares which may be charged by such company without being subject to the charge of impairing the obligation of contracts. *Beardsley v. New York, L. E. & W. R. Co.* 15 App. Div. 251, 44 N. Y. Supp. 175, Reversed on other grounds in 162 N. Y. 230, 56 N. E. 488.

Where the charter of a railroad company empowers it to exact tolls at its discretion, an act of the legislature restricting the rates that may be taken is an alteration of the charter within the scope of a reserved power to alter or repeal. *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425.

A statute empowering city councils to regulate the price to be charged for gas may constitute a valid exercise of the power to alter the charter of a gas company. *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262.

The right of the legislature to regulate and provide for the rates at which water shall be supplied by a water company organized under the Illinois general incorporation act of 1872 is reserved by § 9 of that act, which provides that the general assembly shall have power to prescribe such regulations and provisions as it may deem advisable, which shall be binding on corporations formed under such act. *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118.

An act creating a state corporation commission, and giving it the right to regulate railroad rates, is an exercise of the reserved power to amend or repeal the charter of a railroad company, giving it the exclusive right to regulate rate charges. *Matthews v. Corporation Comrs.* 97 Fed. 400.

A statute requiring railroad companies to issue mileage books good for two years, and fixing the maximum price therefor, is within the reserve power to alter, amend, or repeal the

the part of the said city of Detroit, or of any other person, corporation, or authority to interfere with, lessen, reduce, or impair the same, and, the said right to have and receive the rates of fare so fixed being so mortgaged as a part of the security for the payment of said bonded indebtedness, the action of said city by the adoption of the ordinances, Exhibits A and B, is an impairment of the obligation of said contract as against the rights of said bondholders under and by virtue of the security created by said various mortgages and in contravention of said § 10 of article 1 of the Constitution of the United States."

Complainant also averred in its bill the granting of consent by the city to its predecessors to lay tracks in the streets and [372]*charge tolls at the rates named in certain ordinances, for transporting passengers, and the due assignments by the various companies of all such rights, by purchase or lease to the complainant, and the defendant by its answer makes no issue as to the validity of such assignments or the ownership by complainant of all the interests of the former companies in the contracts and ordinances set forth in the bill.

The answer admits the passage by the common council of the ordinances of 1899, reducing the rates of fare on the roads operated by the complainant, and also admits that the city intends to compel the complainant to comply with the provisions of such ordinances, which the defendants aver are valid because, as they claim, the former ordinances did not constitute a contract as to rates of fare which could not be altered by the city.

This litigation arises out of the different constructions placed by the parties upon the statutes of Michigan, called respectively the tram railway act and the street railway act, and the various amendments of those acts, and also out of the different claims of the parties as to the character and validity of the ordinances passed by the common council subsequently to the passage of those statutes.

The tram railway act was passed in 1855, and the street railway act in 1867. Prior to the amendment in 1861, made to the former act, there was no authority for the incorporation of street railways, and in the year

charter of a railroad company. *Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 460, 72 N. W. 328, Reversed in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

But a statute requiring a railroad company to issue "family mileage tickets" cannot be deemed an exercise of the power of amendment reserved in its charter subject to the right to compensation for all damages sustained by reason of the amendment, where such statute does not purport to be an amendment of the charter, and contains no provision for compensating the company for the loss of its exclusive power under its charter to fix its rates. *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L. R. A. 274, 76 N. W. 635.

The provision in the California act of 1858 for the determination of water rates by a com-

named that act was amended by adding §§ 33 and 34, which are as follows:

"Sec. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this state.

"Sec. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them: Provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe." [2 Mich. Comp. Laws 1897, §§ 6424, 6425.]

*In 1867 the above § 34 was further [373] amended by adding an additional proviso, as follows:

"Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named pursuant to the terms thereof."

These sections of the tram railway act, it will be seen, made no special provisions as to rates of fare, and there were no other sections of the act which did. The last amendment, above set out, of § 34, was passed March 27, 1867, or twenty-two days after the passage of the original street railway act, March 5, 1867.

The provisions of the street railway act material in this controversy are as follows:

"Sec. 13. Any street railway corporation organized under the provisions of this act may with the consent of the corporate authorities of any city or village given in and by an ordinance or ordinances duly enacted for that purpose and under such rules, regulations, and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain, and own a street railway for the transportation of passengers in and upon the lines of such streets and

mission does not constitute a contract with a corporation formed under that statute which will be impaired by enforcing the provision in the state Constitution of 1879 giving the board of supervisors power to fix such rates. *Spring Valley Waterworks v. Bartlett*, 8 Sawy. 555, 16 Fed. 615; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

A statute imposing severe penalties for exceeding the charter rates does not violate the contract of a railroad charter. *Camden & A. R. & Transp. Co. v. Briggs*, 22 N. J. L. 623.

For an extended discussion of the legislative power to fix tolls, rates, or prices, see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177.

ways in said city or village as shall be designated and granted from time to time for that purpose in the ordinance or ordinances granting such consent, but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use, and maintain their road in and along the streets or highways of any township adjacent to said city or village upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof shall be recorded by the township clerk in the records of his township.

[374] *"Sec. 14. After any city, village, or township shall have consented as in this act provided to the construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city, or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred.

"Sec. 15. Any street railway company may also purchase and acquire, either at public or private sale, whether judicial or otherwise, or may hire any street railway in any city, village, or township owned by any other corporation or company, together with the real and personal estate belonging thereto, and the rights, privileges, and franchises thereof, and may use, maintain, and complete such road, and may use and enjoy the rights, privileges, and franchises of such company and upon the same terms as the company whose road and franchises were so acquired might have done. Every street railway company may also purchase, hold, own, or take upon lease such real estate, barns, stables, buildings, fixtures and property as may be necessary for the use and business of their road; and the whole or any part thereof, together with their railway, fixtures, property, and appurtenances, rights, privileges, and franchises, may sell, lease, dispose of, pledge or mortgage, whenever the corporation shall deem it expedient so to do."

"Sec. 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities."

"Sec. 29. All companies and corporations heretofore organized in this state for the purpose of building and operating street railways under the statutes then in force shall have the same powers, rights, protection, and privileges, and shall be subject to all the liabilities, as are hereby provided for companies and corporations organized under the provisions of this act." [2 Mich.

184 U. S.

Comp. Laws 1897, §§ 6446-6448, 6453, 6461.]

Section 30 in substance provides that all companies and corporations thereafter formed for street railway purposes must be organized under this act.

*Some of the railroads of which the com-[375] plainant is the owner or lessee were organized under the tram railway act, and some were organized under the street railway act of 1867. The Detroit Street Railway Company, now owned by the complainant, was organized under the tram railway act, and the city adopted an ordinance assenting to the laying of tracks through the designated streets of the city on November 24, 1862. Section 1 of the ordinance provides:

"Sec. 1. That consent, permission, and authority is hereby given, granted and duly vested in Eben N. Wilcox and his associates, who may be approved by the council, their successors and assigns, organized into a corporation, under the laws of the state of Michigan, as aforesaid, to lay a single or double track for a railway, with all the necessary and convenient tracks for turnouts, side tracks and switches, in and along the course of the streets of, and bridges in, the city of Detroit, hereinafter mentioned, and the same to keep, maintain, and use, and to operate thereon railway cars and carriages, during all the term hereinafter specified and described, and in the manner and upon the condition set forth in this ordinance."

The following sections then provide for the streets in which the rails are to be laid, the manner of laying, whether double or single track, and various other matters not essential to enumerate.

Section 8 reads as follows: "The rate of fare for any distance shall not exceed 5 cents in any one car, or on any one route named in this ordinance, except where cars or carriages shall be chartered for specific purposes: Provided, cars so chartered shall not be considered regular cars, within the meaning of the preceding section."

Section 20 limits the powers and privileges conferred by the ordinance to thirty years from and after the date of its passage.

On November 14, 1879, an ordinance was passed supplementary to the one passed on November 24, 1862, which provided for extensions by the railway company of its tracks through various other streets of the city, and also provided, among other things, for a special tax on the gross receipts of the several lines of railway operated by the company, payable to the city, which tax was to be in lieu of license or other taxes and charges under the existing ordinances. [376]

Section 5 of the supplemental ordinance provided that the powers and privileges conferred and the obligations imposed on the railway company, by the ordinance passed November 24, 1862, and the amendments thereto, should be thereby extended and limited to thirty years from date (November 14, 1879).

Section 6 provided that the ordinance

should take immediate effect when written acceptances of the terms thereof were filed in the office of the city clerk of Detroit by the different companies controlled by the Detroit City Company; and it also provided that all ordinances or parts of ordinances in conflict with the provisions thereof were thereby repealed; and all ordinances and parts of ordinances not in conflict therewith were thereby affirmed and continued in force. The acceptances were subsequently duly filed in the city clerk's office.

A similar ordinance to that of November 14, 1879, was passed on June 30, 1880, relative to the Fort Wayne & Elmwood Street Railway Company, confirming and extending for thirty years its grant under the ordinance of January 31, 1865. Similar ordinances were passed in favor of other lines which had been organized under the tram railway act and its amendments.

And ordinances of the same nature were passed relating to the companies organized under the street railway act of 1867.

The original ordinance under which the city gave consent to the laying of the rails of the Grand River Street Railway was adopted on May 1, 1868, and the section providing for the rate of fare is the same in language as § 8, in the foregoing ordinance relative to the Detroit Street Railway.

The ordinance relating to the Dix Avenue Railway provided in § 6 "that the rate of fare for a single trip shall not exceed 5 cents for any distance within the city limits." Similar language was used in § 5 of the ordinance approved by the common council July 13, 1886, relating to the Highland Park Railway. The 8th section of the ordinance approved by the common council January 31, 1868, with regard to the Fort Wayne & Elmwood Railway Company, provides that

[377] "the *rate of fare for any distance shall not exceed 5 cents in any car."

These ordinances embrace the various railroads now owned or leased and operated by the complainant, and it is in them, taken in connection with the statutes already referred to, that the complainant finds the contracts or agreements as to the rate of fare, the obligation of which agreements it avers is impaired by the later ordinances passed in 1899.

The charter of the city of Detroit, approved June 7, 1883, by §§ 121 and 122, clothed the common council with power over the streets, highways and alleys, to establish, open, widen, extend, straighten, alter, vacate, etc., and generally to control and regulate the manner in which the highways and streets, avenues, lanes, alleys, public grounds, and spaces within the city should be used and enjoyed.

The Constitution of the state of Michigan, art. 15, § 1, provides that—

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed."

The various ordinances which have been

referred to contain certain reservations of the right to alter, etc., which are thus worded: Section 19 of the grant of November 24, 1862, to the Detroit City Railway, is as follows:

"It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railways."

Section 7 of the grant of November 14, 1879, re-enacting and extending the grant of November 24, 1862, is as follows:

"The right to amend or repeal this ordinance in case of its violation by said company or companies is expressly reserved."

Section 3 of the grant of January 5, 1885, authorizing the Brush street line, is as follows:

"It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders, or regulations *as [378] may from time to time be deemed by the common council necessary to protect the interest, safety, welfare, or accommodation of the city and public in relation to said railway."

Section 3 of the Trumbull avenue line grant of July 31, 1865, is a literal copy of the one last quoted.

Section 18 of the grant to the Grand River Street Railway of May 1, 1868, is as follows:

"It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, welfare, or accommodation of the public in relation to said railways."

The same reservation was contained in § 4 of the grant of June 27, 1885, of the Myrtle street route.

And § 3 of the grant of August 3, 1888, relating to the Grand River line, is the same.

Section 19 of the grant of January 31, 1865, to the Fort Wayne & Belle Isle Company is as follows:

"It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railways."

Mr. Timothy E. Tarsney argued the cause and filed a brief for appellants:

The common council of Detroit possessed no authority to pass the various ordinances under which the complainant is operating its road, except such as was conferred upon it by express grant of the legislature of the state of Michigan.

People's Pass. R. Co. v. Memphis City R. Co. 10 Wall. 38, 19 L. ed. 844; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529;

Detroit v. Fort Wayne & B. I. R. Co. 95 Mich. 456, 20 L. R. A. 79, 54 N. W. 958; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 21 L. ed. 490, 21 Sup. Ct. Rep. 490; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; *Detroit Citizens' Street R. Co. v. Detroit*, 110 Mich. 384, 35 L. R. A. 859, 68 N. W. 304, 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

A state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce.

Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, sub nom. *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Ruggles v. Illinois*, 108 U. S. 531, 27 L. ed. 815, 2 Sup. Ct. Rep. 832.

This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Providence Bank v. Billings*, 4 Pet. 560, 7 L. ed. 955; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *The Delaware Railroad Tax*, 18 Wall. 206, sub nom. *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Bailey v. Magwire*, 22 Wall. 215, 22 L. ed. 850; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 660, 24 L. ed. 1036; *Newton v. Mahoning County*, 100 U. S. 548, 25 L. ed. 710; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 685, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301; *Slidell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Stein v. Bienville Water Supply Co.* 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L. R. A. 177, 34 S. W. 518; *Omaha Horse R. Co. v. Cable Tramway Co.* 30 Fed. 324; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

Franchises are always granted subject to the police power.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, sub nom. *Chicago, B. & Q. R. Co. v.* 184 U. S.

Cutts, 24 L. ed. 94; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 236; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 858, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The police power cannot be delegated or bargained away, nor can the corporation by any contract hamper itself in the exercise of it.

Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.* 25 W. Va. 324; *Dill. Mun. Corp.* 4th ed. § 97; *Milbau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Goszler v. Georgetown*, 6 Wheat. 593, 5 L. ed. 339; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *People's Pass. R. Co. v. Memphis City R. Co.* 10 Wall. 38, 19 L. ed. 844; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Pontiac v. Carter*, 32 Mich. 164; *Re First Street*, 66 Mich. 42, 33 N. W. 15; *Petz v. Detroit*, 95 Mich. 169, 54 N. W. 644; *Knoxville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748.

The regulation of fares in the ordinances in question may be supported by the reserve power of alteration, amendment, or repeal, contained in the Constitution and statutes of Michigan.

Pennsylvania College Cases, 13 Wall. 213, 20 L. ed. 553; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 403, 2 Sup. Ct. Rep. 267; *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *United States v. Union P. R. Co.* 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; *Grand Rapids Electric Light & P. Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co.* 33 Fed. 659; *Dill. Mun. Corp.* 4th ed. § 317; *Atty. Gen. ex rel. Barbour v. Pingree*, 120 Mich. 550, 46 L. R. A. 407, 79 N. W. 814; *Indianapolis v. Narin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80; *Detroit City*

Street R. Co. v. Guthard, 51 Mich. 180, 16 N. W. 328.

The purpose of the provision of the Michigan Constitution that "no law shall embrace more than one subject, which shall be expressed in its title," was to arrest corruption and "log-rolling" in legislation, and the insertion by dexterous management of clauses in bills of which the titles gave no intimation, and thus securing their passage by legislative bodies whose members were not generally aware of their intention and effect.

People ex rel. Drake v. Mahaney, 13 Mich. 481; *Kurtz v. People*, 33 Mich. 279; *Thomas v. Collins*, 58 Mich. 64, 24 N. W. 553; *Bissell v. Durfee*, 58 Mich. 237, 24 N. W. 886; *Atty. Gen. ex rel. Longyear v. Weimer*, 59 Mich. 580, 26 N. W. 773; *Davies v. Saginaw County Supers.* 89 Mich. 295, 50 N. W. 862.

The Constitution requires that titles shall be truthful indices of legislation.

Wardle v. Cummings, 86 Mich. 395, 49 N. W. 212, 538.

Under our Constitution the title of an act is significant and usually controlling in determining its scope. The body of the statute must be reasonably harmonious with it.

McKellar v. Detroit, 57 Mich. 158, 23 N. W. 621; *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 381, 25 N. W. 372; *Booth v. Eddy*, 38 Mich. 245.

Titles may be as general or as specific as the legislature sees fit to make them, but the body of the act must be confined in its purposes to the object expressed in the title. And when the act is broader than the title, if after striking out all not indicated by the title, what is left is complete, in itself capable of execution and wholly independent of what was rejected, the act may be sustained.

Callahan v. Chipman, 59 Mich. 610, 26 N. W. 806; *Skinner v. Wilhelm*, 63 Mich. 568, 30 N. W. 311; *Sanilac County v. Auditor General*, 68 Mich. 659, 36 N. W. 794; *Ellis v. Hutchinson*, 70 Mich. 154, 38 N. W. 14.

The title of the street railway act, "An Act to Provide for the Formation of Street Railway Companies," is not broad enough to warrant the sweeping into such act corporations not formed or organized thereunder, but which are governed and controlled by different provisions of law.

Isle Royale Land Corp. v. Osmun, 76 Mich. 162, 43 N. W. 14.

The street railway act cannot control the provisions of the tram railway act, and thus operate as an indirect amendment thereof, without violating the constitutional provision which forbids any amendment without re-enactment of the section amended.

Mok v. Detroit Bldg. & Sav. Asso. No. 4, 30 Mich. 511; *Burton v. Schildbaeh*, 45 Mich. 504, 8 N. W. 497.

The reservations in the ordinances were intended to meet any changes in conditions, and to cover rules, orders, and regulations for the benefit of the public, even though

such rules, orders, and regulations cover matter that was originally specified.

Detroit v. Fort Wayne & E. R. Co. 90 Mich. 646, 51 N. W. 688; *Detroit v. Fort Wayne & B. I. R. Co.* 95 Mich. 456, 20 L. R. A. 79, 54 N. W. 958; *Kalamazoo v. Michigan Traction Co.* 126 Mich. 525, 85 N. W. 1067.

Mr. Henry M. Duffield argued the cause, and, with Messrs. Michael Brennan and John C. Donnelly, filed a brief for appellee:

The provisions in the ordinances giving to the Detroit City Railway and to the other grantors of the complainant company the right to fix fares within the limit of 5 cents for a single fare, when accepted by the company, constituted an irrevocable contract with the city which passed to the complainant company on its purchase of the property, franchises, rights, and privileges of its grantors.

Detroit v. Detroit City R. Co. 76 Mich. 421, 43 N. W. 447; *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 107, 86 N. W. 809; *Electric R. Co. v. Grand Rapids*, 84 Mich. 257, 47 N. W. 567; *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L. R. A. 274, 76 N. W. 635; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Electric R. Co. v. Grand Rapids*, 84 Mich. 257, 47 N. W. 567; *Hamtramck Twp. v. Rapid R. Co.* 122 Mich. 472, 81 N. W. 337; *Union Street R. Co. v. Saginaw Circuit Judge*, 113 Mich. 94, 71 N. W. 1073; *Detroit v. Ellis*, 103 Mich. 612, 27 L. R. A. 211, 61 N. W. 886; *Detroit v. Detroit City R. Co.* 60 Fed. 161; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653. To the same effect, *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 34, 47 U. S. App. 36, 76 Fed. 309; *Knoxville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501, 70 Fed. 730; *Stone v. Yazoo & M. Valley R. Co.* 62 Miss. 607, 52 Am. Rep. 193.

The ordinances do not purport to regulate fares, but attempt an unlawful discrimination between passengers against the legal rights of the company.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Old Colony Trust Co. v. Atlanta*, 83 Fed. 45.

The exercise by the city of the police power must be in subordination to the provisions of the Federal Constitution.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The class of rights which the city may not bind itself from exercising are such rights only as are public or governmental in their nature, and are essential only to the protection of the health, safety, and welfare of the citizen and the public convenience.

Walla Walla v. Walla Walla Water Co. 172 U. S. 2, 43 L. ed. 342, 19 Sup. Ct. Rep. 77; *Cooley, Const. Lim.* p. 577; *Beach, Pub. Corp.* § 1248; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 306; *Grand Rapids Street*

R. Co. v. West Side Street R. Co. 48 Mich. 433, 12 N. W. 643; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Baltimore v. Baltimore Trust & Guarantee Co.* 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; *Detroit v. Fort Wayne & B. I. R. Co.* 95 Mich. 456, 20 L. R. A. 79, 54 N. W. 958.

A regulation designed to affect the city or the inhabitants in a financial way does not come within this class of powers.

Newport v. Newport & C. Bridge Co. 90 Ky. 193, 8 L. R. A. 484, 13 S. W. 720; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278, 10 S. W. 197.

The reservation by the legislature of the right to alter, amend, or repeal was not delegated to the city.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

Mr. John C. Donnelly also argued the cause, and, with **Mr. Michael Brennan**, filed a brief for appellee:

The effect of the new agreement between the city and the railway companies was to re-execute or renew and extend the original contract existing between the parties.

Detroit Citizens' Street R. Co. v. Detroit, 26 L. R. A. 667, 12 C. C. A. 368, 22 U. S. App. 570, 64 Fed. 628.

The street railway act being in force at the time of the making of such new contracts, the provisions thereof apply, and by operation of law became a part of the agreements; and the rights of the parties and their powers and obligations in the making of such contract must be construed with reference to the street railway act.

Ibid.

When the consent of the municipality to the use of the streets has been given, and the conditions upon which such consent is given have been agreed to, a contract is thereby created, and the power of the city is exhausted so far as it has any power to deal with the substantial rights created by that contract.

Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653. See also *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 153; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; *People ex rel. Bliss v. Chicago West. Div. R. Co.* 118 Ill. 113, 7 N. E. 116; *Tudor v. Chicago & S. S. Rapid Transit Co.* 164 Ill. 73, 36 L. R. A. 379, 46 N. E. 446; *State ex rel. Kansas City v. Corrigan Consol. Street R. Co.* 85 Mo. 263, 55 Am. Rep. 361; *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *Columbus v. Columbus Street R. Co.* 45 Ohio St. 104, 12 N. E. 651; *Cincinnati & S. R. Co. v. Carthage*, 36 Ohio St. 634; *Cincinnati Street R. Co. v. Smith*, 29 Ohio St. 292; *People ex rel. Kunze v. Fort Wayne & E. R. Co.* 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010; *Atty. Gen. v. Detroit Suburban R. Co.* 96 Mich. 65, 55 N. W. 562.

While the legislature in the exercise of
184 U. S.

its police power has the right to fix the rates to be exacted by railroad companies for the carriage of persons and property in the first instance, yet wherever it has in the charter or act of incorporation fixed the rate to be charged, and authorized the company to charge that rate, or authorized the company to regulate and fix the tolls up to a certain maximum rate, a contract right is thereby created and conferred, and the grantee cannot be deprived of the right to exact the toll fixed, or the right to regulate the toll up to the maximum mentioned, by subsequent legislation.

Pingree v. Michigan C. R. Co. 118 Mich. 314, 53 L. R. A. 274, 76 N. W. 636; *Detroit v. Detroit City R. Co.* 60 Fed. 171; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, *sub nom.* *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *State v. Maine C. R. Co.* 66 Me. 488.

Section 20 of the street railway act in express terms removes the question of the rates of fare from the domain of general legislative authority and jurisdiction, and declares that it shall be a subject of agreement alone.

This section must therefore not only be considered as a grant of authority to the city to deal with the subject, but also as a limitation upon the authority of the city to deal with it, and is the full measure of that authority.

Loveland v. Detroit, 41 Mich. 367, 1 N. W. 952.

The reservations contained in the various ordinances by which the city retains the right to make further rules and regulations were not intended, and cannot be construed, to have the effect of giving the city the right to interfere with or lessen the substantial rights of the companies, nor as giving to the city, with the consent of the company, the right to treat as a matter of legislation the rate of fare, which by the terms of the street railway law is expressly made a matter of agreement, in the making of which the company is one of the contracting parties.

Old Colony Trust Co. v. Atlanta, 83 Fed. 39, Affirmed in 32 C. C. A. 125, 59 U. S. App. 230, 88 Fed. 859; *Africa v. Knoxville*, 70 Fed. 729; *Electric R. Co. v. Grand Rapids*, 84 Mich. 257, 47 N. W. 567.

The general rule is that there is no objection to a statute as not within its title so long as it is not made to cover legislation incongruous in its character, or which by no fair intendment can be considered as having a necessary or proper connection.

People ex rel. Secretary of State v. State Ins. Co. 19 Mich. 392; *South St. Paul v. Lamprecht Bros. Co.* 31 C. C. A. 585, 60 U. S. App. 78, 88 Fed. 449; *Tabor v. Commercial Nat. Bank*, 10 C. C. A. 429, 27 U. S. App. 111, 62 Fed. 387.

Messrs. Henry M. Duffield, Michael Bren-

nan, and John C. Donnelly filed an additional brief on the question of equitable jurisdiction:

The bill is a bill of peace, and its allegations make a case of equitable jurisdiction.

Western U. Teleg. Co. v. Norman, 77 Fed. 13; *Smith v. Bivens*, 56 Fed. 352; *Parker v. Winnipiscogee Lake Cotton & Woolen Co.* 2 Black, 551, 17 L. ed. 337; *Wahle v. Reinbach*, 76 Ill. 322; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65; *Scott v. Donald*, 165 U. S. 108, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; *Dinsmore v. Southern Exp. Co.* 92 Fed. 74; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The court is not compelled to consider this question. It is waived by failure to raise it in the answer or on the proofs.

Waite v. O'Neil, 34 L. R. A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408; *Dumont v. Fry*, 18 Fed. 578, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594.

Mr. Fred. A. Baker also filed a brief for appellee:

The language of § 20 of the street railway act of 1867, that the rates of fare "shall be established by agreement between such company and the corporate authorities of the city or village where the road is located," is too plain to require or admit of construction or interpretation.

Freeport Water Co. v. Freeport City, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

Municipal corporations, in making grants to street railway, gas, and other corporations, for the use of public highways and streets, may enter into irrevocable contracts with the grantees surrendering a portion of their governmental functions.

People ex rel. Maybury v. Mutual Gas-light Co. 38 Mich. 154; *People ex rel. Kunze v. Fort Wayne & E. R. Co.* 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010; *Atty. Gen. v. Detroit Suburban R. Co.* 96 Mich. 65, 55 N. W. 562; *Detroit v. Detroit City R. Co.* 76 Mich. 421, 43 N. W. 447; *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

The fact that the exclusive privilege to build street railways in Detroit, attempted to be granted by the ordinance of November 24, 1862, was invalid, in the judgment of the supreme court of Michigan, and of the Supreme Court of the United States (*Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732), is a conclusive reason why the contract fixing the rates of fare should be held to be irrevocable.

The reservation made by § 19 of the ordinance of November 24, 1862, to the common council, of "the right to make such further rules, orders, and regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railways," was not intended to apply, and does not apply, to taxation or rates of fare.

Detroit Citizens' Street R. Co. v. Detroit,
604

26 L. R. A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628.

As a business proposition, the theory that the rates of fare were to be reasonable under common-law rules, enforced by ordinances passed from time to time by the common council is not consistent with the subject-matter of the contract and the relations of the parties to it.

The fact that the original ordinance and the ordinance extending, as modified, the terms and conditions of the grant, were each limited to thirty years from their respective dates, shows that the rates of fare agreed upon were to be irrevocable during these periods of time.

See *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

*Mr. Justice Peckham, after making the [378] foregoing statement of facts, delivered the opinion of the court:

A question has arisen at the outset as to the jurisdiction of a court of equity over a case like the one now presented. Assuming the right to relief in some form, has the complainant a plain and adequate remedy at law, or is the case such in its nature *and [379] in the relief demanded as would be cognizable in a court of equity? The foundation of the right of action lies in the alleged invalidity of the ordinances of 1899, reducing the rates of fare on the railways of the complainant, because, as averred, those ordinances are in violation of the Federal Constitution, as impairing the obligation of contracts between the parties already existing, and therefore the claim is made that they should not be permitted to be enforced against the complainant where such enforcement might result in a multiplicity of suits, or in harassing and expensive litigation.

The averments in the complainant's bill upon this subject, which are set forth in the above statement of facts, show the additional and special grounds upon which the jurisdiction in equity is invoked. Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and, without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of nonpayment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would, of course, give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would

either pay no fare, or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.

[380] The roads operated by complainant are also indebted to an extent of over \$8,000,000, secured by mortgages upon the railways, their franchises, rights, and privileges, together with the tolls and fares, earnings and profits arising therefrom, *and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned; such belief being based upon the existence and terms of such ordinances.

The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinances of 1899. The immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation.

The mayor and corporation counsel have, as is seen, been joined with the city as defendants in the suit. The reason for the joining of the individual defendants would seem to be that they are the officers upon whom would devolve the execution of the ordinances passed by the common council, and in the answer of the defendants it is admitted that they intend to enforce obedience by the company to such ordinances. The case is similar in some of its aspects to that of *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. It is true there are no penalties fixed in the ordinances for disobedience to their commands on the part of the company, but the bill shows that there are a large number of passengers carried over the roads of the complainant daily, amounting to many thousands, each of whom would have the right to demand transportation at the rates provided for by the ordinances in case they were valid. As is said in *Smyth v. Ames*, p. 518, L. ed. p. 839, Sup. Ct. Rep. p. 423: "The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say [381] nothing of the heavy *penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community as involved in the use of a public 184 U. S.

highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained." While this is not such an extreme case, and there are no penalties provided in the ordinances for disobedience, yet the same principle applies.

It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and once for all, and thus a multiplicity of suits and other complications prevented.

Taking all these facts into consideration, and bearing in mind that the answer does not set up any defense of the lack of jurisdiction of a court of equity over the subject-matter, and does not insist that there is an adequate and plain remedy at law (and no such objection has been taken at any time, and has not been insisted upon before us), we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it.

It is not such a case as on its face equity could have no jurisdiction over, such as an action to recover damages for an assault, or for a libel or slander, but the question between the parties as to the validity of various ordinances and the right of the city to enforce them, involving, as they may, the credit and possibly the solvency of the complainant, and taking into consideration the public interests involved in a speedy and final determination of the question, all these as well as other facts already mentioned, we think, make out a case for following the general rule, that a defense of this nature will not be recognized where it has not been taken by answer or in any other manner and is not insisted upon on the hearing before the court. *Reynes v. Dumont*, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604.

We do not mean to assert that in all cases of this nature, involving *simply the [382] validity of a subsequent ordinance or law, a court of equity would be the proper forum, but confine our decision to the special facts of this case, including the fact that no objection has been taken to the jurisdiction of the court at any stage of the litigation, and is not now raised by any party to the same.

This brings us to a consideration of the questions argued at the bar.

In furtherance of the claim by defendants that the ordinances of 1899 reducing the rates of fare are valid, it is urged that express authority from the legislature is required to enable the common council of a city to pass ordinances such as those described in this case, providing for the consent of the city to the laying of tracks and the running and operation of a railroad through its streets and the fixing of rates of fare, and that no such power was granted in this case, and if there were, there has been no agreement made by the passage of the

ordinances referred to in the statement of facts. It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare. But there can be no question in this court as to the competency of a state legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract. *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 683, 29 L. ed. 528, 6 Sup. Ct. Rep. 273; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 570, 44 L. ed. 886, 892, 20 Sup. Ct. Rep. 736; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 593, 45 L. ed. 679, 686, 21 Sup. Ct. Rep. 493. The contract once having been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract.

It is, however, urged that the terms employed in the ordinances *under which the complainant runs its different lines of street railways are not sufficient to constitute contracts, which may not be altered at the pleasure of the common council. It is said that at least in regard to the ordinances relating to those companies organized under the tram railway act, no contract can be found in them, as there was no special provision in that act for an agreement between the city and a company applying for the use of its streets, as to the rates of fare, and therefore a statement in an ordinance upon that subject would amount to no more than a license which might be altered or revoked at any time; and that if the language were a contract, it was in the power of the common council to alter or abrogate it under § 34 of the tram railway act.

It will be seen that under § 34 of the tram railway act, as it was enacted in 1861, a railway corporation organized under the act could not construct a railway through the streets of a city without the consent of the municipal authorities, "and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe." Hence, it is argued that any terms or conditions under which the railway company obtained the consent of the municipal authorities might by the same authorities be from time to time altered as they should in their discretion think fit.

In *Pingree v. Michigan C. R. Co.* 118 Mich. 314, 53 L. R. A. 274, 76 N. W. 635, decided in 1898, the supreme court of Michigan held that § 15 of the laws of 1846, relating to the

incorporation of the Michigan Central Railroad Company and other sections mentioned in the act which provided that the company might fix, regulate, and receive tolls taken for the transportation of passengers or property on the railroad, subject only to the limitation, as to passengers, of 3 cents per mile, etc., the company having the power to charge for tolls and transportation such sums as might be lawfully established by the by-laws of the company, and the board of directors having power to pass all by-laws necessary for carrying into execution all powers vested in the company, conferred a contract right on the corporation to fix tolls within the limits of 3 cents per mile, which right could not be violated by the acts of a succeeding legislature.

*There is no provision in the act referred to in the above-cited case, of a nature similar to the one in question here, providing for regulations, terms, and conditions which might from time to time be prescribed. The case shows, however, that in the opinion of the supreme court of Michigan language similar to that used in the ordinance (omitting such provision) amounted to a contract, and the question remaining would be whether the further language contained in the ordinance permitted an alteration of the terms of the contract as the common council might from time to time prescribe. The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and, when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement. Can it be possible that under this language permitting consent upon such terms and conditions as the city might from time to time prescribe, the power was reserved to make a rate of fare which might ruin the whole enterprise? That a rate once deliberately and mutually agreed upon might be thereafter and from time to time altered at the pleasure of the city alone? Will it be believed the parties thus understood the meaning of that provision? It would hardly be credible that capitalists about to invest money in what was then a somewhat uncertain venture, while procuring the consent of the city to lay its rails and operate its road through the streets in language which as to the rate of fare amounted to a contract, and gave the company a right to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council. It would rather seem that the language above used did not and was not intended to give the right to the common council to change at its pleasure from time to time those important and fundamental rights affecting the very existence and financial success of the

[385] company in the operation *of its road, but that by the use of such language there was simply reserved to the city council the right from time to time to add to or alter those general regulations or rules for the proper, safe, and efficient running of the cars, the character of service, the speed and number of cars, and their hours of operation and matters of a like nature, such as are described in the opinion of the court below in this case. Such would seem to be a reasonable construction of the language. It is unnecessary to conclusively determine the question, because we think that under §§ 20 and 29 of the street railway act of 1867, above set out, and by the subsequent adoption of the ordinance of 1879 (set out in the foregoing statement of facts) relating to the Detroit City Railway Company (and by the adoption of similar ordinances thereafter with regard to the other companies), binding agreements were made and entered into between the city on the one side and the companies on the other relating to rates of fare, and such agreements could not be altered without the consent of both sides.

These agreements had express legislative authority, not only under the tram railway act, but also and particularly under the street railway act of 1867. By the 20th section of the latter act it was provided that the rates of toll or fare, which any street railway may charge for the transportation of persons or passengers over its road, should be established by agreement between the company and the corporate authorities of the city or village where the road is located, and should not be increased without the consent of such authorities. The provisions of this section, among others, were by the 29th section of the act transferred to "all companies and corporations heretofore organized in this state for the purpose of building and operating street railways under the statutes then in force, shall have the same powers, rights, protection, and privileges, and shall be subject to all the liabilities, as hereby provided for companies organized under the provisions of this act."

It is plain that the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties, and not as an exercise of a governmental *function of a legislative character by the city authorities under a delegated power from the legislature. It was made matter of agreement by the expressed command of the legislature. Ordinances of a like nature were passed by the common council relating to the other companies, and all of them were accepted in writing, and they all had in them provisions relating to, or referred to ordinances providing for, the rate of fare in language similar to the foregoing.

Coming to a consideration of the effect of the language used, we think it amounted to a contract as to rates of fare. The ordinance of 1879 and the similar ordinances thereafter passed relating to the other corporations, together with the street railway act of 1867, and §§ 20 and 29 thereof, make out plain agreements entered into between

the parties in relation, among other things, to the rates of fare to be charged by those companies. In the ordinance of 1879 and in the other ordinances under consideration, there were provisions made for special taxation of the companies which the supreme court of Michigan in *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, has held amounted to a contract between the parties which was as binding as though made by the legislature itself. Such decision by the supreme court of Michigan is entitled to very great respect and weight. If the ordinance constituted a contract between the parties in relation to taxes which were to be levied upon the company, we do not see any reason, in the language used providing for the rates of fare, for not holding that there is a contract as to those rates equally binding with that in regard to taxes.

In *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653, the common council of Indianapolis, on January 18, 1864, adopted an ordinance which said: "Consent, permission, and authority are hereby given, granted, and duly vested unto the company organized with R. B. Catherwood as president, a body politic and corporate by the name of the Citizens' Street Railway Company of Indianapolis, and their successors, to lay a single or double track for passenger railway lines," etc., under which ordinance the railway was built. This court *said, p. 567, L. ed. p. 1118, [387] Sup. Ct. Rep. p. 656: "The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the state was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose."

Although in that case there was no provision in the statute directing that the rates of fare should be established by agreement, yet nevertheless it was held that the language used amounted to an agreement upon the subject-matter which could not be altered during its continuance by either party.

Upon this question considerable stress has been laid in the brief and in the arguments of counsel for the defendants upon the case of *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47. The 12th section of the charter to that company declared, among other things, that it should have the exclusive right of transportation or conveyance of persons, merchandise, etc.,

over the railroad to be constructed, and it provided that the charge of transportation or conveyance should not exceed 50 cents per 100 pounds for heavy articles, and 10 cents per cubic foot on articles of measurement for every 100 miles, and 5 cents per mile for every passenger. Permission was granted the company to rent or farm out any part of their exclusive right of transportation to any individual on such terms as might be agreed upon. Pursuant to that authority the company leased to one Wadley for the term of ninety-nine years such privileges. Afterwards the legislature of Georgia erected a board of *railroad commissioners (Ga. Laws 1879, p. 125), and gave the board power to prevent railroad companies from charging other than just and reasonable rates. That board prescribed rates for the transportation of freight and passengers by railroad companies in the state which were less than the maximum rates authorized by the 12th section of the charter of the company above referred to. The question of the validity of this order of the board of commissioners was brought before this court, and it was held that the language of the charter did not justify the holding that, notwithstanding any altered conditions of the country in the future, the legislature had, in 1833, at the time of the grant of the charter, contracted that the company might for all time charge rates for the transportation of persons or property over its line up to the limits there designated. The reasons for so holding are stated by Mr. Justice Field at pages 180 and 181 of the report, L. ed. p. 380, Sup. Ct. Rep. p. 49, and it was not thought that in the exercise of the merely governmental function of creating a charter and incorporating the banking and railway company the legislature had in regard to this particular matter of rates surrendered the right to alter the maximum charges. The language used was regarded as a mere delegation of authority by the legislature to the company to make those charges until the authority was altered or withdrawn. In other words, that the language did not constitute a contract or agreement between the parties, the legislature and the railroad company.

In the case at bar, however, the rates are fixed under the provisions of a statute which declares that they shall be so fixed by agreement between the parties. The ordinance of 1879 adopts that of 1862 and reaffirms it. The rate of fare therein provided is made a rate under the ordinance of 1879, and that ordinance was adopted while the street railway act was in force, and which specially provided for an agreement as to rates of fare, and the provisions of that act were transferred to the companies organized under the tram railway act. It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be re-

garded as *forming a contract because the statute provided specially for that mode of determining them. Under such direction, we are of opinion the language used in the ordinances amounts to an agreement, for that is the way in which the rates are to be arrived at, and the reaffirmation of the previous language, by reaffirming and adopting the ordinance of 1862, by the ordinance of 1879, and its acceptance, constitute an agreement as of that time. The same as to the ordinances relative to the other roads. The rate of fare having been fixed by positive agreement under the expressed legislative authority, the subject is not open to alteration thereafter by the common council alone, under the right to prescribe from time to time the rules and regulations for the running and operation of the road.

Nor does the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than 5 cents, give any right to the city to reduce it below the rate of 5 cents established by the company. It is a contract which gives the company the right to charge a rate of fare up to the sum of 5 cents for a single passenger, and leaves no power with the city to reduce it without the consent of the company. The language of § 20 in the street railway act of 1867, which provides that the rate of fare agreed upon shall not be increased without the consent of the city authorities, does not mean that the rate may be reduced without the consent of the railway companies, nor does it show the parties did not suppose there was a contract between them as to rates. That provision does not seem to perform any material function, because without it, the parties having agreed upon the subject of rates, it would follow that the agreement could not be altered by either party without the consent of the other. It may be that it was meant that the company, while unable to increase the rates of fare without the consent of the city authorities, had the right to reduce the rates as it might please without consulting the city.

It was probably inserted from abundant caution, but in no event can it properly or fairly be regarded as an implied permission to the city authorities to reduce the rates of fare as agreed upon without the consent of the railway company. The reasons are obvious and need not be restated.

*It is said, however, that § 34 of the tram railway act was amended some twenty-two days after the passage of the street railway act containing the above §§ 20 and 29, and that, therefore, the provisions of the amended tram railway act must apply exclusively.

The amendment made to § 34 of the latter act in 1867 has been set forth in the statement of facts above made, but for convenience will be repeated here, as follows:

"Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed

or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named pursuant to the terms thereof."

Referring to this amendment, it is argued that the city had the right to pass these ordinances of 1899 as a regulation and condition for the operation of the road, unless the rights or franchises already granted to the company should thereby be destroyed or unreasonably impaired, or unless the company would be thereby deprived of the right of constructing, maintaining and operating its railway pursuant to the terms of the original consent, and such impairment is not alleged in the complainant's bill. It is obvious that the additions to the original tram railway act made in 1861 and 1867 were laws *in pari materia* with the street railway act passed in 1867, and should therefore be construed together to obtain the legislative meaning.

[391] Bearing in mind the provision of § 29 of the street railway act, granting to other corporations the same powers as are given to the companies organized under that act, and coming to a consideration of the amendment to § 34 of the tram railway act made in 1867, we find no inconsistency or contradiction between the two acts. The amendment to the 34th section prohibited the city from making any regulations or conditions whereby the rights or franchises of the company should be destroyed or unreasonably im-
paired, or whereby it *should be deprived of the right of constructing, maintaining, and operating its railway pursuant to the terms of the consent, while § 20 of the street railway act provided in terms for an agreement between the parties upon the question of rates of fare, and the parties having fixed such rate by agreement, entered into by authority of the legislature, there can be no question of its binding force. Section 14 of the same act also safeguarded the rights of the companies, and that section might be referred to in aid of its rights, by the company. The tram railway act amendment of 1867 is a general provision regarding regulations or conditions, destroying or unreasonably impairing rights or franchises already granted, or depriving the company of rights of construction and operation, and should be construed also in connection with § 14 of the street railway act, while the matter of rates of fare is specially provided for by § 20 of the last-named act, which provides for an agreement on that subject. The two acts are entirely harmonious, and may be fully carried out so as to involve neither ineongruity nor inconsistency.

But the defendants raise the objection that § 29 of the street railway act cannot be applied to companies formed under any other act for the reason that to apply it to such companies would violate the state Constitution, § 20 of art. 4, which provides that "no law shall embrace more than one object which shall be expressed in its title."

The title of the street railway act is "An Act to Provide for the Formation of Street
184 U. S.

Railways," and the claim is made that the provision of § 29, making the act applicable to other companies, is outside and beyond the object of the act as expressed in its title.

The meaning to be given to the constitutional provision was stated in *People ex rel. Secretary of State v. State Ins. Co.* 19 Mich. 392, wherein Chief Justice Cooley, at page 398, said:

"We must give the constitutional provision a reasonable construction and effect. The Constitution requires no law to embrace more than one object, which shall be expressed in its title. Now, the object may be very comprehensive and still be *without ob- [392]jection, and the one before us is of that character. But it is by no means essential that every end and means necessary or convenient for the accomplishment of the general object should be either referred to or necessarily indicated by the title. All that can reasonably be required is that the title shall not be made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection."

Similar provisions are to be found in the Constitutions of several of the states, among them that of New Jersey, and the meaning of such provision was brought before this court in *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391, and it was held that the provision did not require a detailed statement or index or abstract of its contents in the title of an act, and that it did not prevent uniting, in the same act, numerous provisions for one general object fairly indicated by its title.

The Constitution of Illinois contains a similar provision, the construction of which also came before this court in *Jonesboro v. Cairo & St. L. R. Co.* 110 U. S. 192, 199, 28 L. ed. 116, 118, 4 Sup. Ct. Rep. 67, 71. In that case this court said, through Mr. Justice Harlan:

"The title of the act is 'An Act to Amend the Charter of the Cairo & St. Louis Railroad Company.' The contention is, that the legalization of an election previously held, and at which the people voted in favor of a subscription of stock to that company, and the granting of authority to issue bonds in payment of such subscription, is not a subject expressed by the title of the act. In this view we do not concur, and our conclusion is justified by the later decisions of the supreme court of Illinois construing a similar provision in the state Constitution of 1870. It was held in *Johnson v. People*, 83 Ill. 431, that the Constitution 'does not require that the subject of the bill must be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required.'"

We have examined the various cases cited by counsel for the defendants, arising in the state of Michigan under the constitutional provision in question, and it is sufficient to say that *we think not one of them extends [393]

that provision so as to embrace a case like the one at bar. Narrowly considered, an act to provide for the formation of street railway companies should contain nothing but provisions relating to their formation and organization, but it would be absurd to hold that the constitutional provision would prevent the introduction into such an act of various details in regard to the corporations after their formation and in regard to their government, operation, regulation, and other matters which might be fairly considered as germane to the particular object named in the title of the statute, and hence, we think it would be a most narrow construction of the constitutional provision to hold that under such a title it was incompetent for the legislature to provide that the benefits and obligations conferred and provided for in the act should be made applicable to corporations of a like character already organized and in operation. It is germane and appropriate to the subject-matter of the act; and to enact under such a title that all companies of the like nature should have the same privileges is fairly within the general object described in the title. This being true, the companies organized under the tram railway act were equally, with those organized under the street railway act, enabled by the express authority of the legislature to enter into a contract for a rate of fare with the city, and when in 1879 and the subsequent years those companies which were organized under the tram railway act entered into further agreements with the city in the way of ordinances, those agreements were valid so far as the objections heretofore considered are concerned, and not subject, in regard to this matter, to alteration at the will of one party only. The agreements being valid in the case of companies organized under the tram railway act, it follows that those entered into with the other companies organized under the street railway act were also valid.

Still another objection is raised by the defendants to the validity of the ordinances passed in 1879 and 1880 and 1885, by which the powers and privileges conferred and the obligations imposed upon the railway companies by the former ordinances were extended and limited to thirty years from the date of the supplemental ordinances, the objection being that the extending of *the term of the consents beyond the then limit of the corporate life of the companies was illegal and void. We are not of that opinion.

This was matter of agreement between the parties. The franchise to be a corporation came from the state, and all that the company required from the city was its consent to the laying down of the rails and the operation of the road through the streets of the city, and such consent was to be given upon terms and conditions to be agreed on. This consent, when given, became a privilege or franchise granted to the corporation, and was property belonging to it. By the ordinance of 1879 the duties and obligations of the company therein mentioned were largely increased, additional taxes were pro-

vided for, and also extensions of its tracks as stated in the ordinance. The company also agreed to furnish all the materials and do all the paving mentioned at its own expense. One inducement to the company to agree upon and accept this ordinance was that the term which the city had originally consented to for the use of its streets by the company should be extended to thirty years from the date of the new ordinance. Although the company itself, by the act under which it was incorporated, was limited in its corporate life to a term of thirty years from the date of its organization in 1862, the extension of the term of consent by the city carried such consent about sixteen years beyond its then corporate life. Of course, no one contends that this extension of the term for the use of the streets of the city in any manner affected the limit of the term of the corporate life of the company, but the limitation of its life did not prevent it from taking franchises or other property, the title to which would not expire with the corporation itself. A corporation whose corporate existence was limited to a term of years could always purchase the fee in property which it needed for the operation of its business. If at the end of its term its life were not extended, the property which it owned was an asset payable to the shareholders after the payment of its debts, and in a case like the present, where the consent was assignable and transferable, particularly by virtue of § 15 of the street railway act above set forth, any company itself having corporate existence *for that purpose could purchase the outstanding term and operate its road thereunder. We see no reason why the company could not take the extended term as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the circuit court of appeals for the sixth circuit in *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628. In the course of the opinion of the court in that case, the cases of *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692, and *Miner v. New York C. & H. R. R. Co.* 123 N. Y. 242, 25 N. E. 339, were cited. *People v. O'Brien* is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use; and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corpora-

[395]

[394]

tion. The other case, in 123 N. Y., announces the same doctrine. It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee.

The case above cited in the circuit court of appeals for the sixth circuit, it will be noticed, is between the same parties as the case at bar, and if the judgment therein had been pleaded or put in evidence upon the trial of this action, we cannot now see why it would not have been *res judicata* between the parties in this suit upon that question, at least as to the particular road then under discussion.

[396] In *Detroit v. Ellis*, 103 Mich. 612, 27 L. R. A. 211, 61 N. W. 886, *upon an application for a mandamus the decision of the United States circuit court of appeals was regarded as *res judicata* of the question in issue in that suit on an application by the city and certain individual citizens for a mandamus to compel the attorney general to file an information in the nature of quo warranto to inquire by what right the railway company maintained and used its tracks in the streets after the date named. Without treating the case in the circuit court of appeals as strictly *res judicata*, we regard the conclusion arrived at by that court upon the question under discussion as correct, and consequently the objection now urged by the defendants to the validity of the ordinance of 1879 and the other ordinances similar to it cannot be maintained.

The further objection is made that under the power of alteration and repeal, provided for in the Constitution of Michigan and under the terms of the various ordinances giving power to the common council in certain cases to provide for further rules and regulations, the right is reserved to the common council to alter the rates of fare provided for in the various ordinances under consideration, as it alone may regard reasonable and just, without the consent of the company.

The Constitution of the state of Michigan, art. 15, § 1, provides: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed." Counsel for the defendants contends "that the regulation of rates of fare or toll upon the street railway is a governmental function, delegated by the legislature of the state of Michigan to the municipalities, and no matter in what form such delegation of power may be exercised, whether by ordinance or an assumed contract, it is nevertheless a law, subject to alteration, amendment, or repeal. It has not been the policy of the state of Michigan, since the adoption of the present Constitution, to permit irrevocable legislation. The state cannot do it itself, and if it cannot, surely one of its creatures, like a city, cannot be permitted to do that which its creator is prohibited from doing."

184 U. S.

We have already seen that the legislature was competent to *grant to the city of De- [397] troit the right to give its consent to the laying of the tracks of a street railway and the operation of the same in and through its streets upon such terms and conditions as the parties might agree upon. The grant of this power was not the formation of a municipal corporation, directly or indirectly, either in substance or effect. The legislative act which granted the power to the city could not be altered, amended, or repealed by the latter. No such power was given to it by the legislature, and probably could not even be delegated in any event. It is sufficient to say that none was attempted. *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 563, 41 L. ed. 1114, 1116, 17 Sup. Ct. Rep. 653.

The legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power so to do is not involved in the case.

We are then brought to the question of the reservations in the ordinances themselves. An examination of them leads us to the conclusion that not one provided or was intended to provide for a power to alter an agreement in relation to the rates of fare entered into between the parties. The right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, cannot be held to extend to the alteration of a contract as to the rate of fare which shall be charged for the transportation of passengers. We think, as was stated by the court below, that this reservation permitted the city to make further rules or regulations than those contained in the ordinances, in regard "to all matters incident to the construction and operation of the road, such as the location of the tracks in the streets, the placing of switches and turntables, the repair of the pavement between the tracks, the removal or limitation of the number of tracks, in the interest of public travel, the frequency with which cars should be run for the public convenience, the stopping of cars at street crossings, the use of fenders, the rate of speed to be maintained, the sale of tickets, and generally to details of the conduct and operation of the railway, which experience might show to be necessary, in addition to or in amendment of those specified in the consent for the protection of life, the accommodation of the public, *and the avoidance of [398] injury to private property. Such regulations are not invasions of the contract rights of the company, and are just and reasonable." *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 305, 43 L. ed. 702, 709, 19 Sup. Ct. Rep. 465.

The fixing of rates is, as we have already said, among the most vital portions of the agreement between the parties contained in the ordinances. It cannot be supposed for one moment, with regard to a right so fundamental in its nature, that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary

success of the company. For the reasons already given, we think the language used does not, in fact, give any such power to the common council. The ordinances of 1899 are, so far as this record shows, the first wherein the common council has assumed to make any change in the rates of fare without the assent of the company to be affected thereby. From 1862 until 1899 there seems to have been no attempt to exercise this alleged power of alteration by the common council without the consent of the railway company. While the rate of fare existed as agreed upon between the city and the railway company, expenditures involving millions of dollars were entered upon, changing the mode of transportation from animal to electric power, and no claim seems ever to have been made on the part of the city of a right of alteration to be exercised in accordance only with its own views of reason and propriety. This in itself is a strong implication of the want of any such power under the various reservations set forth in the foregoing statement of facts and contained in the ordinances specified. But, aside from that and considering only the nature of the right itself growing out of the agreement as to fares, we are of the opinion that not one of the reservations of the right to make further rules or regulations could by any fair construction be held to include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in those ordinances.

[399] We have thus answered the chief objections of the city to the maintenance of this action. Some others have been made, which we have examined, but do not think it necessary to further *refer to them than to say they are in our opinion not well founded.

We think the conclusions arrived at by the court below are correct, and *its judgment is therefore affirmed.*

T. K. WILSON, *Plff. in Err.*,
v.

J. F. STANDEFER.

(See S. C. Reporter's ed. 399-416.)

Contracts—impairing obligation—forfeiture of lands of state.

The judicial proceeding to forfeit lands bought of the state, provided by the Texas act of July 8, 1879, § 12, in case of a default in the payment of interest, is not a contract right of the purchaser, and therefore his contract with the state is not impaired by the enact-

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna v. Citizens' Trust & Surety Co.* 24 C. C. A. 20, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 35 C. C. A. 12.

That impairing the remedy impairs the obligation of contract—see notes to *Best v. Baumgardner* (Pa.) 1 L. R. A. 356; *Louisiana ex rel. Ranger v. New Orleans*, 26 L. ed. U. S. 132, and *Phlinney v. Phlinney* (Me.) 4 L. R. A. 348.

ment of the act of March 25, 1897, which authorizes forfeiture in such cases without any judicial proceeding, but which provides that at any time within six months after forfeiture the purchaser may institute a suit to establish the fact of payment, which was the sole defense allowed to him by the former statute.

[No. 105.]

Argued January 16, 1902. Decided March 3, 1902.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a judgment entered in accordance with an opinion of the Supreme Court sustaining a forfeiture of land bought of the state, against the contention that the purchaser's contract was impaired by a state statute. *Affirmed.*

See same case in Texas supreme court, 54 S. W. 898, and in Texas court of civil appeals, 55 S. W. 1135.

Statement by Mr. Justice Shiras:

This was an action brought in the district court of Tom Green county, Texas, in May, 1899, by J. F. Standefer against T. K. Wilson, involving the title and ownership of a tract of land containing 640 acres situated in said county.

At the trial a jury was waived, and an agreed statement of facts was filed, which was as follows:

*"1. The land sued for and described in [400] plaintiff's petition, to wit, section No. 42, district No. 11, S. P. R. R. Co., in Tom Green county, Texas, was on May 1, 1882, public free school land, being the alternate section surveyed by said S. P. R. R. Co. for the public school fund of Texas and reserved under the Constitution and laws for the use and benefit of the public free schools of Texas, and was a part of the said land, the sale of which was authorized under the act of the legislature of Texas, approved July 8, 1879, and the amendment thereto approved April 6, 1881.

"2. That on the 1st day of May, 1882, said survey of land was recognized and abstracted by the state as situated wholly in Concho county and was so recognized, abstracted, assessed for taxation, and taxes paid thereon until the year 1891, when the boundary line between the counties of Concho and Tom Green was run and established under a joint survey made by the two counties, and said land was ascertained to be in Tom Green, and has since said year been recognized and abstracted by the state as situated in Tom Green county, and since said year has been assessed for taxation and the taxes paid thereon in said Tom Green county.

"3. That the county surveyor of Concho county, in obedience to and under the act approved July 8, 1879, and the amendment thereto approved April 6, 1881, viewed and appraised said land under oath, as required by said act, and made return of same to the commissioners' court of Concho county, which said court examined and approved

same, classifying as suitable only for grazing purposes, no timber or water, and appraised it at \$1.00 per acre.

"4. That upon the completion of said appraisalment the county commissioners' court of Concho county prepared a tabulated report of their action as to said survey, setting forth the following, to wit, 'Survey No. 42, district No. 11, 640 acres, S. P. R. R. Co., \$1 per acre, suitable only for grazing purposes, no timber or water,' one copy of which said report was filed in the office of the county surveyor of Concho county, one copy forwarded to the commissioner of the general land office, and one copy to the treasurer of the state.

[401] "5. That upon receipt of said tabulated report by the commissioner of the general land office the same was by him examined and in all things approved, and the said commissioner of the general land office notified the county surveyor of Concho county of his approval of said tabulated report and appraisalment.

"6. That thereafter, on May 1, 1882, Thomas Dolan made his application in writing to the county surveyor of Concho county to purchase said land, which said application was as follows, to wit: 'To the surveyor of Concho county: In accordance with the provisions of an act to amend the caption and §§ 1, 2, 3, 4, 5, 6, 7, and 8 of an act to provide for the sale of alternate sections of land in organized counties, as surveyed by railroad companies and other works of internal improvements and set apart for the benefit of the common school fund, to provide for the investment of the proceeds and to repeal all laws in conflict therewith, approved July 8, 1879, and to provide for the sale of such lands in unorganized counties, approved April 6, 1881, I hereby apply to purchase the following land: Section No. 42, district No. 11, Concho County, about N. 12 miles from Kickapoo Springs, surveyed for S. P. R. R. Co. certificates: Beginning at N. E. corner S. P. R. R. Co. survey 117, thence north 1,900 varas, thence west 1,900 varas, thence south 1,900 varas, thence east 1,900 varas to the place of beginning. Date, 1st day of May, 1882. (Signed) Thomas Dolan;' which said application was on same day filed with said county surveyor and recorded by him May 22, 1882, and all fees required by law paid to said surveyor.

"7. That immediately thereafter said Thomas Dolan forwarded to the state treasurer his application, with the sum of \$32, being 1-20 of the appraised value of said land at \$1 per acre, and said treasurer entered a credit on his books in the name of said Dolan, and thereafter, on June 22d, 1882, the state treasurer issued a receipt for said first payment as follows: Treasurer's office, Austin, Texas, June 22d, 1882. Received of Maddox Bros. & A. on account of Thomas Dolan the sum of \$32, the same being first payment on section No. 42, district No. 11, S. P. R. R. Co., of state school

[402] land in Concho county under an act to provide for the sale of the alternate sections

of land set apart for the benefit of the common school fund. Approved April 6, 1881. (Signed) F. R. Lubbock, treasurer. And said state treasurer forwarded said receipt, together with said application, to the commissioner of the general land office, who filed said application in his office on June 22d, 1882, and issued his certificate in lieu thereof, setting forth the amount paid to the treasurer, and the quantity, description, and valuation of the land applied for; which said certificate was by said Thomas Dolan presented to the county surveyor of Concho county, who thereupon surveyed the land embraced in said original application, recorded the field notes thereof in his office, and forwarded same to the commissioner of the general land office, and entered said land on his books July 2, 1882, as sold to said Thomas Dolan, and he paid the said surveyor all fees required by law.

"8. That when said surveyor received said application said Thomas Dolan executed and delivered his obligation to the state for the balance of the purchase money of said survey of land, said obligation being as follows, to wit: '\$608.00. Note for purchase money, common school lands. For value received, I, the subscriber hereto, do promise to pay to the governor of the state of Texas and his successors in office the sum of six hundred and eight dollars, with interest thereon at the rate of 8 per cent per annum, as hereinafter specified, the same being the purchase money for the following-described tracts of land this day purchased by me from the state of Texas in accordance with the terms of an act of the legislature of said state, viz., An Act to Amend the Caption and §§ 1, 2, 3, 4, 5, 6, 7, and 8 of an Act to Provide for the Sale of Alternate Sections of Land in Organized Counties as Surveyed by Railroad Companies and Other Works of Internal Improvement and Set Apart for the Benefit of the Common School Fund; to Provide for the Investment of the Proceeds, and to Repeal All Laws in Conflict Therewith, Approved July 8, 1879, and to Provide for the Sale of Such Lands in Unorganized Counties, Approved April 6, 1881, to wit, Survey 42, District 11, Surveyed for the S. P. R. R. Co., Concho County. I am to pay or cause to be paid into the treasury of the state *of [403] Texas, on the 1st day of January of each year, one-twentieth of the above amount, together with the annual interest of 8 per cent, upon the unpaid principal until this entire obligation is liquidated, and it is expressly understood that I am to comply with all the conditions and requirements and am subject to all the penalties contained and prescribed in the above-recited act. Witness my hand this the 1st day of May, 1882. (Signed) Thomas Dolan;' which said obligation was forwarded to the commissioner of the general land office and by him registered in a book kept for that purpose, setting forth the name of the purchaser, the amount and date of the obligation, the tract of land for which it was given, and the county in which situated, and indorsed said obligation as follows: 'Registered June

22nd, 1882. W. C. Walsh, commissioner of the general land office,' and delivered said obligation to the treasurer of the state, who filed the same in his office.

"9. That said Thomas Dolan and his vendees paid on account of interest on said obligation as the same accrued the sum of \$272.65, which was received and applied as interest thereon, but the other payments of principal, except the first payment of 1-20 of the appraised value of said land, to wit, \$32, which paid at the time of his said application to purchase, as aforesaid, was deferred, as authorized and permitted by said act.

"10. That thereafter said Thomas Dolan sold said land and conveyed it by deed in proper form to H. Buckley, duly acknowledged and recorded and filed in the land office, and thereafter by regular and constructive chain of transfers said title vested in the Ostrander & Loomis Land & Live Stock Company on April 4, 1888, all of which said conveyances being properly acknowledged and duly recorded and filed as required by law, each of said vendees in succession assuming to pay to the state the balance of the purchase money and interest, as provided in the obligation of said Dolan.

[404] "11. That said land, among others, was mortgaged by said Ostrander & Loomis Land & Live Stock Company to the Knickerbocker Trust Company to secure payment of \$600,000.00 due holders of its coupon bonds; that in 1892 said Ostrander & Loomis Land & Live Stock Company became insolvent and [404] *unable to meet any of its obligations, and in a suit in the district court of Tom Green county, brought to foreclose said mortgage, judgment was entered on the 17th day of May, 1898, foreclosing the same and ordering the sale of the land so mortgaged, including said survey 42 described in plaintiff's said petition; that an order of sale issued in due form and time on said judgment, and said survey of land, with others, was sold thereunder by the sheriff of Tom Green county, after due and legal notice, on the first Tuesday in July, 1898, being the fifth day of said month, when the land described in plaintiff's petition was bid in by T. K. Wilson, defendant herein, with some other lands, for the sum of \$3,250, the amount of his bid paid, and the said sheriff executed to him a deed in due and legal form, properly acknowledged, conveying to him the title of the said Ostrander & Loomis Land & Live Stock Company, and was on the same day filed and duly recorded in Tom Green county.

"12. That on the 20th day of August, 1897, the commission of the general land office of Texas, acting under and by virtue of the authority conferred upon him by the act of the legislature of Texas, entitled 'An Act to Authorize the Commissioner of the General Land Office to Forfeit All Lands Heretofore sold by the State under Any of the Various Acts of the Legislature for Failure to Pay Any Portion of the Interest Thereon, Approved March 25, 1897,' indorsed on the application of said Thomas Dolan given as aforesaid 'Land forfeited,' and

caused an entry to that effect to be made on the account kept of said Thomas Dolan, purchased as aforesaid, and declared said land forfeited to the state without the necessity of re-entry or judicial ascertainment, and had said land duly and regularly reclassified under chapter 12 A, title 87, of Revised Civil Statutes of Texas of 1895 and the amendment thereto, chapter 129, General Laws of Texas of 1897.

"13. That the commissioner of the general land office did not at any time prior to the forfeit entered and declared on the 20th day of August, 1897, notify the county or district attorney of the county in which said land was situated of the failure of said Thomas Dolan or his vendees to pay any interest due on the said obligation of Thomas Dolan hereinbefore mentioned, *and neither [405] the county nor district attorney of the county in which said land is situated caused any writ to be served upon said Thomas Dolan or his vendees or the mortgagee or beneficiaries thereunder, all of whom resided at said date in Concho and Tom Green counties, requiring him, them, or any or either of them to show cause why he or they should not be ejected from said land, and no judgment was rendered in any court against said Thomas Dolan or any or either of his vendees or the mortgagee or beneficiary under the mortgage aforesaid awarding a writ of possession against him or them in favor of the state, and no copy of any such judgment was forwarded to the state treasurer and commissioner of the general land office, as required by § 12 of the said act approved July 8, 1879, and no proceedings whatever were had as required and provided by said § 12 of the act aforesaid, but said forfeiture was entered and declared on August 20, 1897, without any judicial proceedings whatever in any court of Texas, and no judicial proceedings of any kind or character have ever been had by the state to forfeit or rescind the sale made to Thomas Dolan, as hereinbefore set out, or to recover on or enforce his obligation given, as aforesaid, for the purchase money of said land, but said forfeiture was made under said act of March 25, 1897, and was without re-entry or judicial ascertainment, and without any actual or personal notice to said Dolan or any of his vendees or to the mortgagees or beneficiaries aforesaid.

"14. The commissioner of the general land office of Texas, after the forfeiture entered and declared, as aforesaid, on August 20, 1897, classified said land described in plaintiff's petition as dry grazing land, and appraised and valued the same at \$1 per acre, and placed the same upon the market for sale, and notified in writing the county clerk of Tom Green county on September 11, 1897, of the valuation placed by him upon the said land, and that said land was offered for sale, which said notification was duly recorded on September 11, 1897, by the said clerk in a book for that purpose in his office; and it is agreed that in the classification, valuation, and the placing of said land on the market September 11, 1897, ev-

[406] everything was done as required and in strict compliance with chapter 12 A, *title 87, Revised Civil Statutes of Texas of 1895, and the amendment thereto, chapter 129, General Laws of Texas of 1897.

"15. That thereafter, on September 13, 1897, plaintiff J. F. Standefer, residing upon with his family and being an actual settler on said land, made his application, in writing, as required by law, and on the form adopted and prescribed by the commissioner of the general land office, to purchase said survey 42, district 11, S. P. R. R. Co., 640 acres, in Tom Green county, as an actual settler thereon, at the valuation and classification placed thereon by said commissioner, to wit, \$1 per acre, as dry grazing land, and accompanied his said application with his affidavit, stating that he desired to purchase said land for a home, that he had in good faith settled thereon, and that he was not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation was interested in the purchase thereof, which said application was forwarded by said J. F. Standefer to the commissioner of the general land office, together with his obligation to the state, duly executed, binding him to pay to the state on the 1st day of November of each year thereafter until the whole purchase money was paid $\frac{1}{10}$ of the aggregate price of said land, with interest, at the rate of 3 per cent per annum, on the whole unpaid purchase money, payable on the 1st day of November of each year, and upon the same day that he forwarded his application and obligation to the commissioner of the general land office he also transmitted to the state treasurer \$16, being $\frac{1}{10}$ of the aggregate purchase money for said land at \$1 per acre; and thereafter, on October 25, 1897, the commissioner of the general land office awarded said land to him under his said application to purchase as aforesaid and notified him on that date of said award, and the said Standefer has since said purchase paid all interest due upon his said obligation to the state and has continuously resided upon said land as a home and is now residing thereon, and he has in all things strictly complied with the said laws of 1895 and 1897 and the regulations adopted by said commissioner of the general land office.

[407] "16. That on April 25, 1899, defendant T. K. Wilson, through *his attorneys, tendered to the state treasurer all interest and principal due on account of said Thomas Dolan purchase, as aforesaid, as is fully shown by the following certificate of said state treasurer, to wit: 'I, John W. Robbins, treasurer of the state of Texas, do hereby certify that Messrs. Hill & Wright have tendered to this department all interest and principal due on account for section No. 42, in district No. 11, S. P. R. R. Co., in Tom Green county, sold to Thomas Dolan under act of April 6, 1881, which cannot be accepted for the reason that the account for said land under said act has been forfeited for nonpayment of interest to January 1, 1896. In testimony

whereof I hereunto set my hand and affix the seal of office, at Austin, Texas, this the 29th day of April, 1899, John W. Robbins, state treasurer, by R. C. Roberdeau, chief clerk and acting treasurer. (Seal.)'

"And on the same day Wilson, by his attorneys, made written application to the commissioner of the general land office for a patent on said survey under said Dolan purchase, and tendered to said commissioner the patent fee of \$6, and the commissioner of the general land office refused to issue said patent for the reason that it appeared from the records of his office that the sale to Thomas Dolan was made under the act of 1879 and amendment thereto of 1881, and that the Dolan purchase of this land was forfeited August 20, 1897, by the commissioner of the general land office for nonpayment of interest and because this land was afterwards, on September 13, 1897, sold to J. F. Standefer.

"17. It is further agreed that at the time of said forfeiture, August 20, 1897, the state did not pay or offer to pay to Thomas Dolan or any of his vendees the purchase money on said land or any of the interest paid on said obligation, and has not since paid or offered to pay any part of said principal or interest, and the said obligation of Thomas Dolan, executed May 1, 1882, as aforesaid, has not been returned or offered to be returned to said Dolan or his vendees or said Wilson, but the same is still held and retained by the state treasurer."

On May 27, 1899, the district court entered judgment in favor of the defendant. Thereupon an appeal was taken to the court *of civil appeals of the third supreme judicial [408] district of Texas, and by that court certain questions were certified to the supreme court of Texas, viz.: "1. Did the state, through its commissioner of the land office, without judicial proceedings, have the authority to legally declare a forfeiture of the Dolan title on account of the failure to pay the interest, as stated? 2. Are the principles of law, as decided by the supreme court of this state in the case of *Fristoe v. Blum*, 92 Tex. 76, 45 S. W. 998, applicable and controlling of the question certified?"

On January 15, 1900, the supreme court of Texas filed an opinion answering the certified questions in the affirmative, and directing that a copy of the opinion should be certified to the court of civil appeals for the third supreme judicial district, and that said cause be therein proceeded with in accordance with said opinion.

On February 7, 1900, the court of civil appeals, in accordance with the opinion of the supreme court, reversed the judgment of the district court, and rendered judgment in favor of Standefer, the appellant. Thereupon a petition was filed in the supreme court of Texas by T. K. Wilson for a writ of error to the court of civil appeals, but this application was by the supreme court refused. Thereafter a writ of error, bringing the cause to this court, was allowed by the Chief Justice of the court of civil appeals.

Mr. Jared W. Hill argued the cause, and, with **Mr. T. K. Wilson**, read a brief for plaintiff in error:

Whether § 12 of the act of 1879 is a part of the contract is a question which this court will decide for itself.

McGahey v. Virginia, 135 U. S. 665, 34 L. ed. 305, 10 Sup. Ct. Rep. 972; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 549.

The Federal question is squarely presented by the record, and submitted by the court of civil appeals on certified question to the supreme court of Texas.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

An instrument shall be considered as a whole, and every clause and every word shall be given effect, and no part will be disregarded unless absolutely repugnant to the general intent.

17 Am. & Eng. Enc. Law, 2d ed. p. 7.

That one party is the state makes no difference as to the contract. The principles governing them are the same.

Jumbo Cattle Co. v. Bacon, 79 Tex. 13, 14 S. W. 840; *Fristoe v. Leon*, 92 Tex. 80, 45 S. W. 998; *People v. Stephens*, 71 N. Y. 549.

The legislature is presumed to have intended that every word and clause in a statute shall be of some force and effect, and courts will so construe statutes that the whole may stand and be effective.

Ogden v. Strong, 2 Paine, 584, Fed. Cas. No. 10,460.

The law under which the purchase was made having provided that, in the event of a default in payment of annual interest, a forfeiture of the contract of purchase should be had through a judicial proceeding, and the re-entry should be by a judgment of the court and a writ of possession, such law became a part of the contract.

International Bldg. & L. Asso. v. Hardy, 86 Tex. 615, 24 L. R. A. 284, 26 S. W. 497; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Woodruff v. Trapnall*, 10 How. 190, 13 L. ed. 383; *Winter v. Jones*, 10 Ga. 190; *State ex rel. Damman v. School & University Land Comrs.* 4 Wis. 414.

When there is an offer made by the legislature, which is accepted by an individual, there is a contract which it is not within the power of the state to impair.

Jumbo Cattle Co. v. Bacon, 79 Tex. 13, 14 S. W. 840.

Parties have the right to make remedies the subject of their contract, and when they do they are as much protected against impairment as any other provision of the contract.

International Bldg. & L. Asso. v. Hardy, 86 Tex. 615, 24 L. R. A. 284, 26 S. W. 497; *Billmeyer v. Evans*, 40 Pa. 327; *Bronson v. Kinzie*, 1 How. 311, 322, 11 L. ed. 143, 147; *Breitenbach v. Bush*, 44 Pa. 313, 84 Am. 616

Dec. 442; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Von Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Seibert v. Lewis*, 122 U. S. 284, sub nom. *Seibert v. United States ex rel. Lewis*, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; *Barnitz v. Beverly*, 163 U. S. 119, 41 L. ed. 95, 16 Sup. Ct. Rep. 1042; *State ex rel. Damman v. School & University Land Comrs.* 4 Wis. 414; *Simms v. Wright* (Tex. Civ. App.) 56 S. W. 110.

The "remedy" which the state has the right to change refers to those modes of procedure in the courts which lead up to and end in the judgment and its execution.

Johnson v. Fletcher, 54 Miss. 628, 28 Am. Rep. 388.

The state cannot change the obligation of the state to a purchaser under pretense of a change of remedy.

The general law of the state prescribing remedies enters into and forms a part of all contracts.

McCracken v. Hayward, 2 How. 608, 11 L. ed. 397.

When authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded.

Sutherland, Stat. Constr. § 326.

A valid forfeiture of school lands in Kansas cannot be had without giving the sixty days' notice of the state's intention to declare a forfeiture required by law, when default is made in the payment of the purchase money or interest.

Hansen v. Wilson, 40 Kan. 211, 19 Pac. 717.

Where by statute a purchaser of lands from the state has the right, upon the forfeiture of his contract of purchase for the nonpayment of the sum due upon it, to revive it at any time before a public sale of the lands by the payment of all sums due upon the contract, with a penalty of 5 per cent, this right cannot be taken away by the subsequent change in the law which subjects the forfeited land to private entry and sale.

State ex rel. Damman v. School & University Land Comrs. 4 Wis. 414.

The several courts of civil appeals of Texas, wherever the question came before them prior to the decision of the supreme court in *Fristoe v. Leon*, 92 Tex. 76, 45 S. W. 998, uniformly held that the acts of the legislature of Texas authorizing summary forfeitures were not applicable to sales made previous to the passage of such acts.

Cuba v. Island City Sav. Bank (Tex. Civ. App.) 41 S. W. 532; *Capps v. Garvey* (Tex. Civ. App.) 41 S. W. 379; *Simms v. Wright* (Tex. Civ. App.) 56 S. W. 110.

The doctrine of nonjudicial rescission has never been favored, and it has been only in strong instances where the courts have upheld the right to resort to this remedy.

Moore v. Giesecke, 76 Tex. 551, 13 S. W. 290.

No counsel for defendant in error.

[408] *Mr. Justice **Shiras** delivered the opinion of the court:

The Federal question in this case is founded upon the contention that the act of July 8, 1879, under which the land was purchased by Dolan, having provided in its 12th section for the forfeiture of the contract of purchase, in event of default in payment of annual interest, by a judicial proceeding, such section became part of the obligation

[409] of the contract between the state *and the purchaser, which was impaired by the subsequent act of August 20, 1897, authorizing a forfeiture without judicial ascertainment or proceedings, and that therefore the proceedings under the last-mentioned act were null and void, as a violation of § 10, art. 1, of the Constitution of the United States.

As the supreme court of Texas overruled that contention, and as the civil court of appeals entered the final judgment in the case in accordance with the opinion of the supreme court, the question is properly before us for determination.

The reasoning upon which the supreme court of Texas proceeded can be best presented by the following extracts from its opinion, as it appears in this record:

"The act of 1897, under which the commissioner took the action the effect of which is in question, authorized the commissioner, when any portion of the interest due by purchasers of such land has not been paid, to declare a forfeiture of the purchase without judicial aid, and gave to his action the effect of putting an end to the contract. That this statute by its terms applies to cases such as this is not disputed.

"We think it clear that all of the terms of the contract between the state and a purchaser under the act of 1879 are contained in §§ 6, 7, 8, 9, and 10, above outlined, and their rights, the obligations of their contract, arise from a compliance with those provisions. The contract there provided for is an executory contract of sale and purchase, which arises upon acceptance of and compliance with the stated terms of the offer made by the state for the sale of the lands. The purchaser presents his application, makes the cash payment, causes the land to be surveyed, and executes his obligation to perform the things to be done in the future. The contract then is complete, and its terms are fixed. *Jumbo Cattle Co. v. Bacon*, 79 Tex. 12, 14 S. W. 840. Both the state and the purchaser are bound so long as there is compliance with the obligation,—the purchaser to make the further payments, and the state, upon completion thereof, to grant the land to the purchaser. But no title passes, and a right of rescission in the state may arise just as it might arise in an individual upon default in performance on the part of the other party.

[410] *"This right might be exercised either by legislative act or by the act of some officer properly empowered thereto. . . . The statute of 1879 does not give authority to any officer to rescind without judicial action; but the right of rescission existed in 184 U. S.

the state, and its exercise might be subsequently authorized through the lawmaking power, and an exercise of it, based upon the default of the other party, would not be a denial of any right of his. It could only be held that the right of rescission for default of the purchaser did not exist by holding that the contract provided that it should not exist, or that it should be exercised in a particular manner. But the contract embraces no such provision. There is no undertaking on the part of the state with the purchaser that the remedy prescribed in this statute, and no other, shall be pursued, unless it is to be implied from the mere presence of the provision in the statute, and we think it well settled that no such implication arises. In the proposition often stated in the decisions that parties contract with reference to existing laws, and that such laws become a part of the contract, the reference is to those laws which determine and fix the obligation of the contract, the correlative rights and duties springing from it, and not to laws of mere procedure prescribing remedies. With reference to these, there is ordinarily no obligation arising, but the contract is made in contemplation of the power of the legislature to change them. Of course, all remedy cannot be taken away, nor can the existing remedy be so altered as to take away or impair any of the rights given by the contract as interpreted by existing law. It is also true that a specific remedy, provided by the contract itself, cannot be changed by legislation, because it constitutes a part of the contract. *International Bldg. & L. Asso. v. Hardy*, 86 Tex. 610, 24 L. R. A. 284, 26 S. W. 497. But none of these limitations on legislative power are applicable to this legislation. The act of 1897 simply enforces a right which existed in the state from the formation of the contract. It takes away no right of the purchaser, unless it can be said that he had the right to demand that the particular remedy provided by the act of 1879 should be followed. This could only be true if the contract made that remedy exclusively applicable, which was not the case.

*"That prompt payment of interest instal-[411]ments was made an essential part of this contract is made very clear by the terms of the statute, as well as by its purpose, to provide available funds annually for the support of the public schools, and that a breach of his obligation to make such payment on the part of the purchaser gave the state the right to rescind the contract is equally clear. If the facts did not exist to authorize the action taken by the commissioner, that could be made to appear whenever such action came in question in the courts, and thus the purchaser could be deprived of no right by such action. The statute would only be taken as authorizing rescission when the right of rescission existed." [93 Tex. 232, 54 S. W. 898.]

It will be observed that, in this opinion, the supreme court of Texas concedes that a contract of sale and purchase of land between the state and Dolan was created by

the transactions as they are admitted to have taken place. It is also conceded that it was competent for the parties to have provided, as a substantive part of the contract, special remedies, each against the other, for the enforcement of their respective obligations, and that, in such a case, neither party could, without the consent of the other, resort to any form of remedy other than those stipulated for. But the court held that, in the present case, there was no undertaking on the part of the state with the purchaser that the remedy prescribed for the state in the act of 1879, and no other, should be pursued, if the purchaser should fail to comply with his part of the contract; that § 12 of the act was not a contract with purchasers, but was a general law of the state, regulating its method of procedure against delinquent purchasers, and that purchasers in default had no vested rights in the form of remedy reserved by the state in its own behalf.

We are first confronted with a question of construction. The supreme court of Texas having held that § 12 was a law, and not a term of a contract with a purchaser, is it open for this court to put a different construction upon the statute? It is settled law that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for [412] itself the existence or the *nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment. *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 58, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

But as the general rule is that the interpretation put on a state Constitution or laws by the supreme court of such state is binding upon this court, and as our right to review and revise decisions of the state courts in cases where the question is of an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of this court, even in such a case, to follow the decision of the state court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a state, regulating its exercise of the taxing power, or relating to the state's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special function is to expound and interpret the state enactments.

The legislation in question in this case is one of that general character, providing for the sale of public lands theretofore set apart for the benefit of common schools, and was enacted in twenty sections, on July 8, 1879. On April 6, 1881, an act was passed, amendatory of several of the sections of the act of 1879, but such amendments do not seem to have any important bearing on the case. On May 1, 1882, one Thomas Dolan made an application in writing to the county surveyor to purchase the land in question. Under the formalities of the statute, Dolan paid down, on June 22, 1882, the sum of \$32, and gave his note, dated May 1, 1882, for the balance of the purchase money, being \$608, payable in instalments with annual interest of 8 per cent upon the unpaid principal. Thereafter Dolan sold and conveyed said land to one Buckley, and by successive transfers the title of Dolan became vested, on April 4, 1888, in the Ostrander & *Loomis Land & Live Stock Company,—[413] each of the successive vendees assuming to pay the balance of the purchase money and interest, as provided in the obligation of Dolan. Said land with other tracts was mortgaged by said Land & Stock Company to the Knickerbocker Trust Company to secure the payment of \$600,000. In 1892 the land company became insolvent, and in a suit in the district court of Tom Green county, to foreclose said mortgage, judgment was entered on May 17, 1898. Upon a sale on said judgment on the first Tuesday of July, 1898, the Dolan tract, with other lands, was bid in by T. K. Wilson, the plaintiff in error, for the sum of \$3,250, and the sheriff executed and delivered to him a deed conveying the title of the said Ostrander & Loomis Land & Live Stock Company.

On August 20, 1897, the commissioner of the general land office of Texas, acting under the act of March 25, 1897, indorsed on the application of Thomas Dolan that said land was forfeited, and restored the said land to the public domain. Thereafter J. F. Standefer, on September 13, 1897, who was then residing with his family and being an actual settler upon said land, made his application in writing to purchase said land, and on October 25, 1897, the commissioner of the land office awarded said land to him, and Standefer paid down the money and gave his obligation to pay the balance of the purchase money with interest to the state, and has since said purchase paid all interest due upon his said obligation, and has continuously resided upon said land as a home, and has in all things strictly conformed to the laws and with the regulations adopted by the commissioner of the general land office.

On April 25, 1899, T. K. Wilson, through his attorneys, tendered to the state treasurer all the purchase money and back interest due on account of the Dolan purchase, and, on the same day, demanded from the commissioner of the general land office a patent for the land. This tender and demand were refused by the officers, giving the reason that said Dolan purchase had been forfeited on August 20, 1897, for nonpayment of in-

terest, and because said land had afterwards, on September 13, 1897, been sold to J. F. Standefer.

[414] It therefore appears that when T. K. Wilson bid in this land *the interest on the Dolan purchase was in arrears from January 1, 1896, to July, 1898, and that when he made a tender to the state treasurer, more than three years' interest was in arrears, and that, in the meantime, and before Wilson's purchase, the land had been declared forfeited, and had been sold by the state for a valuable consideration to J. F. Standefer. While the agreed statement of facts shows that Wilson paid \$3,250 for the lands bid in by him at the sheriff's sale, it does not appear how much, if any, of that sum was on account of the Dolan tract. It seems to have been a lump sum for all the lands bought by Wilson. At the time of that sale Standefer was in actual possession of and residing on the land in dispute. It may fairly be presumed that when Wilson bid at the sheriff's sale he knew of the forfeiture and sale of the Dolan tract, for they were matters of record. But whether this were true or not, he certainly had notice of an existing outstanding title by Standefer's actual possession, a fact admitted in the agreed statement of facts.

But whatever may have been the views of the state courts as to the legal rights and equities between the parties, the sole question for our consideration is whether the Supreme Court of Texas erred in overruling the contention of the plaintiff in error that the state was precluded by contract from changing its mode of procedure in respect to purchasers in default.

There seems to be no ground for complaint by the plaintiff in error in point of equity. His counsel does, indeed, contend that he was deprived by the change of remedy of a right to have the forfeiture declared by a judicial proceeding, and that he was thereby deprived of his property without due process of law. But this argument is refuted by the fact that the only question on which he had a right to be heard was whether he had made payment in compliance with his part of the contract. By the 12th section of the act of July, 1879, the purchaser was shut up to the defense whether he had paid the annual interest as provided for in his agreement. True he had a right to show that he had made the requisite payments, and thus defeat the forfeiture. But he had the same right and privilege under the act of March, 1897, which expressly provided that "the purchaser of said land shall have the right, [415] at any time *within six months after such indorsement of 'Lands forfeited,' to institute a suit in the district court of Travis county, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed and conclusive; and provided, that if 184 U. S.

any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the 1st day of November next after such death." What would have been the rights of the parties, if time had not been given by the last statute within which to contest the forfeiture evidenced by the commissioners' indorsement, is a question not now necessary to be decided.

It is apparent that the purchaser was not deprived by the act of 1897 of the right to be heard in a court of justice as to the fact of payment. His position under that act was quite as favorable as under the prior act of 1879. It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigant, if they have an opportunity to be heard at any time before final judgment is entered. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763. 8 Sup. Ct. Rep. 921; *Gallup v. Schmidt*, 183 U. S. 307, ante, 213 22 Sup. Ct. Rep. 164; *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925.

Neither Dolan nor any of the successors to his title availed of the opportunity to be judicially heard afforded by the law; and the reason for not doing so clearly appears in the admitted fact that the payments were in arrears for a considerable period of time. The tender made, if it could have had any legal effect at any time, was manifestly too late after the state had declared the forfeiture and sold the land to another.

Upon the whole, we agree with the conclusion of the supreme court of Texas, that no contract rights of a purchaser under the act of 1879 were impaired by the provisions of the subsequent act of 1897; that the 12th section of the act of 1879 was not, in legal contemplation, a stipulation by the state that *the only remedy which might be resorted to [416] by the state was the one therein provided for; that, in the language of Chief Justice Marshall, "the distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct." *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529. The judgment of the Court of Civil Appeals for the Third Judicial District of the State of Texas is affirmed.

UNITED STATES, Appt.,
v.
RIO GRANDE DAM & IRRIGATION COMPANY *et al.*

(See S. C. Reporter's ed. 416-425.)

Appeal in equity—discretionary orders—reversal for absence of material evidence.

1. Error in the denial of a motion for the 619

continuance of a cause and of an application for a rehearing does not constitute a ground for the reversal of the final decree.

2. A decree dismissing a suit by the United States, under the act of Congress of September 19, 1890, chap. 907 (26 Stat. at L. 426, 454, § 10), to enjoin the creation of an obstruction of a navigable stream, will be reversed in the exercise of the power, on an appeal in equity, to render such a decree as under all the circumstances may seem proper, and the cause will be remanded for further hearing, where material evidence is absent from the record because of the action of the trial court in not giving sufficient time to the government to prepare its case for the inquiry directed on a prior appeal to be made on the question whether the navigability of the stream would be substantially diminished by the creation of such obstruction.

[No. 239.]

Argued November 14, 15, 1901. Decided March 3, 1902.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for the Third Judicial District of New Mexico dismissing a suit by the United States to enjoin an obstruction of a navigable stream. *Reversed* and remanded for further hearing.

See same case below (N. M.) 65 Pac. 276.

The facts are stated in the opinion.

Mr. Marsden C. Burch argued the cause and filed a brief for appellant.

Mr. J. H. McGowan argued the cause and filed a brief for appellees.

[417] ***Mr. Justice Harlan** delivered the opinion of the court:

This suit presents a contest between the United States and the appellee corporations as to the right asserted by the latter to construct over and near the Rio Grande a certain dam and reservoir for the purpose of appropriating the waters of that river in their private business.

By the 7th article of the treaty of February 2d, 1848, between the United States and the Republic of Mexico, it is provided that "the river Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the 5th article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation.

. . . The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits." 9 Stat. at L. 928. And by the 4th article of the treaty of December 30th, 1853, between the same countries, it was further provided that "the several pro-

visions, stipulations, and restrictions contained in the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte, below the initial of the said boundary provided in the 1st article of this treaty, that is to say, below the intersection of the 31° 47' 30" parallel of latitude, with the boundary lines established by the late treaty dividing said river from its mouth upwards, according to the 5th article of the treaty of Guadalupe." 10 Stat. at L. 1034. Again, by a convention between the United States and Mexico, concluded December 26th, 1890, provision was made for an international boundary commission, empowered, upon application by the local authorities, to inquire whether any works were being constructed on the Rio Grande which were forbidden by treaty stipulations. 26 Stat. at L. 1512.

Just before the last-named convention, Congress, by the act of September 19th, 1890, chap. 907, provided: "That the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$5,000, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States." 26 Stat. at L. 426, 454, § 10.

These treaties with the above and other acts of Congress being in force, the present suit was brought, May 24th, 1897, in the district court for the third judicial district of New Mexico—the plaintiff being the United States of America, and the original defendant being the Rio Grande Dam & Irrigation Company, a corporation of that territory. By an amended bill, the Rio Grande Irrigation & Land Company—a British corporation doing business in the territory of New Mexico—was also made defendant. The latter corporation, it is alleged, was organized as an adjunct and agent of the New Mexico corporation.

The bill and amended bill show that the object of the suit was to obtain a decree enjoining the defendants from commencing or attempting to construct or build a certain [419] dam and reservoir* or any other dam, breakwater, reservoir or other structure, or obstruction of any character whatsoever, "across the Rio Grande or the waters thereof, or from maintaining such dam or obstruction in the territory of New Mexico, and especially at Elephant Butte in said territory, or any other point on said river in said territory of New Mexico, as shall affect the navigable capacity of said Rio Grande at any point throughout its course, whether in the territory of New Mexico or elsewhere."

The court of original jurisdiction said it was a fact of which it could take judicial notice, and it adjudged, that the Rio Grande was not navigable within the territory of New Mexico, and it dissolved the injunction theretofore granted against the defendants, and dismissed the suit. Upon appeal to the supreme court of the territory that decree was affirmed, August 24th, 1890.

The case was then brought here by appeal. This court in its opinion rendered May 22d, 1899, among other things said that to assert that Congress intended by its legislation "to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress." *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 708, 710, 43 L. ed. 1136, 1143, 1144, 19 Sup. Ct. Rep. 770, 777.

Referring especially to the above act of September 19th, 1890, the court also said: "It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done [420] or however *done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of that prohibition. Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National government, and that nothing should be done by any state tending to destroy that navigability without the explicit assent of the National government, enacted the statute 184 U. S.

ute in question. And it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream. . . . The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." 174 U. S. 690, 708, 43 L. ed. 1136, 1143, 19 Sup. Ct. Rep. 770, 777.

The decree of the supreme court of the territory was reversed by this court, and the cause was remanded "with instructions to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish."

The mandate of this court, based upon its final order of May 22d, 1899, was issued June 24th, 1899. On the 14th of July, 1899, the supreme court of the territory remanded the cause to the court of original jurisdiction to be there proceeded with in accordance with our mandate.

On the 5th day of August, 1899, the district court heard, at chambers, an application of the defendants, based on notice to the United States, to set the cause for final hearing upon evidence taken under the mandate of the supreme court of the territory. That application was sustained, and the cause was set for final hearing on the 1st day of November, 1899.

Subsequently, October 17th, 1899, the United States moved the court for a further continuance and extension of time for the *hearing of the cause, until February 5th, [421] 1900, or such other date as the court deemed reasonable and proper. The grounds upon which the motion was based were stated in writing, as follows: "That said plaintiffs have been and are unable to collect and present to this honorable court the necessary and proper evidence and oral testimony from witnesses for a proper presentation of the plaintiffs' side of said cause, notwithstanding having used due diligence to that end, all of which will more fully appear from an affidavit hereto attached and made a part of this motion in support thereof, and to which the court is respectfully referred. The plaintiffs, as a condition for the extension of time for the taking of testimony for the trial of said cause, have offered and hereby offer to enter into any proper and reasonable stipulation to enable the supreme court of the territory of New Mexico to take jurisdiction of any appeal which may be taken by either party at its ensuing January term, and dispose of the cause during said term, or at any adjourned session of the same."

In support of its motion for continuance, the government filed the affidavit of its attorney, Mr. Burch, who was specially charged with the duty of representing its interests in its litigation. That affidavit is

too lengthy to be embodied in this opinion. It is sufficient to say that it fully supported the grounds of the motion made by the government for further time.

The motion for a continuance was sustained only so far as to fix December 12th, 1899, as the date for the final hearing of the cause. The hearing was commenced on the latter day, and continued from day to day until December 21st, 1899, when the cause was taken under advisement. On the 2d day of January, 1900, a finding of facts was filed in the court. In the last paragraph of that finding it was stated "that the intended acts of the defendants in the construction of a dam or dams, or reservoirs, and in appropriating the waters of the Rio Grande, will not substantially diminish the navigability of that stream within the limits of the present navigability." The court ordered a decree to be prepared dismissing the bill.

[422] On the 3d of January, 1900, the government moved to set aside the findings and grant a rehearing upon the ground of newly discovered evidence which could not by any reasonable diligence on its part have been discovered and procured for use on the hearing of the cause. The grounds of the motion were stated in writing, and were abundantly sustained by the affidavits filed therewith.

The motion for rehearing was denied, and by a final order, entered January 9th, 1900, the bill was dismissed. From that order the present appeal was prosecuted.

At the argument of the cause our attention was called to the action of the district court in setting the cause for final hearing at a date so early as the 1st day of November, 1899; to the denial of the motion made on behalf of the United States on the 17th of October, 1899, to extend the time for final hearing to February 5th, 1900; and to the order denying the motion, made after the facts were found but before final decree, for a rehearing. The making of the last order was specially assigned for error.

The inquiry which this court directed to be made, namely, whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande would substantially diminish the navigability of that stream within the limits of present navigability was not only of great importance, but was one that could not properly be made and concluded within the time ordinarily required for the preparation of an equity cause for final hearing. We think that the district court, upon the showing made by the government, might well have granted the motion to postpone the final hearing to a date later than that fixed. We make the same observations in reference to the motion for a rehearing in respect of the facts to be specially found, supported by affidavits as to newly discovered evidence, and made before the final decree was entered. The evidence set forth in those affidavits, if it had been brought before the court, would, we think, have materially strengthened the case of the United States.

But the motion for the continuance of the

cause, and the application for a rehearing, were addressed to the discretion of the trial court; and it is well settled that matters of discretion *or practice cannot, generally [423] speaking, be made the basis of an appeal, and do not constitute in themselves grounds for the reversal of a final decree. 2 Dan. Ch. Pl. & Pr. 5th ed. *1462, and authorities cited in note, *1463; *Cook v. Burnley*, 11 Wall. 659, 672, 20 L. ed. 29, 31; *Freeborn v. Smith*, 2 Wall. 160, 176, 17 L. ed. 922, 924; *Parsons v. Bedford*, 3 Pet. 433, 445, 7 L. ed. 732, 736; *Wiggins v. Gray*, 24 How. 303, 306, 16 L. ed. 688, 689; *Woods v. Young*, 4 Cranch, 237, 2 L. ed. 607; *Sims v. Hundley*, 6 How. 1, 6, 12 L. ed. 319, 321; *Thompson v. Selden*, 20 How. 195, 198, 15 L. ed. 1001, 1002; *San Antonio v. Mehaffy*, 96 U. S. 312, 315, 24 L. ed. 816, 817; *Terre Haute & I. R. Co. v. Struble*, 109 U. S. 381, 384, 27 L. ed. 970, 971, 3 Sup. Ct. Rep. 270. We cannot therefore reverse the decree merely upon the ground that the trial court erred in its denial of the motions to which we have referred.

But there are other considerations which may be properly made the basis for the reversal of the decree to the end that injustice may not be done. As upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper. *Ridings v. Johnson*, 128 U. S. 212, 218, 32 L. ed. 401, 403, 9 Sup. Ct. Rep. 72. If it appears that injustice may be done by proceeding to a final decree upon the record as it is presented to us, we have the power to forbear a determination of the merits and remand the cause for further preparation.

In *Estho v. Lear*, 7 Pet. 130, 131, 8 L. ed. 632, 633, involving the validity of a certain paper purporting to be and which had been recorded as the last will and testament of Kosciuszko, the bill charged that the paper was not a will. The bill made no reference to any other will. The answer insisted that the will referred to in the bill was a valid instrument and operative. Chief Justice Marshall, speaking for the court, said: "Before the court can decide the intricate questions which grow out of this will, we think it necessary to possess some information which the record does not give." It appearing that the testator had made another will, which was not in the record, the court said that "since we are informed of its existence, it would be desirable to see it. We do not think the case properly prepared for decision; and therefore direct that the decree be reversed and the cause remanded, with liberty to the plaintiff to amend his bill." In *United States v. Galbraith*, 22 How. 89, 96, 16 L. ed. 321, 323, the question was as *to the validity of a claim for five [424] leagues of land. The Board of Land Commissioners decided against the United States, upon the ground that there was an absence of any rebutting testimony that would overcome the prima facie case made by the claimant. Speaking by Mr. Justice Nelson, this court said that it was "of opinion that, in consideration of the doubtful

character of the claim, and entire want of any merits upon the testimony, the decree of the court below should be reversed, and the case remitted for further evidence and examination." In *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, one of the questions arising in the pleadings was whether the Illinois Central Railroad Company was entitled to maintain certain docks, piers, and wharves on the lake front at Chicago. The circuit court decided that question in favor of the railroad company. But this court was of opinion that the evidence in the record was not adequate for the determination of that question, and upon its own motion reversed the decree and remanded the cause with directions for further investigation, so as to enable the court to determine whether the structures in question extended into the lake beyond the point of practical navigability, having reference to the manner in which commerce was conducted on the lake.

In the present case it is quite clear that the record does not contain evidence of a material character, and that the absence of such evidence is due to the action of the trial court in not giving sufficient time to the government to prepare its case. We cannot resist the conviction that if we proceed to a final decree upon the present record, great wrong may be done to the United States, as well as to all interested in preserving the navigability of the Rio Grande. As the record does not show that the representatives of the government were chargeable with want of diligence in their preparation of the cause, we think that the decree should be reversed and the cause remanded, with liberty to both parties to take further evidence.

[425] We are the better satisfied with this disposition of the case because the questions presented may involve rights secured by treaties concluded between this country and the Republic of Mexico. As the latter country cannot be indifferent to the result of this litigation, and is not a party to the record, the court ought not to determine the important question before us in the absence of material evidence, which we are not at liberty upon this record to doubt would be in the record but for the somewhat precipitate action of the trial court.

Without considering the merits the decree must be reversed, and the cause remanded to the Supreme Court of New Mexico, with directions to reverse the decree of the District Court and to remand the case with direction to grant leave to both sides to adduce further evidence.

It is so ordered.

Mr. Justice **Gray** and Mr. Justice **McKenna** did not sit in this case nor participate in its decision.

Mr. Justice **Brewer** and Mr. Justice **Shiras** dissented.
184 U. S.

ALFRED BOOTH, *Plff. in Err.*,
v.

PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 425-432.)

Constitutional law—liberty — prohibition against options.

The prohibition against options to buy or sell grain or other commodities at a future time, which is made by Ill. Crim. Code, § 130, does not invade the liberty granted to every citizen by U. S. Const. 14th Amend.

[No. 201.]

Argued and Submitted November 6, 1901.
Decided March 3, 1902.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a conviction for a violation of the Illinois act against options. *Affirmed.*

See same case below, 186 Ill. 43, 50 L. R. A. 762, 57 N. E. 798.

The facts are stated in the opinion.

Mr. **Charles H. Aldrich** argued the cause, and, with Mr. **Lee D. Mathias**, filed a brief for plaintiff in error:

The word "options" at the time the law was enacted (1874) was a trade word, and had the significance of a contract of purchase and sale of grain or other commodity for future delivery, in which the parties did not intend to deliver the thing bought or sold, but intended to settle the transaction by the payment from one to the other of the difference between the contract price and the price at the date of delivery, in accordance with the rise or fall of the market.

Shaw v. Clark, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786; 8 Am. & Eng. Enc. Law, p. 1011; *Wolcott v. Heath*, 78 Ill. 433; *Tenney v. Foote*, 95 Ill. 99; *Pearce v. Foote*, 113 Ill. 228, 58 Am. Rep. 414; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646.

The supreme court of Illinois has practically overruled this interpretation of the act, and held that the legislature did not intend by the act to make the most prevailing form of gambling in commodities a crime, but only intended that the law should prohibit option contracts, strictly speaking, whether the same were moral or immoral.

Schneider v. Turner, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497; *Schlee v. Guckenhaimer*, 179 Ill. 593, 54 N. E. 302; *Coreoran v. Lehigh & F. Coal Co.* 138 Ill. 390, 28 N. E.

NOTE.—As to the constitutionality of statutes restricting contracts and business—see note to *State v. Loomis* (Mo.) 21 L. R. A. 789.

On the validity of contracts for future delivery, and of optional contracts—see notes to *Preston v. Cincinnati, C. & H. V. R. Co.* (C. C. S. D. Ohio) 1 L. R. A. 141; *Osgood v. Bauder* (Iowa) 1 L. R. A. 655; *Sprague v. Warren* (Neb.) 3 L. R. A. 679; *Kimball v. Gafford* (Iowa) 4 L. R. A. 398; *Harvey v. Merrill* (Mass.) 5 L. R. A. 200; *Austin v. Davis* (Ind.) 12 L. R. A. 120; *Baumgardner v. Leavitt* (W. Va.) 12 L. R. A. 776, and *Irwin v. Williar*, 28 L. ed. U. S. 225.

759; *Kerting v. Hilton*, 51 Ill. App. 437; *Ubben v. Binnian*, 78 Ill. App. 330; *McKeon v. Wolf*, 77 Ill. App. 325; *Wolsey v. Neeley*, 62 Ill. App. 141; *Peterson v. Currier*, 62 Ill. App. 163.

Bona fide speculation is not gambling.

Kirkpatrick v. Bonsall, 72 Pa. 155.

Option contracts are not immoral, nor were they illegal at common law.

Schneider v. Turner, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497; *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302.

Courts of equity compel the specific performance of option contracts.

Watts v. Kellar, 5 C. C. A. 394, 12 U. S. App. 274, 56 Fed. 1.

The act, in so far as it prohibits the making of bona fide moral option contracts, deprives the citizen of liberty and property without due process of law. The liberty to contract is protected by the 14th Amendment of the Constitution of the United States.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Re Grice*, 79 Fed. 627; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288.

If a statute prohibiting dealing in "futures" must be construed to apply to all contracts for future delivery which a broad interpretation of the statute might justify, then it would be unconstitutional.

Fortenbury v. State, 47 Ark. 188, 1 S. W. 58. See also *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39.

The act cannot be justified under the doctrine of police power.

Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; *Wilkinson v. Lealand*, 2 Pet. 627, 7 L. ed. 542; *Des Plaines v. Poyer*, 123 Ill. 348, 14 N. E. 677; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *State v. Noyes*, 47 Me. 189.

Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462, 465.

The reasonableness or unreasonableness of a state enactment is always to be considered in determining whether the legislation comes within the police power, and it is submitted that the statute as construed comes within the principles announced in—

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Reb-*

man, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

Messrs. Howland J. Hamlin and Elbert S. Smith submitted the cause for defendant in error:

The power of the legislature to pass police regulations is not restricted by any constitutional limitation.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The police power is the general power of the government to protect and promote the public welfare, even at the expense of private rights.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; 18 Am. & Eng. Enc. Law, p. 739, *Police Power*.

The police power extends, not only to the right to prohibit gambling, but also to prohibit those acts which may be used as disguises for unlawful practices, and so have a tendency to injure public interests and degrade the public welfare.

Tiedeman, Pol. Power, § 99a; *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497; *Tenney v. Foote*, 4 Ill. App. 594, 95 Ill. 99; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 98, 31 L. R. A. 529, 43 N. E. 774; *Pearce v. Foote*, 113 Ill. 234, 58 Am. Rep. 414.

The general assembly may, by valid enactments,—i. e., by due process of law,—prohibit all things hurtful to the comfort, safety, and welfare of society, even though such prohibition invades the right of liberty or property of an individual.

Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; *Magner v. People*, 97 Ill. 320; 18 Am. & Eng. Enc. Law, pp. 739, 740.

With the wisdom, policy, or necessity for such enactments, courts have nothing to do.

Booth v. People, 186 Ill. 43, 50 L. R. A. 762, 57 N. E. 798.

Laws whose purpose and tendency are to suppress gambling or other crimes are constitutional.

Crandell v. White, 164 Mass. 54, 41 N. E. 204.

Where a law operates alike upon all persons and property similarly situated it is not obnoxious to any constitutional provi-

sion guaranteeing equal protection to all persons and classes of persons.

Barbier v. Connolly, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Humcs*, 115 U. S. 513, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Walston v. Nevins*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1037, 19 Sup. Ct. Rep. 594.

It is not required that the statute shall embrace all kinds of personal property, whether they are the usual subjects of option dealings or not.

State v. Gritzner, 134 Mo. 512, 36 S. W. 39.

[426] *Mr. Justice Harlan delivered the opinion of the court:

By § 130 of the Criminal Code of Illinois it is provided that "whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." Ill. Rev. Stat. Crim. Code, § 130.

The defendant was indicted in the criminal court of Cook county, Illinois, being charged with violating this statute so far as it related to options to buy grain or other commodities at a future time.

The memorandum of the option purchased by the defendant was as follows:

B. Al. V. Booth, Grain and Provision Broker.
Chicago, Aug. 16, 1899.
10 Weare Com. Co.
Sep. corn, 1899. C., 31½. Paid.
Good till close of 'change, Sat., Aug. 26,
1899. Weare C. Co.
J. C. C.

The defendant was found guilty and adjudged to pay a fine of \$100 and the costs of the prosecution.

At the trial, by motions to quash the indictment, in arrest of judgment, and for a new trial, the accused insisted that the statute under which he was prosecuted was repugnant to that clause of the 14th Amendment of the Constitution of the United States declaring that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This contention was

overruled both in the trial court and in the supreme court of Illinois. 186 Ill. 43, 50 L. R. A. 762, 57 N. E. 798.

There was no dispute as to the meaning of the above memorandum. It meant that on the 16th day of August, 1899, the defendant, a grain and provision broker, and the Weare Commission Company, made an agreement whereby, in consideration of the sum of \$10 paid by Booth, he obtained from the company and was given the option of purchasing from it 10,000 bushels of corn at 31½ cents a bushel,—the option to remain good until the close of business on the 26th day of August, 1899.

In *Schneider v. Turner*, 130 Ill. 28, 39, 6 L. R. A. 164, 166, 22 N. E. 497, 498, the question was whether the statute embraced an agreement in these words: "Chicago, November 11, 1885. In consideration of one dollar and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck, and Fred W. Peck seventeen hundred and eighty-six shares of the capital stock of the North Chicago City Railway at six hundred dollars per share, if taken on or before the 15th day of December, 1885. V. C. Turner."

It was contended that that agreement was not prohibited by the statute: that the legislature only intended to make such option contracts unlawful as were gambling contracts, that is, option contracts that did not contemplate the delivery or acceptance of any property and which only required a settlement by "differences;" whereas it was insisted, the option there in question had no element of gambling, being only one that entitled the parties obtaining it to elect on or before a named day whether they would buy the stock described in the agreement.

The supreme court of Illinois, in that case, observed that at common law all gambling contracts were void, and that an agreement [428] for the sale of property was a mere wager or gambling contract and void, if made with the understanding of the parties that no property was to be delivered or accepted but could be satisfied by an adjustment simply on the basis of the difference between the contract and the market price. It said: "It must be presumed that the object of the legislature was to declare that unlawful which theretofore had been lawful. Prior to this act it was lawful to contract to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at the common law. The statute makes them unlawful and void in Illinois."

That such is the scope and effect of the statute in question was recognized by the supreme court of Illinois in the present case. *Booth v. People*, 186 Ill. 43, 50 L. R. A. 762, 57 N. E. 798.

Taking the statute to mean what the highest court of the state says it means, is it unconstitutional?

In support of the position that the statute is repugnant to the 14th Amendment, the learned counsel for the plaintiff advance

many propositions that meet our entire approval. They cite, as in their judgment controlling, what this court said in *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431, namely, that the liberty mentioned in the 14th Amendment "means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

These declarations state, in condensed form, principles which had been announced in previous cases, and which may be regarded as expressing the deliberate judgment of this court. But those declarations do not, in themselves, determine the question now presented. When it is said that the liberty of the citizen includes freedom to use his faculties "in all lawful ways," and to earn his living by any "lawful calling," the inquiry remains *whether the particular calling or the particular way brought in question in a given case is lawful, that is, consistent with such rules of action as have been rightfully prescribed by the state.

It is, however, said that the statute of the state, as interpreted by its highest court, is not directed against gambling contracts relating to the selling or buying of grain or other commodities, but against mere options to sell or buy at a future time without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling. The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights

secured by the fundamental law. *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855.

We cannot say from any facts judicially known to the court, or from the evidence in this case, that the prohibition of options to sell grain at a future time has, in itself, no reasonable relation to the suppression of gambling grain contracts in respect of which the parties contemplate only a settlement on the basis *of differences in the contract and[430] market prices. Perhaps the legislature thought that dealings in options to sell or buy at a future time, although not always or necessarily gambling, may have the effect to keep out of the market, while the options lasted, the property which is the subject of the options, and thus assist purchasers to establish, for a time, what are known as "corners," whereby the ordinary and regular sales or exchanges of such property, based upon existing prices, may be interfered with and persons who have in fact no grain, and do not care to handle any, enabled to practically control prices. Or, the legislature may have thought that options to sell or buy at a future time were, in their essence, mere speculations in prices and tended to foster a spirit of gambling. In all this the legislature of the state may have been mistaken. If so, the mistake was not such as to justify the conclusion that the statute was a mere cover to destroy a particular kind of business not inherently harmful or immoral. It must be assumed that the legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be attained and which it was competent for the state to accomplish.

The supreme court of the state in this case said: "The practice of gambling on the market prices of grain and other commodities is universally recognized as a pernicious evil, and that the suppression of such evil is within the proper exercise of the police power has been too frequently declared to be open to discussion. The evil does not consist in contracts for the purchase or sale of grain to be delivered in the future, in which the delivery and acceptance of the grain so contracted for is bona fide contemplated and intended by the parties, but in contracts by which the parties intend to secure, not the article contracted for, but the right or privilege of receiving the difference between the contract price and the market price of the article. The object to be accomplished by the legislation under consideration is the suppression of contracts of the latter character, which are in truth mere wagers as to the future market price of *the article or commodity which is the[431]

subject-matter of the wager. Clearly a contract which gives to one of the contracting parties a mere privilege to buy corn, but does not bind him to accept and pay for it, is wanting in the elements of good faith to be found in a contract of purchase and sale where both parties are bound, and offers a more convenient cover and disguise for mere wagers on the price of grain than contracts which create the relation of vendor and vendee. Such contracts are in the nature of wagers, that contracted for being the mere privilege to buy the grain should its market value prove to be greater than the price fixed in the contract for such privilege. The prohibition of the right to enter into contracts which do not contemplate the creation of an obligation on the part of one of the contracting parties to accept and pay for the commodity which is the purported subject-matter of the contract, but only to invest him with the option or privilege to demand the other contracting party shall deliver him the grain if he desires to purchase it, tends materially to the suppression of the very evil of gambling in grain options which it was the legislative intent to extirpate, for the reason such evil injuriously affected the welfare and safety of the public. The denial of the right to make such contracts tended directly to advance the end the legislature had in view, and was not an inappropriate measure of attack on the evil intended to be eradicated. So far as that point is concerned, the act must be deemed a valid law of the land, and as such must be enforced, though it infringe in a degree upon the property rights of citizens. To that extent private right must be deemed secondary to the public good." 186 Ill. 51, 50 L. R. A. 764, 57 N. E. 800.

We are unwilling to declare these views of the state court to be wholly without foundation, and therefore cannot adjudge that the legislature of Illinois transcended the limits of constitutional authority when enacting the statute in question. In reaching this conclusion we have recognized the principle, long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional, unless it be plainly and palpably so.

The statute here involved may be unwise. [432] But an unwise enactment is not necessarily, for that reason, invalid. It may be, as suggested by counsel, that the steady, vigorous enforcement of this statute will materially interfere with the handling or moving of vast amounts of grain in the West which are disposed of by contracts or arrangements made in the Board of Trade in Chicago. But those are suggestions for the consideration of the Illinois legislature. The courts have nothing to do with the mere policy of legislation.

The judgment of the Supreme Court of Illinois is affirmed.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.
184 U. S.

JOHN C. GOODRICH *et al.*, Plffs. in Err.,
v.

CITY OF DETROIT.

(See S. C. Reporter's ed. 432-441.)

Constitutional law—due process—notice of proceedings in local improvement—misdescription of lands.

1. Notice to the owners of land which may be assessed for a local improvement need not be given of the proceedings to make the improvement, in order to constitute due process of law, if none of their property is taken for that purpose, and they have notice and opportunity to be heard on the question of the assessment of their property.
2. A resolution that the common council fix and determine that a specified district is benefited by the opening of a certain street, and that there be assessed and levied upon the real estate therein included a certain amount, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire, by the improvement, is in substantial conformity to Mich. Comp. Laws 1897, § 3406, which in effect provides that the common council may assess upon such district as it deems benefited the whole or a part of the cost of the improvement, in proportion, as nearly as may be, to the advantage which each lot derives, and limits the assessment on any lot to the benefits received.
3. A misdescription of the lands taken in proceedings to make a local improvement constitutes no defense to a person whose lands were not taken, against an assessment upon his property for benefits.

[No. 123.]

Argued January 20, 1902. Decided March 3, 1902.

IN ERROR to the Supreme Court of the State of Michigan to review a decision affirming a decree dismissing a bill to enjoin the collection of assessments for benefits from a street improvement. *Affirmed.*

See same case below, 123 Mich. 559, 82 N. W. 255.

Statement by Mr. Justice **Brown**:

*This was a bill in equity filed in the circuit court for the county of Wayne by Goodrich and another against the city of Detroit and its treasurer, to enjoin the defendants

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Ganuon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gillman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 258; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption* (Ind.) 2 L. R. A. 657; *Chauvin v. Valiton* (Mont.) 3 L. R. A. 194, and *Ulman v. Baltimore* (Md.) 11 L. R. A. 225.

On the necessity of special benefit to sustain assessments for local improvements—see note to *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755.

from enforcing the collection of certain taxes assessed upon several parcels of property owned by the plaintiffs, for benefits derived from the opening of Milwaukee avenue, upon the ground, amongst others, that such assessment was in violation of the 14th Amendment, and deprived plaintiffs of their property without due process of law.

These proceedings were taken under the authority of certain sections of the Compiled Laws of 1897, printed in the margin.†

[434] *The proceedings in the case were substantially as follows: On November 14, 1893, a resolution was passed by the common council providing for the opening and extending of Milwaukee avenue, and on January 6, 1894, a petition by the city was filed in the recorder's court, together with a map or plan of the private property proposed to be taken, certified as correct by the city engineer. The owners and persons interested in the real estate proposed to be taken were duly summoned, a jury impaneled, a hearing had, and a verdict rendered condemning certain lands, and fixing the total amount of damages at \$15,214.75. This verdict was confirmed by the court.

Thereafter, and on August 7, 1894, a resolution was adopted by the common council, which was rescinded on November 20, and on January 22, 1895, another was adopted of which the following is a copy:

"Resolved, that the said common council of the city of Detroit do hereby fix and determine that the following district and portion of said city of Detroit, to wit: (Here follows list of descriptions, many of which are different from those in first assessment district) is benefited by the opening of Milwau-

kee avenue, from Chene street to the easterly city limits, where not already opened. And further resolved, that there be assessed and levied upon the several pieces and parcels of real estate included in the above descriptions, the amount of \$15,214.75, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire [435] by this improvement. And further resolved, that the board of assessors of the city of Detroit be, and they are hereby, directed to proceed forthwith to make an assessment roll in conformity with the requirements of the charter of the city of Detroit relating to special assessments for collecting the expense of public improvements when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of \$15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be of said amount, in accordance to the amount of benefit derived by such improvements."

On March 12, 1895, the assessors reported an assessment roll for defraying the expenses of opening the avenue, which was affirmed by the common council April 4, 1895. The property of plaintiffs was included in the assessment district, which was fixed and determined by the common council.

Defendants filed an answer, which was a little more than a demurrer to the bill, and upon hearing upon pleadings and proofs the bill was dismissed, an appeal taken to the supreme court, by which the decree of the circuit court was affirmed. 123 Mich. 559, 82 N. W. 255.

†"Sec. 3394. The city, village, or county clerk shall make and deliver to such attorney, as soon as may be, a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the city, village, or county, in the court having jurisdiction of the proceedings, a petition signed by him in his official character and duly verified by him: to which petition a certified copy of the resolution of the common council, board of trustees, or board of supervisors shall be annexed, which certified copy shall be prima facie evidence of the action taken by the common council, board of trustees, or board of supervisors, and of the passage of said resolutions. The petition shall state, among other things, that it is made and filed as commencement of judicial proceedings by the municipality or county in pursuance of this act to acquire the right to take private property for the use or benefit of the public, without consent of the owners, for a public improvement, designating it, for a just compensation to be made. A description of the property to be taken shall be given, and generally the nature and extent of the use thereof that will be required in making and maintaining the improvement shall be stated, and also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises. The petition shall also state that the common council or board of trustees or board of supervisors has declared such public improvement to be necessary, and that they deem it necessary to take the private property described in that behalf for such improvement

for the use or benefit of the public. *The petition shall ask that a jury be summoned and impaneled to ascertain and determine whether it is necessary to make such public improvement, whether it is necessary to take such private property as it is proposed to take, for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor.* The petition may state any other pertinent matter or things and may pray for any other or further relief to which the municipality or county may be entitled within the objects of this act.

"Sec. 3395. Upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition, stating briefly the object of said petition, and commanding them, in the name of the people of the state of Michigan, to appear before said court, at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, and show cause, if any they have, why the prayer of said petition should not be granted."

"Sec. 3399. The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement, and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just," etc.

Section 3406, which is also pertinent, is reprinted in full in *Voight v. Detroit*. 184 U. S. 115, ante, 459, 22 Sup. Ct. Rep. 337.

Mr. Eldridge F. Bacon argued the cause and filed a brief for plaintiffs in error:

As the statute does not provide for any notice or hearing, or any tribunal where the landowners liable to assessment can have a hearing, as to the necessity of making the improvement and the amount of compensation, it is in violation of the 14th Amendment.

Paul v. Detroit, 32 Mich. 108; *Wells County v. Fahlor*, 132 Ind. 426, 31 N. E. 1112; *State ex rel. Flint v. Fond du Lac*, 42 Wis. 287; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Scott v. Toledo*, 36 Fed. 385.

The determination by the aldermen of the land benefited, and the amount to be assessed upon the land, is judicial in its nature, and cannot be binding upon the taxpayer, and the taxpayer is entitled to a hearing before his rights are finally determined by such action.

Scars v. Boston Street Comrs. 173 Mass. 350, 53 N. E. 876; *Murdock v. Cincinnati*, 39 Fed. 891.

The statute violates the 14th Amendment because by its express terms the city council is authorized to assess the whole or any just proportion of the amount awarded by the jury upon the lands in the assessment district, without limiting such assessment to the amount which the lands included in the district are benefited by the improvement.

Detroit v. Recorder's Ct. Judge, 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *State, Agents, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380; *Barnes v. Dyer*, 56 Vt. 469; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

The resolution of the common council directing the assessment conflicts with the 14th Amendment because it does not find that the property included in the assessment district is benefited to the amount ordered to be assessed upon such district.

Adams v. Bay City, 78 Mich. 211, 44 N. W. 138; *Greeley v. People*, 60 Ill. 19; *Crawford v. People ex rel. Runsey*, 82 Ill. 557; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Dyar v. Farmington*, 70 Me. 515.

By this resolution the assessors were not directed to assess upon each piece of property only such amount as it was benefited, but were directed to assess the entire amount ratably upon the various lots, in proportion to the benefit of each lot, although such assessment might be several times the amount of the benefit; and while the proportion may have been maintained as between the various parcels of property, still the assessment was not limited to the benefit to each lot, and was void.

Greeley v. People, 60 Ill. 19.

As the petition of the city of Detroit, and the certified copy of the resolution to the

common council, attached thereto, do not describe the several parcels of land to be taken for such improvement, the court has no jurisdiction to proceed in the matter.

Mathias v. Carson, 49 Mich. 465, 13 N. W. 818; *Toledo, A. A. & N. M. R. Co. v. Munson*, 57 Mich. 42, 23 N. W. 455; *Detroit, S. & D. R. Co. v. Gartner*, 95 Mich. 318, 54 N. W. 946; *Galena & C. U. R. Co. v. Pound*, 22 Ill. 399; *Chicago & N. W. R. Co. v. Chicago*, 132 Ill. 372, 23 N. E. 1036; *New York C. & H. R. R. Co.* 70 N. Y. 191; *California C. R. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599.

The verdict of the jury follows substantially the same descriptions given in the petition, and does not contain any description of the several parcels of land taken, and contains no data from which the several parcels of property condemned can be ascertained, and is therefore void.

Milton v. Wacker, 40 Mich. 229; *Bay City Belt Line R. Co. v. Hitchcock*, 90 Mich. 533, 51 N. W. 808; *Vail v. Morris & E. R. Co.* 21 N. J. L. 189.

The proceedings being void, the city did not acquire title to the street through such parcels, and, not having acquired title, it would have no authority to levy a tax to pay for such parcels, and as the amount of damages awarded by the jury, and the amount assessed upon the property, included the sums allowed as compensation for such property, the assessment is unauthorized and void.

Brush v. Detroit, 32 Mich. 43; *Detroit, M. & T. R. Co. v. Detroit*, 49 Mich. 47, 12 N. W. 904; *Lorenz v. Armstrong*, 3 Mo. App. 574.

The rights of no person can be concluded by the judgment in a case to which he is not a party.

Hale v. Finch, 104 U. S. 261, 26 L. ed. 732.

A judgment of the state court, even if it is authorized by statute, whereby private property is taken for the city, or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the 14th Amendment to the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Mr. Timothy E. Tarsney argued the cause and filed a brief for defendant in error:

The taxpayer has no right to be heard upon the determination of the extent of the territory to be embraced within the assessment district, for this is a purely legislative question.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hager v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Spencer v. Merchant*, 125 U. S. 349, 31 L. ed. 764, 8 Sup.

Ct. Rep. 921; *Walston v. Nevins*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Williams v. Eggleston*, 170 U. S. 305, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

Whether the property was defectively described in the condemnation proceedings was settled by the confirmation of the court and verdict of the jury in the recorder's court. That court had jurisdiction of the parties and the subject-matter; its judgments cannot be collaterally attacked except for questions affecting its jurisdiction.

Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 9 L. ed. 490. See also *Moore v. Greene*, 19 How. 69, 15 L. ed. 533; *Ransom v. Williams*, 2 Wall. 313, 17 L. ed. 803; *Comstock v. Crawford*, 3 Wall. 396, 18 L. ed. 34.

[435] *Mr. Justice **Brown** delivered the opinion of the court:

This case raises the question whether certain proceedings taken under the Compiled Laws of Michigan for the assessment of benefits upon neighboring lots derived from the opening of Milwaukee avenue, in the city of Detroit, deprived the owners of such lots of their property without due process of law.

[436] These proceedings began with a resolution of the common council declaring the necessity of opening the street. Thereupon the city petitioned the recorder's court for a jury to determine the necessity of such improvements and of taking *private property (a map or plan of which was annexed to the petition), and "to ascertain and determine the just compensation to be made for such private property proposed to be taken," and for the issue of a summons to all persons mentioned in the petition as being interested in the property proposed to be taken. The jury returned a verdict in favor of the necessity of opening the avenue, of taking private property therefor, and fixed the compensation at the aggregate sum of \$15,214.75.

Thereupon the common council passed another resolution fixing the district benefited by the opening, and declaring that there should be assessed upon the real estate included in such district the sum of \$15,214.75, "in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement." The resolution further required the board of assessors to make an assessment roll to that amount, assessing upon each lot "a ratable proportion, as near as may be, of said amount in accordance to the amount of benefit derived by such improvements." Thereupon the matter was referred to the board of assessors, who reported the amount assessed against each lot. The bill averred that none of the plaintiffs' land thus assessed abutted upon those parts of the street opened by these proceedings, but that they had already dedicated to the city all that portion of Milwaukee avenue lying in front of their lands, without cost or expense to the city.

630

Plaintiffs made a large number of objections to the validity of such assessment, none of which require to be noticed, except so far as they are pertinent to the provision of the 14th Amendment, concerning due process of law.

1. The first of these objections is that while the statute provides for a notice to the parties whose land is to be taken for the street, no provision is made for giving notice to the owners of the land liable to be assessed for the improvement. Section 3394 provides for the filing of a petition by the city attorney for the condemnation of land, and that the petition, among other things, shall contain "a description of the property to be taken, . . . also the names of the owners and others interested in the property, so far as can be ascertained, including those in *possession of the premises." See-[437] tion 3395 provides that, "upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition," that is, all interested in the property to be taken, "commanding them, . . . [to] show cause, if any they have, why the prayer of such petition should not be granted."

It will be observed that this section makes no express provision for notice to the owners of property *not* to be taken, but *assumed to be benefited* by the improvements. These owners, however, are not then known, because the proceedings for the condemnation of the property taken precedes the determination of the benefits and the fixing of the assessment district. The sections of the statute taken together provide for two distinct and separate proceedings: (1) for the assessment of compensation for property *taken*, and (2) for the assessment of benefits to property *not* taken. In the former, only the owners of the land taken are interested. Their rights are amply protected by §§ 3394 and 3395, requiring notice to be given to show cause why the petition should not be granted.

The argument of the plaintiffs is that the owners of the property liable to be assessed for the *benefits* are just as much interested in the question as to the necessity of making the improvement and the amount of compensation as are the owners of land to be taken for such improvement, and the same reasons for notice apply in the one case as in the other. A number of cases are cited which, it is argued, give countenance to this position. *Paul v. Detroit*, 32 Mich. 108; *Wells County v. Fahlor*, 132 Ind. 426, 31 N. E. 1112; *State v. Fond du Lac*, 42 Wis. 287; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Scott v. Toledo*, 1 L. R. A. 688, 36 Fed. 385.

But whatever weight be given to these authorities, the law in this court is too well settled to be now disturbed, that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands

184 U. S.

for such improvement, in which they have no direct interest. The position of the plaintiffs in this particular would require a re-
 [428] adjustment of *the entire proceedings, and a determination of the property incidentally benefited, before any proceedings are taken for the condemnation of land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this court that it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have prior notice.

Thus in *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, it was held that, if a state legislature direct the expense of laying out a street to be assessed upon the owners of land benefited thereby, and also determine the whole amount of the tax and what lands are, in fact, benefited, and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Said Mr. Justice Gray, p. 356, L. ed. p. 767, Sup. Ct. Rep. p. 927: "But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited." So, in *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, it was held that an enactment by Congress that taxes levied for laying water mains in the District of Columbia should be at a certain rate per front foot against all lots or lands abutting upon the street in which the main should be
 [439] laid, was conclusive alike *of the necessity of the work and of its benefit to all abutting property. So, also, it was said in *Williams v. Eggleson*, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617, 619: Nor "can it be doubted that, if the state Constitution does not prohibit, the legislature, speaking generally, may create, a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties
 184 U. S.

resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." Cooley, Taxn. 2d ed. p. 149.

This question, however, is decided in the case of *Voigt v. Detroit*, recently disposed of, 184 U. S. 115, ante, 459, 22 Sup. Ct. Rep. 337, and will not be further considered here. Indeed, so far as this question is concerned, this case might be affirmed upon the authority of that.

2. The second objection is that the resolution of January 22, 1895, fixing the assessment district and levying a gross amount thereon for benefits, does not expressly state that the property included therein is benefited to the amount ordered to be assessed. This resolution was passed in pursuance of § 3406, reprinted in the *Voigt Case*, 184 U. S. 115, ante, 459, 22 Sup. Ct. Rep. 337, which provides that "if the common council . . . believe that a portion of the city . . . will be benefited by such improvement, they may . . . determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited, and thereupon they shall by resolution fix and determine the district or portion of the city . . . benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may [be], to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement."

The resolution declares that the "common council do hereby fix and determine that the following district . . . is benefited by the opening of Milwaukee avenue," . . . and "that *there be assessed and levied upon the [440] several pieces and parcels of real estate, included in the above description, the amount of \$15,214.75, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement." If this resolution be not a literal, we think it is a substantial, compliance with the statute, declaring that if the common council believe that the property will be benefited by such improvement, they may determine the proportion of the compensation to be assessed upon the owners; but whether this be so or not, there was no want of due process of law within the 14th Amendment, inasmuch as § 3406 expressly provides, following the language already quoted, "that the assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying, and collecting the expense of a public improvement when a street is graded." Interpreting this, the supreme court of Michigan held in the case of *Voigt v. Detroit*, 123 Mich. 547, 82 N. W. 253, that

"the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement;" and further, that "when the proceeding has reached that stage when it becomes necessary to decide what proportion of the cost of a proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the owner of the land to be heard upon that question." There was, in that case, as well as in the one under consideration, no claim in the bill that plaintiffs' property was not benefited by the proposed improvement in excess of the amount assessed, nor was there any claim that he was not allowed to be heard in relation to the amount which should be assessed against his property. Upon such hearing the property owner may insist that his property was not benefited to the amount assessed, or that it was not benefited at all, and thus obtain every advantage which he might obtain were he informed of every step of the proceedings. The terms of the resolution, that each lot shall be assessed "in accordance with the amount of benefits derived from such improvements," opens the whole question of the amount of benefit derived by the lot, even to showing that no benefit whatever was occasioned by the improvement. It does not follow, however, that he has a right to be heard upon the extent of the territory to be embraced within the assessment district.

[441]

3. The last objection, that there were several of the parcels of land constituting the extension of Milwaukee avenue so defectively described that the judgment of condemnation was absolutely void, is untenable. Not only is it not shown that the plaintiffs were interested in the lands alleged to be misdescribed, but it is obviously impossible, in a proceeding to assess benefits upon other property, to show a misdescription in the lands taken for such improvement. *Voorhees v. Jackson ex dem. Bank of United States*, 10 Pet. 449, 9 L. ed. 490; *Comstock v. Crawford*, 3 Wall. 396, 18 L. ed. 34. It is not only an attempt to raise the question collaterally by one who has no interest in it, but it is exceedingly doubtful if a simple misdescription involves any Federal question whatever. The errors, too, were merely clerical, since a map of the property taken, annexed to the condemnation proceedings, exhibits accurately the lands affected thereby.

There was no error in the decree of the Supreme Court affirming the dismissal of the bill, and it is therefore affirmed.

Mr. Justice **Harlan** did not sit in this case.

UNITED STATES, Appt.,

v.

JOSE ISABEL MARTINEZ et al.

(See S. C. Reporter's ed. 441-450.)

Private land claims—parties to suit for
632

confirmation—recovery of value of lands patented to third parties—laches.

1. Failure to make patentees from the United States of land within the limits of a Spanish land grant parties to a suit for the confirmation of such grant, as required by § 6 of the court of private land claims act, does not affect the validity of the decree of confirmation, where the patents and the boundaries of the land patented are undisputed, as the only consequence of such omission in such a case is an acknowledgment of the title of such patentees to the land, and of its boundaries.
2. An unexplained delay of over six years after a land grant has been confirmed by the court of private land claims will defeat the right to recover a money judgment against the United States, under § 14 of the court of private land claims act, for the value of lands within the grant, disposed of and patented by the United States to third parties before the filing of the original petition.

[No. 169.]

Argued and Submitted January 31, 1902.
Decided March 3, 1902.

APPEAL from the Court of Private Land Claims to review a judgment against the United States for the value of lands within a Spanish land claim, which had been patented to third parties before the confirmation of the grant. *Reversed.*

Statement by Mr. Justice **Brown**:

*This was a petition, under the 14th sec-[442] tion of the court of private land claims act, for a money judgment against the United States for lands within a Spanish land claim, which lands had been patented by the United States to third parties before the Spanish land grant had been acted upon or confirmed.

The original proceeding out of which the present claim for indemnity grew was a suit begun February 28, 1893, by the present appellees, who, with one exception, claimed to be the heirs at law and legal representatives of Juan José Lobato, against the United States, in the court of private land claims, for the confirmation of a grant alleged to have been made to Lobato August 24, 1740, of which juridical possession was given, and the grant ratified and confirmed by the proper authorities June 15, 1744. In their petition it was alleged that the same tract had been previously granted to Cristobal de Torres, but that his grant had been revoked in 1733 and the tract declared to be Crown lands; that from the date of the grant to Lobato in 1740 and for a period of 153 years (down to the time of filing the petition) he and his legal representatives had been in peaceable adverse possession of the same, and that "there are no adverse holders, possessors, or claimants of or to any portion *of said tract." The suit resulted in a de-[443] cree in favor of the claimants (appellees) confirming the grant, and finding the title complete and perfect in the claimants, at the date of the cession by the treaty of Guadalupe Hidalgo. The decree fixed the bounda-

184 U. S.

ries of the tract as shown in a map annexed to the petition. From this decree no appeal was prosecuted, and becoming final, it was executed by a survey approved by the court, and the land patented to the grantees.

More than six years after the confirmation of the Lobato grant the petitioners filed the present petition, alleging that several parcels of land, amounting to 2,056 acres in the aggregate, had been disposed of, granted, and patented by the United States to certain persons named in an exhibit to the petition; that the lands so granted lay wholly within the boundaries of the Lobato grant as confirmed, and were among the most valuable parts of such grant. The petition concluded with a prayer for judgment against the United States for the value of the lands so patented.

The United States answered, admitting the confirmation of the Lobato grant, and averring that the plaintiffs neglected to make the holders of the patented land parties defendant to the suit as required by law, but that they proceeded to try their cause, obtain a decree of confirmation, which had long since become final; and that by failure to make the patentees parties defendant, and by averring that there were no adverse claimants to any portion of the tract, "they thereby waived and disclaimed all right, if any they had, to challenge any disposition theretofore made under the laws of the United States to any portion of said grant."

The petitioners filed a general demurrer to this answer, accompanied by an affidavit to the effect that the plaintiffs, until the survey of said grant, did not and could not know or certainly allege and affirm that the lands granted and disposed of by the United States, as set forth in their petition, were within the exterior limits of their grant, and consequently no allegation with relation thereto was made in their original petition, and that such knowledge only came to the petitioners within the last two years.

[444] *The demurrer to the answer was sustained, the case submitted upon an agreed statement of facts, and a judgment rendered against the United States for \$2,320.91, for 1,856.73 acres at \$1.25 per acre, in accordance with the prayer of the petition,—Justices Shuss and Murray dissenting.

Mr. Matthew G. Reynolds argued the cause, and, with *Solicitor General Richards*, filed a brief for appellants.

It would have been improper to award judgment for indemnity in the original decree without first bringing in by process the vendees of the United States and requiring them to produce their titles, so that the court might ascertain their boundaries, quantity, and value, and decree as is provided by the 8th and 14th sections.

United States v. Moore, 12 How. 209, 13 L. ed. 958; *United States v. Castant*, 12 How. 437, 13 L. ed. 1056; *United States v. Davenport*, 15 How. 1, 14 L. ed. 575; *United States v. Roselius*, 15 How. 31, 14 L. ed. 587.

184 U. S.

The claim for indemnity should have been made in the original petition.

Real de Dolores del Oro v. United States, 175 U. S. 71, 44 L. ed. 76, 20 Sup. Ct. Rep. 71.

The whole theory of indemnity under private land-claim acts is that neither land scrip nor money indemnity can properly be decreed, except where the vendees of the government are made parties.

United States v. Moore, 12 How. 209, 13 L. ed. 958; *United States v. Castant*, 12 How. 437, 13 L. ed. 1056; *United States v. Roselius*, 15 How. 31, 14 L. ed. 587; *United States v. Davenport*, 15 How. 1, 14 L. ed. 575.

Messrs. George Hill Howard and Henry M. Earle submitted the cause for appellees:

In cases of this nature this court has held that it is "called on to decide according to the rules governing a court of equity."

United States v. Moore, 12 How. 209, 13 L. ed. 958.

The necessity cited by the court for making the United States vendees parties in the case of *United States v. Moore*, 12 How. 223, 13 L. ed. 963, does not exist in the case at bar, for the reason that the title is not in dispute (as in the *Moore Case*): to the contrary, the title of the United States vendees is expressly confirmed by the decree and the 8th section of the act creating the land court, the sole question here being the right of the claimants to a money judgment for the property of which they have been divested by the United States.

*Mr. Justice Brown delivered the opinion of the court. [444]

This case raises the question whether, after a land grant has been confirmed by the court of private land claims, that court may, after an unexplained delay of over six years, entertain a supplemental petition for the value of certain parcels disposed of and patented by the United States to third parties, before the filing of the original petition.

The following sections of the court of private land claims act (26 Stat. at L. 854, chap. 539) are pertinent in this connection:

"Sec. 6. That it shall and may be lawful for any person . . . claiming lands within the limits of the territory derived by the United States from the Republic of Mexico . . . by virtue of any such Spanish or Mexican grant . . . which . . . have not been confirmed by act of Congress, . . . and which are not already complete and perfect, in every such case to present a petition, in writing, to the said court, etc.

"The petition shall set forth fully the nature of their claims to the lands, . . . the name or names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioner; . . . and a copy of such petition, with a citation to any adverse possessor or claimant, shall, immediately after the filing of the same, be

served on such possessor or claimant in the ordinary legal manner of serving such process in the proper state or territory," etc.

[445] *"Sec. 8. That any person or corporation claiming lands in any of the states or territories mentioned in this act under a title derived from the Spanish or Mexican government *that was complete and perfect* at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title.

"If in any such case a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for *so much land* only as such perfect title shall be found to cover, *always excepting any part of such land that shall have been disposed of by the United States,*" etc.

"Sec. 14. That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, *such title from the United States to such other person shall remain valid, notwithstanding such decree,* and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found shall be a charge on the Treasury of the United States."

Under these sections the holder of a complete and perfect title may resort to either of two remedies: He may bring suit in the local courts upon his title against anyone in possession of the land covered by the grant, or any portion of it (*United States v. Pillerin*, 13 How. 9, 14 L. ed. 28; *Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, 90, 44 L. ed. 78, 84, 20 Sup. Ct. Rep. 28); or he may file his petition in the court of private land claims under § 8, subject to the condition that the "confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States." In such case, however, while he affirms the title of the patentee of the United States he may,

[446] under § 14, if "it *shall appear that the lands or any part thereof decreed to any claimant . . . shall have been sold or granted by the United States to any other person," recover a money judgment against the United States "for the reasonable value of said lands so sold or granted."

As the petitioners in this case elected the latter remedy, they are entitled to a recourse against the United States to recover the value of the land patented, unless they have in some way estopped themselves to make the claim at this time. The argument of the government in this connection is that,

under § 6, the petitioners were bound to set forth in their original petition "the name or names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioners," and that "a copy of such petition, with citation to any adverse possessor or claimant, shall, immediately after the filing of the same, be served upon such possessor or claimant in the ordinary legal manner," etc., whose duty it shall be to enter an appearance and plead, answer, or demur to said petition; in default of which the court is at liberty to proceed to hear the case upon the petition and proofs presented. Apparently, however, the only object of requiring notice to be given the adverse possessors or claimants is to compel them to show the location and boundaries of their claims and that they are not mere squatters or trespassers, but hold the land under a grant from the United States, in which case, under § 14, such title from the United States to such other person "shall remain valid notwithstanding such decree." If, however, it appear, as it does in this case, that the petitioners admit that the adverse possessors or claimants do hold under grants from the United States, and there are no disputed boundaries, there would appear to be no substantial reason for making them parties, inasmuch as they could not be affected by the decree. The only consequence of an omission to serve on them a copy of the petition is an acknowledgment of their title and of its boundaries.

The government could doubtless exonerate itself from payment by showing that it had never granted or disposed of the lands; *but [447] no attempt of that kind was made, and the proof that the lands were entered under the homestead laws and subsequently patented comes from the land office at Santa Fé, as well as by the express stipulation of the parties. It is true that in *United States v. Moore*, 12 How. 209, 223, 13 L. ed. 958, 964, it was said with regard to a similar act that persons holding under patents from the United States "should be compelled to produce their title, so that, if a decree was made for complainant, the court could ascertain what part of the land should be granted to him by patent; and as this could only be done by a specific ascertainment of interfering claims, the decree must of necessity specify their boundaries and quantities." But where, as in this case, the quantities and boundaries of the lands patented or otherwise disposed of are expressly stipulated between the United States and the claimants of the land grant, and the rights of the entrymen cannot be affected by the decree, we see no occasion for making them parties.

The second objection is that the language of § 14, "that if *in any case* it shall appear that the lands or any part thereof . . . shall have been sold or granted," limits the recovery of the value of such lands to cases wherein it appears in the original petition for confirmation that such lands have been

granted, and that the original petition in this case having gone to a decree affirming the survey, the court lost control of the grant; and in addition thereto that the petitioners had, by the lapse of six years, waived and abandoned their claim, and are guilty of inexcusable laches. The original petition for confirmation was filed February 28, 1893, the decree of confirmation pronounced December 4, 1893, and the decree approving the survey October 19, 1895. The present petition for the value of the lands granted was filed April 23, 1900, over seven years after the original petition was filed, and over four years from the time of the decree approving the survey. While § 14 evidently contemplates that the names of the adverse holders shall be set forth in the original petition, that notice shall be given them and that the claim for a money judgment for the lands granted them shall be incorporated therein, we should not refuse relief solely [448] upon that ground, if sufficient *excuse were shown for the omission to make these grantees parties; since it might well be that, if the grant were a large one and its boundaries indefinite or unsettled, entries might inadvertently be made within the exterior limits of such grant and patents issued therefor in good faith and without the knowledge of the original grantee. In such event the right to reimbursement ought not to be denied, if due diligence to ascertain the facts were exercised at the time the petition for confirmation was filed.

But we are unwilling to admit that a claimant may wait an unlimited time and then, upon a simple allegation that certain lands within the grant had been disposed of, may recover their value. We think the claimant is bound to act with promptness, and if a long delay has occurred, to explain it by proper averments. The original petition for confirmation in this case, not only suggested no adverse claimants, but alleged positively that "there are no adverse holders, possessors, or claimants of or to any portion of said tract," when a simple reference to the records of the land office at Santa Fé would have shown the facts stated in Exhibit A annexed to the petition in this case, that fifteen homesteads had been entered upon this tract before the original petition was filed, in all but five of which patents had already issued. Not the slightest effort appears to have been made to ascertain these facts, and it was not until more than seven years thereafter that the petition in this case was filed. The petition sets forth that several parcels of land aggregating 2,056 acres, within the Lobato grant, were disposed of by the United States to other parties, but there is no allegation explaining why these grantees were not made parties to the original petition, or why the long delay occurred in making the claim for a money judgment.

The answer of the United States sets up the failure of the petitioners to make the patentees parties to the original petition, 184 U. S.

and alleges that they thereby waived and disclaimed all right to a money judgment. Upon the same day this answer was filed, April 26, 1900, a demurrer thereto was filed, together with a deposition or affidavit setting up the fact that "prior and up to the survey of said grant, under the decree of confirmation," *neither the original claim-[449] ants nor their solicitor "knew or could know, or certainly allege and affirm, that the lands granted and disposed of by the United States as set forth and shown in the above said petition were within the exterior limits of the said Lobato grant," and that the facts were not ascertained "until within the past two years." How this affidavit came upon the record is not shown. No order was made permitting it to be filed. No reference to it or to the allegations it contains was made in the stipulation or agreed statement of facts upon which the case was tried, nor in the finding of facts incorporated in the decree of the court. For aught that appears, it was thrust upon the files without authority. But even if the affidavit were treated as a proper part of the record, it fails to show the slightest diligence to ascertain the real facts, although a map annexed to the original petition exhibited the claimed boundaries of the tract, and a reference to the records of the land office would have shown the description of each parcel entered as a homestead. Indeed it virtually confesses a neglect to file the petition for two years after the facts came to the knowledge of the petitioners.

The case then comes to this: Whether upon a petition for value filed seven years after the original petition for confirmation, a decree against the United States can be entered upon a simple allegation that certain parcels had been conveyed and patented by the United States, without showing some excuse for the delay in presenting the petition, or some diligence in ascertaining the real facts. Under the court of claims act petitions must be presented to that court within six years from the time the cause of action accrues (24 Stat. at L. 505, chap. 359), and while there is no limitation of the time for petitions of this character to be filed in the court of private land claims, we have held that a similar act required that cases should be heard and disposed of upon equitable principles, and that we were "bound to give due weight to lapse of time." *United States v. Moore*, 12 How. 209, 222, 13 L. ed. 958, 963; *Indiana v. Kentucky*, 136 U. S. 479, 509, 510, 34 L. ed. 329, 332, 10 Sup. Ct. Rep. 1051. We think there has been such unexplained delay in this case as to justify the court in holding that petitioners had abandoned their claim for a pecuniary judgment.

**The decree of the Court of Private Land Claims is therefore reversed*, and the case remanded to that court for further proceedings not inconsistent with this opinion. [450]

Mr. Justice Harlan and Mr. Justice Gray did not sit in this case.

MICHAEL W. O'BRIEN *et al.*, Exrs., *Petitioners*,
v.

JOHN G. WHEELLOCK *et al.*

(See S. C. Reporter's ed. 450-496.)

Levee assessments—unconstitutional statute—suit in equity to charge land—estoppel of landowners—laches in bringing suit.

1. The work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, is not embraced within the Illinois act of April 24, 1871, authorizing the construction of drains and ditches for agricultural and sanitary purposes, and of levees if deemed necessary for drainage.
2. The special assessments for drains, ditches, and other works which the Illinois act of April 24, 1871, provides may be imposed in proceedings taken in the county court, with the aid of commissioners and a jury, are not authorized by Ill. Const. 1870, art. 9, § 9, which provides that the general assembly may vest corporate authorities of cities, towns, and villages with power to make local improvements by special assessments and by special taxation of contiguous property, since this constitutional provision limits the grant of such power to the authorities of cities, towns, and villages, and thereby excludes the grant of it to a county court, board of commissioners, or jury.
3. Landowners are not estopped to deny the constitutionality of a statute authorizing assessments for a local improvement, as against one who purchased, in the open market and on the advice of counsel, bonds which such assessments, if valid, would be used to pay, merely because they, or some of them, had secured the passage of the act providing for the improvement, had participated in the organization of the assessment district, and in various ways proceeded under the assumption that the act was valid.
4. The application of the doctrine of courts of equity, to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time, does not depend upon mere lapse of time, but upon change of situation during neglectful repose, rendering it inequitable to afford relief.
5. The delay in bringing a suit to charge landowners in equity or on the principle of estoppel with liability for the amount of levee assessments under an unconstitutional statute is fatal, where, after a decree in a former suit permitting the owner of the bonds, by supplemental or original bill, to bring in the landowners, he took no steps to do so during his life, which continued for about six years after the decree, and the bill was brought by his executors about nine years after such decree, during which time the owners of the property assessed were constantly changing, and they had spent large sums for the re-

pair of the levee, and had also become liable to very large assessments under a new statute.

[No. 38.]

Argued October 21, 22, 1901. Decided February 24, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree affirming a decision of the Circuit Court dismissing a bill to charge lands in equity with liability for the amount of invalid levee assessments. *Affirmed.*

See same case below, 37 C. C. A. 309, 95 Fed. 883.

Statement by Mr. Chief Justice Fuller:

*This case is brought here by certiorari to the circuit court of appeals for the seventh circuit to review a decree of the circuit court of the United States for the southern district of Illinois, 78 Fed. 673, affirmed by the court of appeals, 37 C. C. A. 309, 95 Fed. 883. The bill relates to certain proceedings under an act of the general assembly of the state of Illinois, approved April 24, 1871, entitled "An Act to Provide for the Construction and Protection of Drains, Ditches, Levees, and Other Works." The opinion of the circuit court of appeals was delivered by Mr. Justice Harlan, presiding as circuit justice, and the case is therein stated thus:

"By the above act of the general assembly of Illinois, it was provided that whenever one or more owners or occupants of lands desired to construct a drain or drains, ditch or ditches, across the lands of others, for agricultural and sanitary purposes, such person or persons may file a petition in the county court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of its or their proposed starting point, route, and terminus, and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same as proposed, and may pray for the appointment or commissioners for the construction of such work, pursuant to the provisions of this chapter." § 1.

"The act required notice by publication to be given of any petition filed under its provisions, and that: 'Such notice shall state when and in what court the petition is filed, the starting point, route, and terminus of the proposed drain or drains, ditch or ditches, or levees, and, if a levee or other work is intended *to be constructed in connection therewith, shall so state, and at what term of court the petitioners will ask a hearing upon such petition.' § 2.

"If the drain or drains, ditch or ditches, levee or other work proposed to be constructed, was to pass through or over, or be constructed upon, lands lying in different counties, the petition could be filed in the county court of either county." § 4.

NOTE.—On *estoppel by silent acquiescence*—see notes to *Reichert v. St. Louis & S. F. R. Co.* (Ark.) 5 L. R. A. 183; *Brookhaven v. Smith* (N. Y.) 7 L. R. A. 755; *Tarkington v. Purvis* (Ind.) 9 L. R. A. 607, and *Michigan v. Flint & P. M. R. Co.* 38 L. ed. U. S. 478.

As to *laches as a defense*—see notes to *Hammond v. Hopkins*, 36 L. ed. U. S. 135; *Felix v. Patrick*, 36 L. ed. U. S. 720; *Middletown v. Newport Hospital* (R. I.) 1 L. R. A. 191; *Calhoun v. Delhi & M. R. Co.* (N. Y.) 8 L. R. A. 248, and *Coffey v. Emigh* (Colo.) 10 L. R. A. 125.

"The court in which the petition was filed was empowered to determine all matters pertaining to the subject-matter of the petition.

"If it appeared that the proposed drain or drains, ditch or ditches, levee or other work, was necessary or would be useful for the drainage of the lands for agricultural and sanitary purposes, the court was required to so find, and appoint three competent persons as commissioners to lay out and construct such proposed work. § 5.

"It was made the duty of the commissioners to examine the lands proposed to be drained, and those over or upon which the work was proposed to be constructed, and determine: '(1) Whether the starting point, route, and terminus of the proposed drain or drains, ditch or ditches, and if a levee or other work is proposed, the proposed location thereof, is or are in all respects proper or most feasible, and if not, what is or are so; (2) The probable cost of the proposed work, including all incidental expenses, and the expenses of the proceeding therefor; (3) What lands will be injured thereby, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of the proposed work; (4) What lands will be benefited by the construction of the proposed work, and whether the aggregate amount of benefits will equal or exceed the costs of constructing such work, including all incidental expenses and costs of the proceeding.' § 9.

"If the commissioners found and reported that the expense would more than equal the benefits, the proceedings were to be dismissed; if less, then they were to have plans, profiles, surveys, and specifications made, and report the same to the court. §§ 10, 11.

[453] "The commissioners were not confined to the point of commencement, route, or terminus of the drains or ditches, or to the number, extent, or size of the same, or the location, plan, or extent of any levee or other work, as indicated in the petition. But they were directed to locate, design, lay out, and plan the same as they thought would drain the petitioners' land with the least drainage, and for the greatest benefit of all the lands to be affected thereby. All plans proposed by the commissioners could be changed by the court on the application by them or by any person interested. § 12.

"The act required due notice by publication to be given of any application to confirm the report, and the privilege was given to all persons interested to appear and contest its confirmation, or to ask any modification thereof. If no objections were made to the report, or if the objections made to it were not well taken, it was to be confirmed. If the court was of opinion that the report should be modified, it was given authority to make such modification as would be equitable. §§ 13, 14.

"If the report was confirmed, then the court was authorized to impanel a jury of twelve men competent to serve as jurors.

who, being duly sworn, were required to assess damages and benefits according to law; or the court could direct that a jury be impaneled before a justice of the peace for the assessment of damages and benefits, in which case the commissioners could apply to any justice of the peace in the county, who should immediately, without the formality of any written application, proceed to summon and impanel a jury of six men competent to serve as jurors, who should be sworn in the same manner as was provided in case of a jury impaneled by the court in which the proceeding is pending, the justice to enter upon his docket a minute of such proceeding before him, and the names of the jurors. § 16.

"The duty of the jury was to examine the land to be affected by the proposed work; ascertain to the best of their ability and judgment the damages and benefits sustained by or accruing to the land affected by the construction of the proposed work; make out an assessment roll, in which should be set down in proper columns the names of owners, when known, a description of the premises affected, in words or figures, or both, as was most convenient, the number of acres in each tract, and, if damages were allowed, the amount of the same; and in case damages were allowed to, and benefits assessed against, the same tract of land, the balance, if any, should be carried forward to a separate column for damages or benefits, as the case might be. § 17.

"In making the assessment the jury were required to award and assess damages and benefits in favor of and against each tract of land separately, in the proportion in which such tract of land would be damaged or benefited; and in no case should any tract of land be assessed for benefits in a greater amount than its proportionate share of the estimated cost of the work and expenses of the proceeding, nor in a greater amount than it would be benefited by the proposed work, according to the best judgment of the jury. § 18.

"The commissioners, or any person who made objection to the assessment, were given the right of appeal from the finding of the jury. If, upon such appeal, there were corrections of the assessment, or if the assessment roll was confirmed, then the roll was to be spread upon the record, with right of appeal or writ of error therefrom. §§ 24, 26.

"At the time of confirming the assessment the court could order the assessment of benefits to be paid in instalments of such amounts and at such times as would be convenient for the accomplishment of the proposed work; otherwise, the whole amount should be payable immediately, upon the confirmation, and should be 'a lien upon the lands assessed until paid.' § 27.

"It was made the duty of the clerk, immediately after the entry of the order of confirmation, to make out and certify to the commissioners a copy of the assessment roll, and also to make out and deliver to the commissioners separate copies of the same,

pertaining to the lands situated in different counties, to be recorded in the recorder's office of the respective counties in which the lands were situated, and which should be notice of the lien thereon to all persons. § 28.

[455] "Upon receiving a certified copy of such assessment, the commissioners *could proceed to collect the same, or any instalment thereof, or certify the assessment of any instalment thereof which they might be entitled to collect at the time to the county clerk of the county in which the lands assessed were situated, who was required to 'extend the same, in a separate column, upon the proper tax books for the collection of state and county taxes: Provided, the owner, agent, or occupant of any land through or on which any drain, ditch, or levee shall be constructed shall have the right, under the direction of said commissioners, within such time as they shall prescribe, to construct such drain, ditch, or levee, or any part thereof, at his own cost; and in case he shall so construct the same, he shall be allowed for the value thereof upon his assessment.' § 29.

"In case the assessment for benefits should be payable in instalments, such instalments were to draw interest at the rate of 10 per cent per annum from the time they became payable till they were paid, and the interest could be collected and enforced as part of the assessment. § 30.

"Other sections of the act are as follows:

"§ 31. When the commissioners shall have elected to collect any assessment or instalment thereof themselves, or shall not have caused the same to be extended upon the state and county tax books, and any assessment or instalment shall be due and uncollected, and as often as any instalment shall become due and be uncollected at the time for making return of the tax books for the collection of state and county taxes next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any instalment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for the collection of state and county taxes in the counties or respective counties where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amounts so collected to the commissioners."

[456] "§ 34. The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be *necessary in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee, or other work for which they shall have been appointed, including all necessary bridges, crossings, embankments, protections, dams, and side drains, and may employ all necessary agents

and servants, and enter into all necessary contracts, and sue and be sued.

"§ 35. The commissioners may borrow money, not exceeding in amount the amount of assessment unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding 10 per cent per annum, and not running beyond one year after the last assessment on account of which the money is borrowed shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof."

"§ 37. All damages over and above the benefits to any tract of land shall be payable out of all the amounts assessed against other lands for benefits, and shall be paid or tendered to the owner thereof before the commissioners shall be authorized to enter upon his land for the construction of any work thereon. In case the owner is unknown, or there shall be a contest in regard to the ownership of the land, or the commissioners cannot, for any reason, safely pay the same to the owner, they may deposit the same with the clerk of the court, and the court may order the payment thereof to such party as shall appear to be entitled to the same."

"§ 45. Any person who shall wrongfully and purposely fill up, cut, injure, destroy, or in any manner impair the usefulness of any drain, ditch, or other work constructed under this chapter, or that may have been heretofore constructed, for the purposes of drainage or protection against overflow, may be fined in any sum not exceeding \$200, to be recovered before a justice of the peace in the proper county; or if the injury be to a levee, whereby lands shall be overflowed, he may, on conviction in any court of competent jurisdiction, be fined in any *sum not exceeding \$5,000, or imprisoned in [457] the county jail not exceeding one year, or both, in the discretion of the court. All complaints under this section shall be in the name of the people of the state of Illinois, and all fines when collected shall be paid over to the proper commissioners, to be used for the work so injured.

"§ 46. In addition to the penalties provided in the preceding section, the person so wrongfully and purposely filling up, cutting, injuring, destroying, or impairing the usefulness of any such drain, ditch, levee, or other work, shall be liable to the commissioners having charge thereof for all damages occasioned to such work, and to the owners and occupants of lands for all damages that may result to them by such wrongful act, which may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction." Ill. Laws 1871, 1872, pp. 356-365.

"Proceeding under the above act, numerous owners and occupants of the lands

known at the time as the 'Mississippi bottom lands,' in the counties of Adams, Pike, and Calhoun, Illinois, filed a petition in the county court of Pike county, expressing their desire to construct drains and ditches, and also a levee and other works, across the lands of others in that bottom, for agricultural and sanitary purposes, so as to reclaim the bottom land from overflow by the waters of that river, 'in order to make the location salubrious, and render the soil available for tillage and otherwise develop the agricultural resources of said bottom land.' They represented that 'said bottom land has been from time immemorial, and now is, a low and nearly level tract of land formed by deposits of alluvion from said river; that it is traversed throughout nearly its entire length by a slough or bayou known as "the Sny Cartee slough;" that said bottom land is also variously intersected by other and smaller sloughs, some of which are short channels putting out from the river and returning thereto, while others start from and return to the said Sny Cartee slough, and others are, again, lateral branches connecting said Sny Cartee slough with the river; that the said bottom land is below the level of the high-water mark of said river, and absolutely without protection therefrom; *that the greater part thereof is nearly every year inundated by the waters of said river, and all are subject to inundation, and have been repeatedly submerged by said overflow, the river on such occasions being a stream from about 4 to 8 miles wide, and running from bluff to bluff on either side;' 'that, by reason of said exposure to overflow, the mass of the said bottom land has been allowed to remain in its primitive condition, and will so remain unless reclaimed; that it is but sparsely populated, and that the occupants thereof support themselves almost exclusively by the cultivation of the soil; that they are every year greatly embarrassed in putting in their crops by the peculiar character of the rise in said river, which has no regular time for reaching its maximum height, nor any fixed number of rises during a season; that their crops when planted are frequently destroyed by an unexpected rise in said river, and in such cases they are either compelled to replant their crops, or the crops are destroyed so late in the year as to render the operations of the season a total failure;' 'that upon the subsiding of the waters the said bottom land is left in a wet and marshy condition, so that the stagnant water is left on various parts of its surface, and the succeeding heat of summer and autumn evolve therefrom malaria and disease;' 'that by reason of said facts said bottom land not only now remains sparsely populated, while the territory around it is thickly settled, but the same is practically incapable of supporting any further population, so that the average taxable value of the lands now subject to overflow is no more than about 50 cents per acre, and the present occupants of said bottom lands have been in most cases induced to remain solely by the prospect of

the ultimate reclamation of said land,—a consummation which has been the theme of their enterprise and endeavor ever since the settlement of the bottom lands described.'

"The petitioners called the attention of the court to the act of 1871, and asked the appointment of commissioners, in accordance with the provisions of that law, 'for the purpose of constructing a levee on the Mississippi river, from a point on said river at or near the head of the Sny Cartee, in the county of Adams and state of Illinois, and thence in a southerly direction *along[459] or near the east bank of the Mississippi river, as shall be deemed advisable for the safety of the proposed work, to a point at or near the mouth of Hamburg bay, in the county of Calhoun, state of Illinois, and to do and perform any and all acts, as provided in said law, for the surveying, laying out, and constructing, altering, repairing, enlarging, protecting, and maintaining, said proposed levee, or to render it efficient for the protection and reclamation of the lands lying east of the said levee, and between it and the bluffs, and now subject to overflow by the Mississippi river and other streams.'

"After asking a confirmation of the report of the commissioners, if they found and reported that the proposed levee could be constructed at a cost not exceeding \$5 per acre for all lands benefited and reclaimed from overflow, the petitioners prayed: 'That the assessment for benefits upon the property to be affected by the construction of said work shall be paid in ten equal annual instalments, the first instalment being due and payable three years after the date of the commissioners' report and the filings of the plans and specifications with the court, and one tenth of such assessment, with accrued and accruing interest, each year thereafter, until the whole amount shall have been paid.'

"The county court of Pike county, having found that the proposed work was necessary, appointed in 1871, William Dustin, George W. Jones, and John G. Wheelock commissioners, and they duly qualified and acted in that capacity. In the same year the commissioners reported the result of their examination, and in their report indicated, by map and profiles, the work to be done. The report was confirmed without objection, and a jury of twelve was organized to assess damages and benefits, and make an assessment roll. The assessments were made and put upon the record of the court. Certified copies of the assessments were recorded in Pike, Adams, and Calhoun counties. An order was made requiring the assessments to be paid in ten annual instalments, with interest from October, 1872.

"In conformity with the order of the court, the commissioners issued bonds from time to time, upon estimates made by the engineer as the work progressed, to be used in the construction *and completion of the[460] work. They were delivered directly to the contractors as they were earned. The first issue of bonds amounted to \$499,500, of which Francis Palms purchased \$202,500.

A second issue was made, amounting to \$148,500, which were also purchased by him. That issue was the result of a second petition under the act of 1871, proceedings under which resulted in further assessments.

"It may be here stated that by an act of the general assembly of Illinois, approved April 9, 1872, it was provided that whenever it appeared by the findings of the court before which proceedings were pending or might be had, under the act of April 24, 1871, that any drain, ditch, levee, or other work authorized by that act to be made would be of public benefit for the promotion of the public health, or in reclaiming or draining lands, the same should be deemed 'a public work;' and that it should be lawful for the commissioners appointed under the act of 1871 to register at the office of the auditor of public accounts any bonds issued by them under order of court; such registration to show the date, amount, number, maturity, and rate of interest of the bonds, and the fact of such registration to be certified by the auditor, under his seal of office, upon each bond. The act contained other provisions, but it is not necessary to refer to them.

"All of the bonds issued by the commissioners were in the same form. We give here a copy of one of them, issued in 1872:

"No. 6. United States of America. \$500.
Sny Island Levee Bond.
(Ten per cent interest bond.)

"State of Illinois.

"The commissioners appointed by the county court of Pike county and state of Illinois, on the petition of John Morris and others, to locate and construct a levee on the Mississippi river, in the counties of Adams, Pike, and Calhoun, by virtue of an act of the general assembly of the state of Illinois entitled "An Act to Provide for the Construction and Protection of Drains, Ditches, Levees, and Other Works," and by power vested in them by said act, acknowledge [461] themselves, as such commissioners, held and firmly bound unto John G. Wheelock or bearer in the sum of five hundred dollars, lawful money of the United States, payable in the city of New York, at the bank or agency used by the treasurer of the state of Illinois, on the first day of October, A. D. 1882, with interest at the rate of ten per cent per annum, interest payable on the first day of July in each year, on the surrender of annexed coupons as severally due.

"This bond is one of a series of five hundred thousand dollars issued for the purpose aforesaid, and after an order of the county court of Pike county aforesaid approving of the assessment made by a jury of the cost of said levee.

"In witness whereof, the said commissioners,' etc.

"Annual interest coupons, payable to bearer, were attached to each bond.

"On each bond was indorsed a certificate in these words:

"Auditor's Office, Illinois.

Springfield, Nov. 12th, 1872.

"I, Charles E. Lippincott, auditor of public accounts of the state of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of an act entitled "An Act to Provide for the Registration of Drainage and Levee Bonds, and Secure the Payment of the Same," approved April 9th, 1872, and in force July 1st, 1872.

"In testimony whereof,' etc.

"At the January term, 1876, of the supreme court of Illinois, the case of *Updike v. Wright*, 81 Ill. 49, was decided. That case involved, among other questions, the constitutionality of the above act of April 24, 1871, providing for the construction and protection of drains, ditches, levees, and other works. The case related to certain proceedings taken for the construction of a levee on the banks of the Wabash river. The representation to the county court was that the lands of the petitioners were subject to overflow from that river, that their fences and crops were liable to be swept away and destroyed by such overflow, and that the same could be prevented by an earthwork levee.

"After observing that the above act of [462] 1871 was evidently passed in view of article 4, § 31, of the Illinois Constitution of 1870, declaring that 'the general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others,' Chief Justice Scott, delivering the unanimous judgment of the court, said: 'Apparently, an effort, was made to have the law enacted conform to the constitutional provisions in every particular. Hence it is declared the work to be done is the construction of drains and ditches for agricultural and sanitary purposes, and if it becomes necessary, in the construction of a system of drainage, that a "levee or other work" be adopted to make that system available, such levee or other work may be constructed under the provisions of the statute. But it is nowhere intimated the owners or occupants of land may undertake, under the provisions of this law, the building and maintenance of an immense levee on the borders of the river, not connected with any system of drainage by ditches. Neither the Constitution nor the statute contemplates any such work. What was in the mind of the framers of the Constitution, and the legislators who enacted the law in pursuance of its provisions, must have been the drainage of lands by means of drains and ditches, and what is said in the statute on the subject of a "levee or other work" is always in connection with a system of drainage in that mode. The work outlined by the Constitution and the statute is comparatively insignificant, and may be done at no great cost; but that which is undertaken in this case is the construction of a levee on the banks of the Wabash river, of many miles in length and

estimated to cost a great many thousand dollars. No system of drainage by drains and ditches was planned, nor deemed necessary for agricultural and sanitary purposes. The representation to the county court is, the lands of the petitioners are subject to overflow from the Wabash river; that their fences and crops are liable to be swept away and destroyed by such overflow; and that the same can be prevented by an earthwork levee. The undertaking is one of great magnitude, and will require the expenditure of large sums of money. The assessment [463] *on complainant's land is over \$10,000. And the allegation in the bill is that, unless all further assessments proposed to be made be arrested, the levee will cost more than the land is worth. Any construction of the statute that would warrant the owners or occupants of lands to enter upon such an immense and costly work seems forced and unreasonable. It is only in connection with drainage for agricultural and sanitary purposes that "levees or other works" may be undertaken, as auxiliary to the drainage of the lands. Our opinion is, this is the only construction the statute will bear, consistently with the Constitution; otherwise, one owner, whose lands are subject to overflow at certain seasons of the year from a river, could set in motion the proceedings for the erection of a levee sufficient to protect his lands, no matter how expensive, and have the cost levied upon the lands of others in the vicinity which commissioners appointed by the court might deem benefited by the improvement. Such a work cannot be said to be draining lands by drains and ditches over the lands of others; nor is such a levee, in any just sense, in the language of the statute, "necessary to the drainage of the lands." The work of constructing a great levee along the banks of a river subject to overflow, which defendants are about to do, is not embraced within the provisions of the statute, and is therefore without authority of enabling law.'

"But the court proceeded to observe that the decision could be placed on the ground that the general assembly possessed no power under the Constitution to vest commissioners or juries selected, or the county court, with authority to assess and collect taxes or special assessments for the contemplated improvement. It said: 'Section 5, article 9, of the Constitution of 1848, which declared "the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same," was always construed by the decisions of this court as a limitation upon the power of the general assembly to grant the right to assess and collect taxes to any other than [464] the corporate *or local authorities of the municipalities or districts to be taxed. *Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318; *Harvard v. St. Clair & M. Levee & Drainage Co.* 51 Ill. 130; *Pee-* 184 U. S.

ple ex rel. Wilson v. Salomon, 51 Ill. 37; *Gage v. Graham*, 57 Ill. 144; *Hessler v. Drainage Comrs.* 53 Ill. 105. It was also held that the power in the legislature was subject to the further limitation that a local burden of taxation or special assessments could not be imposed upon a locality without the consent of the taxpayers to be affected. That section of the Constitution of 1870, upon this subject, provides: "The general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The clause in the present Constitution, like that in the Constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the general assembly can only vest cities, towns, and villages with power to make local improvements by special assessments or special taxation upon contiguous property benefited by such improvement. By necessary implication, it is inhibited from conferring that power upon other municipal corporations or upon private corporations. Only cities, towns, and villages are within the constitutional provisions; and, although other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, the limitation is absolute, such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same. With equal propriety, this clause of the present Constitution must be regarded as restricting the general assembly in conferring the power to levy and collect taxes, either general or special, to the mode and manner therein indicated. We do not understand the legislature possesses plenary power, unlimited and unrestricted, to invest whomsoever it may choose with authority to assess and collect either special assessments *or taxes for [465] every conceivable purpose. As we have seen, only cities, towns, and villages may levy special assessments or special taxation for local improvements, and all other municipalities can only be vested with jurisdiction to assess and collect taxes for corporate purposes, and that, too, under the positive inhibition such taxes shall be uniform in respect to persons and property. It would seem, therefore, to follow, as a corollary from the propositions stated, that neither the commissioners nor the juries selected, nor the county court, is such a body as, under the Constitution, may be given power to make local improvements by special assessments or by special taxation upon contiguous property. There is still another consideration that has an important bearing upon the decision of the case. The clause of the Constitution we have been considering, like that in the Constitution of 1848, must be understood, in the light of the decisions of

this court, as forbidding the general assembly from imposing a burden by taxation upon any locality, without the consent of the citizens affected. Under this law, the people whose property is subject to taxation or assessments have never given any consent to it, if we exclude those who may have signed the petition addressed to the county court. No opportunity was afforded them to do so, nor does the law make any provision for submitting the question to a vote, to ascertain the will of those whose property is subjected to this local burden. It is imposed upon them under the statute, by the decision of the county court. Obviously, that section of the Constitution that declares "the general assembly may pass laws permitting the owners or occupants of lands to construct drains or ditches, for agricultural and sanitary purposes," implies that the community whose property is to be taxed may have the right of election in the matter. Otherwise, an onerous burden may be imposed upon them, without their consent, and such proceedings might be had as would result in the deprivation of property. How can the land owners be permitted to construct drains and ditches, unless some election is guaranteed to them? The language employed implies voluntary action. Illustration will make the inconsistency of the present law apparent. For example, the privilege is given to [466] any occupant, *as well as the owner of land, of presenting a petition to the county court. Should the construction contended for prevail, a tenant residing upon land adjacent to a river subject to overflow might present a petition, and, under the decision of the court, the work of erecting a levee miles in length, and costing large sums of money, might be entered upon, and the expenses assessed upon the property in proximity to the river that might in any degree be deemed benefited. An intention to confer such unwarranted power upon one man, who would himself be subject to none of the burdens imposed, ought not to be imputed to the legislature. Any laws not permitting an election as to the propriety of undertaking the work are vicious, and within the inhibition of the Constitution. It does not militate against this construction that the landowner may appear before the county court when the petition is presented, and resist the application, or may contest the assessment upon his property when made. Whether the contemplated work shall be undertaken, and his property subjected to taxation, is not made to depend upon his election, but upon the decision of the court. It would be a solecism to call that privilege an "election."

"At the same term of the court, the case of *Webster v. People* (unreported) was decided. That case related to the above work undertaken under the authority of the county court of Pike county. The efforts of the commissioners to collect instalments of interest on the assessments were resisted by certain landowners. The supreme court of Illinois said: 'The principal questions raised and discussed in this case are the

same as in *Udike v. Wright*, decided at the present term, and for an expression of our views reference is made to the opinion in that case. For the reasons there given, the judgment in this case will be reversed, and the cause remanded.'

"It may be well to state in this connection that the Supreme Court of the United States, in *Harter Trcp. v. Kernochan*, 103 U. S. 562, 570, 26 L. ed. 411, 413, referring to § 5, article 9, of the Illinois Constitution, declaring that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, *has said: 'It is the settled law of the state, [467] as heretofore recognized by this court, that this constitutional provision was intended to define the class of persons to whom the right of taxation might be granted, and the purposes for which it might be exercised, and that the legislature could not constitutionally confer that power upon any other than corporate authorities of counties, townships, school districts, cities, towns, and villages, or for any other than corporate purposes.' See also *Livingston County v. Darlington*, 101 U. S. 411, 25 L. ed. 1017; *Weightman v. Clark*, 103 U. S. 256, 259, 26 L. ed. 392, 393. "After the above decision in *Webster v. People*, certain landowners undertook to provide for the protection of their lands from overflow by the execution of deeds of trust to the commissioners. Under these deeds as much, perhaps, as \$30,000 was raised and expended by the commissioners.

"In May, 1878, while those deeds were in force, Palms, on behalf of himself and others, instituted a suit in equity in the circuit court of the United States for the southern district of Illinois against the levee commissioners. The bill in that case recited the above legislation, and the proceedings resulting in the appointment of the commissioners, the assessments by the jury, and the issuing of bonds by the commissioners, and charged that the expense of the work was paid by the commissioners with money furnished by Palms and others, of which, it was alleged, the owners and occupants of the lands benefited and assessed were at the time well aware. Referring to the 29th section of the act of 1871, prescribing the duties of the commissioners, and also to the above act of 1872, that bill alleged that the commissioners made efforts 'to collect the amount of some of the instalments of said assessments, and the interest thereon, but the courts of the state of Illinois, before whom the question of the collection of such assessments and the instalments thereof under said statutes was brought, refused to give effect to the provisions of said acts, so far as they purported to authorize the collection of the same by the collectors of taxes under extensions on the tax books; and no means are left for the collection of such assessments and interest, except such as may be supplied by the general authority of *the [468] courts that have jurisdiction of such questions. And your orator would further show unto your honors: That the whole amount

of the moneys advanced by him, and by other purchasers of the bonds, with interest thereon, remains unpaid, and that said commissioners remain and continue in the actual use and possession of the said levee and other works constructed with the moneys borrowed of your orator and others, by the said commissioners, under the proceedings aforesaid; and they do also, by and under the direction of the owners of said lands, keep and use the said works to protect their own lands, and the lands of the other owners and occupants, from overflow from said river. And your orator further shows unto your honors: That the said commissioners refuse to pay to your orator and the other holders of said bonds, the whole or any portion of their principal—money loaned to them for the purposes aforesaid,—or interest, and they also refuse to enforce the collection of said assessments on the several tracts of land described in said Exhibit A, or the interest thereon, as it is their duty to do, and the owners and occupants of said lands refuse to pay said assessments, or the interest thereon, so that the moneys loaned by your orator for the construction of said works is wholly lost, together with the interest thereon. And your orator would further show unto your honors: That the owners and occupants of said lands are very numerous, as will appear by the lists of land and the names of the owners thereof, as stated and set forth in the said Exhibit A, and the names of many of them are unknown to your orator, but all of them reside in other of the states of the United States than the state of Michigan; the greater number of them are residents and citizens of the states of Illinois and Missouri; and that the said commissioners, John G. Wheelock, George W. Jones, and Benjamin F. Westlake are citizens of the state of Illinois, and of the southern district aforesaid.

[469] "The relief asked was a decree directing an account to be taken of 'the moneys loaned and advanced' by Palms to the commissioners, 'to be used by them in the purchase and acquisition of the lands required for the location and construction of the said levee and other works, and for the construction
[469] and *the completion of the said levee and all the works and improvements connected therewith, together with interest thereon at the rate of 10 per cent per annum, according to the terms of said bonds and the coupons thereto attached;' the amount due Palms being ascertained, then that such amount be adjudged a lien in favor of Palms 'upon the said levee and other works, and the lands acquired, owned, and held by the said commissioners for the site of said levee, and all other improvements, and upon the said assessments upon all of the said lands described in the said Exhibit A, for the benefits to said lands afforded by the said levee and other works, and the interest thereon;' and that 'the said commissioners proceed at once, under the order and direction of your honors, to collect such assessments upon all and every of said tracts of land and the interest that has, or that may hereafter, ac-

crue thereon, or so much thereof, from time to time, as will be sufficient to pay the interest money or the principal, payable to your orators as the same falls due; or that it may please your honors to appoint one or more competent persons, as receiver or receivers, to take possession and charge of the said levee and other works, and manage and control the same, together with all the books, papers, and properties of said commissioners, and with authority to collect, under the order and direction of this honorable court, the said assessments and interest thereon, as often and in such sums as may be sufficient to meet and satisfy the claims of your orators as aforesaid.'

"The commissioners answered in that case, insisting, among other things, that the bonds in question having been registered with the auditor of public accounts under the act of 1872, they were not responsible for the failure to collect the money to pay interest, and were without any duty in respect to the said assessments. They referred to the fact that certain landowners had at all times opposed the proceedings instituted to assess their lands for benefits on account of the said levee, and refused to pay interest on assessments, in consequence whereof the township collector had returned nearly all the landowners involved in the proceedings as delinquents; that thereupon the county collector made application to the Pike county court to "enforce said assess- [470] ments against the delinquent lands; that some of the landowners opposing the assessments filed objections to judgment for such assessments, setting up that the law under which the assessments were imposed was unconstitutional; that the commissioners employed counsel to prosecute the application for judgment and for the collection of said assessments, and the county court gave judgment against the lands; that the landowners appealed to the circuit court, which affirmed the judgment of the county court; that thereupon the landowners carried the case by appeal to the supreme court of the state, stipulating that one appeal should be decisive of all the assessments; that the commissioners themselves employed counsel in the argument of the case in the supreme court of the state, and said court decided adversely to the right to collect said assessments; and that such decision of the highest court of the state was decisive of any question of right on their part to enforce assessments. The case referred to by the commissioners in their answer was the above case of *Webster v. People*. The commissioners also averred that 'as such commissioners they are not now, and never have been, in any actual possession of any part of said levee or other work, except for the purpose of constructing, maintaining, and repairing the same; that they have never had title to any portion of the said levee, as they are likewise advised and believe on account of the unconstitutionality of the law under which said work was done; and that since said law was declared unconstitutional these respondents, as commissioners, have only exercised authority

over said levee in warning parties against injuring said levee, but this was in their private capacity, at the request of a portion of the landowners, who supplied them with funds for that purpose, in whose behalf they have, in like private capacity, tried to keep said levee in repair.'

"On the 13th day of March, 1879, that cause was heard upon bill and answer in the circuit court of the United States. By that court it was adjudged and decreed 'that the said defendants [the commissioners] take, retain, and hold the right of way, levee, and other works and property in question, and described in the pleadings, and keep, take [471] care of, preserve, *and protect the same, under the order and control of this court, for the benefit and on behalf of the complainant and all other parties interested therein, or who may hereafter be found to be interested in the same, in whole or in part.'

"It was further decreed 'that the complainants and all other persons who may have loaned or advanced money to the defendants for the acquisition by those of the said right of way, or for the construction of the said levee and other works and property connected therewith, or who may be the holder of any of the bonds issued by said defendants to raise money for the purposes aforesaid, or to pay for such right of way or the construction of such levee and other works, or to pay any of the proper expenses connected therewith, who may come into this suit, contributing their proper proportion to the expenses thereof, have liberty to go before the master and produce these said bonds and coupons for interest thereon, and make proof of the amount due them of principal and interest on account of such loans, advances, and bonds; and the cause is referred to John A. Jones, master in chancery, for the purposes aforesaid, who will, upon the application of the complainants, or other persons who may come into the cause as complainants upon the terms hereinbefore prescribed, and reasonable notice to the defendants or their solicitors, proceed to take the proofs of the amounts due to the complainants, and allow parties who may have before that time come into the cause, and, after such proofs are taken, make a report to the court of the amounts found by him to be due each and any party who may appear before him, and the grounds and facts of his several findings and conclusion;' and that after the coming in of the master's report of the amount or amounts found by him to be due to the complainant or other persons who may come into the cause as aforesaid, and the approval of said report, and the determination and adjustment by the court of the amount or amounts due to the complainant or other persons who may come into the cause for moneys advanced or loaned on bonds held as aforesaid, the said complainants or other persons have the liberty to exhibit and file their supplemental bill or bills against any or all the present or [472] former *owners of the said lands alleged in said bill to be benefited by the said levee and other works, or who have heretofore or

who may now be in any way interested in the said levee and other works, or the lands benefited thereby, to compel them to contribute to the payment of the amount or amounts which may be found due to the said complainant or other persons as aforesaid, and for such other and further relief as they may be advised they are entitled to; and the court reserves all other questions of relief to the parties, and of the costs, to be considered hereafter. And the said complainant is at liberty to use the names of the defendants in any such proceeding by way of supplemental bill, if they are advised it is necessary to do so, upon rendering them a sufficient indemnity against all costs and expenses.'

"The master to whom the cause was referred to ascertain the amount of the several bonds and coupons made his report, showing the names of various persons, and the amount of bonds held by them, respectively. The amount reported as due to Francis Palms on the bonds held by him was \$221,228.26. The total amount found due to him and certain parties who became coplaintiffs with him in the cause was \$304,908.26. In the decree confirming the master's report it was declared: 'And it is further ordered, adjudged, and decreed by the court that the said several sums of money so found to be due to the said complainants as aforesaid are a lien upon the assessments made under the order of the county court of Pike county, in the state of Illinois, upon the lands described in the bound book, Exhibit A with complainant's bill, and upon the said lands, as provided in the 27th and 37th sections of an act of the general assembly of the state of Illinois entitled "An Act to Provide for the Construction and Protection of Drains, Ditches, Levees, and Other Works," approved April 24, 1871. And it further appearing to the court that the defendants, commissioners under the several orders of the county court of Pike county, aforesaid, have no money in their hands for the payment of the amounts so found and adjudged to be due to the said several complainants, and it also appearing to the court from the allegations of the complainant's bill, and not denied by the said *defendants in their [473] answer thereto, that they have taken no steps for the collection of the assessments made upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the court that the complainants have the right and liberty to proceed in this court, in the name of the said defendants as complainants as such commissioners, or in their own names as complainants, against the lands described in the said Exhibit A, and the owners thereof, or such of such lands and the owners thereof, or other persons, and said commissioners, as they may be advised, are liable for or bound to pay the sums found to be due to the complainants as aforesaid, jointly or severally, by a bill or bills, original, supplemental, or otherwise, as they may be advised, for the recovery of

the amounts found due them as aforesaid, and also for the costs of this suit.'

"It should be here stated that after the decision in *Webster v. People*, and after the institution by Palms of the suit in the circuit court of the United States, the following amendment to the Constitution of Illinois was adopted: 'The general assembly of Illinois may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary, or mining purposes across the lands of others, and provide for the organization of drainage districts, and vest the corporate authority thereof with power to construct and maintain levees, drains, and ditches, and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of this state by a special assessment upon the property benefited thereby.' 1 Starr & C. Anno. Stat. (Ill.) p. 122.

"Subsequently the legislature of Illinois passed an act which took effect May 29, 1879, entitled 'An Act to Provide for the Construction, Reparation, and Protection of Drains, Ditches, and Levees Across the Lands of Others for Agricultural, Sanitary, and Mining Purposes, and to Provide for the Organization of Drainage Districts.' 1 Starr & C. Anno. Stat. (Ill.) p. 919.

[174 "Some of the defendants in the present case made efforts to secure the passage of the act last referred to. That act provided for the formation of drainage districts with authority not only to construct drains, ditches and levees for agricultural, "sanitary, and mining purposes, but also to maintain and keep in repair any such drains, ditches or levees 'heretofore constructed under any law of this state;' and, in cases where a levee had been theretofore built 'under any law of this state,' the annual assessment for keeping the same in repair was made due and payable on the 1st of September annually.

"Subsequently, on the 26th of January, 1880, some of the landowners whose lands were described and included in the original assessments and in the original bill filed by Palms instituted proceedings under the act of 1879. In their petition they described the route and terminus of the levee, alleging that the levee 'was constructed, under the laws of Illinois then in force, in the counties of Adams, Pike, and Calhoun, for the years 1872, 1873, and 1874.' They further alleged that, by proper repair and maintenance of the levee, the lands aforesaid (which are alleged to be part of the lands described in the original bill and in the present bill, amounting in the aggregate to about 90,000 acres) would be reclaimed and brought into cultivation; that, in addition, it would greatly improve the sanitary condition of the locality through which the levee passed; and that it was absolutely necessary for the health and proper drainage and protection of the said land that the levee be repaired as speedily as possible. They prayed that a drainage district, to be known as 'Sny Island Levee Drainage District,' be formed out of the lands subject to periodi-

cal overflow by the Mississippi river in the townships named, for the repair and maintenance of such levee, according to the statute; that commissioners be appointed under the act of 1879, with directions to do all acts provided in the law for repairing levees, ditches, and drains, through assessments to be ordered; and for other and further relief.

"Such proceedings were had that the county court of Pike county duly created the Sny Island Drainage District, and in 1880 it received the surrender of the levee from the original Sny Levee commissioners, and now retains possession and control of the same.

"Palms died on the 24th day of November, 1886, more than six years after the last order made in the suit brought by him in the Federal court.

"*The present suit was brought by his ex-[475] eutors; the defendants herein being the surviving commissioners, Wheelock and Jones, and numerous individuals who own lands within the territory described in the proceedings instituted in the county court of Pike county under the act of 1871.

"The bill proceeded upon the general ground that each tract of land in question was chargeable in equity with the amounts assessed against it under the act of 1871, with interest, and that the plaintiffs had a lien on each tract for such sums as had fallen due and might become due under such assessments. It alleged that each defendant owned or claimed one or more tracts (Exhibit A showing a description of the various tracts, and the names of the persons against whom the assessments were made); that each defendant who acquired title to any of the lands after the assessments of 1872 and 1873 did so with full knowledge of such assessments and the above issue of bonds, as well as of the fact that the plaintiffs had purchased the bonds, and that the levee was constructed with the proceeds thereof; that, with like notice and knowledge, each of the defendants had appropriated and used the levee for the protection of their lands, and continued so to do; that all the defendants named in Exhibit A participated in causing said bonds to be issued and sold, and the proceeds expended by actively soliciting the passage of the act of 1871; that before and at the passage of the act of 1871 the reclamation and protection of the lands described in that exhibit had been a subject of consideration and discussion among the owners and occupants of the same, as well as others, and it was understood by all parties interested in such lands that in order to reclaim and protect the same a statute was absolutely necessary, under the provisions of which the persons interested in the lands could be united and organized, and a common agency created, with authority to make all necessary plans, estimates, and contracts for the location of the levee, and to borrow money upon bonds or otherwise, to be secured by assessments or pledges of the lands benefited; that the defendants, through the agency of their codefendant Charles M.

Clark, had procured the passage of that statute, and caused its provisions to be made known to the *people interested, and thereupon devised a plan for the organization of a corporation composed of persons interested in the lands, for the purpose of raising money to put the act into effect; that a large number of the defendants subscribed to the capital of that corporation in order to effect the objects of its creation; that the other defendants purchased lands through such last-named landowners, with full notice of the equities of the plaintiffs; that all of the defendants who purchased after May 4, 1878, did so with full notice of said assessments, and that the same were unpaid, and also that said original suit in the Federal court was pending; that certain other defendants participated in causing the said bonds to be issued and sold to the plaintiffs' testator, and the proceeds thereof to be expended in the construction of the levee, and in causing the said assessments to be made by signing the original petition to the Pike county court in the year 1872; that certain other defendants purchased lands from other landowners who had joined in the petition, with full knowledge of what had previously taken place; that other defendants participated in procuring the bonds to be sold, and the proceeds to be expended as stated, and in causing said assessments, by signing on the 20th day of November, 1874, a petition for a second assessment under the act of 1871; and that other defendants purchased from or through persons of the class last mentioned, with full knowledge of all the facts.

"The plaintiffs also alleged that certain named defendants, after the above decision by the supreme court of Illinois, knowing the levee to be constructed with the plaintiffs' money, and having full notice of all the facts, executed to Jones, Wheelock, and Westlake deeds of trust; that said deeds were made for the purpose of defeating the claims of the plaintiffs, and it was stipulated between the trustees and the last-named defendants that no part of the funds collected by the former should ever be applied to the payment of any indebtedness created by or on account of the original levee; that said deeds of trust continued in force until 1887, when the same were canceled, said Jones, Wheelock, and Westlake having, it is alleged, devised another scheme for defeating the claim of *the plaintiffs; and that certain other defendants purchased from defendants of the class last mentioned, with full notice of all the facts.

"It was further alleged that after the decree of March 13, 1879, namely, on January 26, 1880, certain defendants named filed a petition in the county court of Pike county setting forth that they owned certain lands, and alleging that a certain levee (the one heretofore described) had been constructed under the laws of the state of Illinois; that said petition set forth the purposes for which the levee had been constructed; that the same was in bad repair; that, in the faith that the same would be properly

constructed and repaired, they had expended large sums of money, had improved farms, and that all such improvements would be washed away, unless the levee should be repaired and kept up; and that the lands subject to overflow amounted to an aggregate of 90,000 acres. The bill set forth the substance of the petition, and the various steps taken, as already stated, for the formation of a new drainage district, to be known as the 'Sny Island Levee Drainage District,' and alleged that all the defendants so joining had full notice of all the facts and of the making of the assessments aforesaid; that certain other defendants purchased lands from the defendants of the class last mentioned, with notice of all the facts; that certain other named defendants, pursuant to the statute of Illinois approved May 29, 1879, were severally made parties to, and had notice of, all the proceedings for the organization of the Sny Island Levee Drainage District, as well as of the contents of the petition therefor, and were bound by such proceedings and the appropriation of the levee aforesaid; that certain other named defendants acquired title to said lands, or interests therein, after July 26, 1880, and were bound by said proceedings and the appropriation of said levee; that certain other defendants named were heirs at law and took title to portions of said lands from ancestors who took part in some or all of the aforesaid proceedings; that certain other defendants had acquired title to some of said lands by accepting deeds of conveyance expressly recognizing the lien of plaintiffs on said tracts; and that every one of the present defendants had full *notice [478] of the claims of plaintiffs and of the facts aforesaid; and that all of the defendants now appropriated said levee and other works and refuse to contribute anything to the payment of the plaintiffs.

"The bill alleged that the Sny Island Levee Drainage District had every year made large assessments, and, contriving and intending to defeat the plaintiffs, had caused many of the tracts of land to be sold for nonpayment of such assessments (such sales, it was alleged, being merely colorable, as against the rights of the plaintiffs, and mere clouds on the title to said land); that before the construction of said levee the lands were wet, and not worth exceeding 50 cents per acre; that the average amount assessed against the lands for the cost of the levee was greatly in excess of the then value of the lands, but it was expected that the work would, when constructed, drain every tract, and so enhance the value of the same as to make the lands ample security for the money borrowed; that the plaintiffs, relying on this and on the assurances of the landowners and commissioners, purchased the bonds in question; and that the lands were enhanced in value by said expenditures until they became worth \$25 per acre.

"It was also alleged that, if the levee had been kept up, it would have afforded full protection, and would have caused the lands to have continued to be good security; that

defendants had spent some money in repairing said work, but made such improvements and repairs so unskilfully that they were insufficient; and that by neglect of the defendants the lands had again become wet and overflowed, and were not now good security for the plaintiffs.

"After stating that the defendants were, by reason of the matters and things set forth in the bill, bound to preserve, protect, improve, and repair the said levee and other works described, by sufficient contribution in money, ratably or otherwise, and by further assessments upon the lands, in order to protect and keep the security of the plaintiffs adequate and sufficient, the plaintiffs prayed that by the appointment of a receiver with ample powers, and by other appropriate order, the defendants should be compelled to preserve, protect, repair, improve, *and make said levee and other works protective of said lands, 'or to give and confer upon such receiver the power to make needful assessments upon said lands in proportion to benefits and the relative value of each tract thereof, and with the money arising therefrom, or by the mortgage of such assessments and the lands upon which they are made, raise the money necessary for the repair and improvement of the said levee and other works, and with the money so raised proceed to repair and improve said levee until it is made adequate for the drainage and protection of all of the said lands; that each and every of said defendants herein may be enjoined by this honorable court from selling, transferring, or assigning, the title to said lands owned by them, or any part thereof, upon which any of said assessments may rest, except subject to the lien of said assessments, as the same shall be determined by this honorable court, or in any manner whatsoever changing, altering, or affecting the title thereto so as to in anywise impair, diminish, hinder, or prejudice the lien of said assessments thereon, or on any portion thereof, and that the Sny Island Levee Drainage District, its officers and agents, be enjoined from selling or offering for sale any lands covered by any of the assessments herein in question, for any pretended assessments or alleged liens by said district attempted to be assessed, except subject to the lien of all assessments and liability on said lands, respectively, as the same shall be determined by this honorable court.'

"It was further asked in the bill that the court order, determine, and declare the amounts due to the plaintiffs and all other holders of bonds and coupons who would come in and contribute to the expenses of this suit, 'and the amount due for principal and interest on the several assessments made against and upon each tract of land described in the pleadings and exhibits, and the proportion of the amount of such assessments upon each tract of land necessary to the payment of the amount of the principal and interest now due upon the bonds and coupons of your orators and others who may come into the cause and contribute as be-

184 U. S.

fore mentioned, and that each of the said tracts of land be sold under the order and decree of this court for the amount chargeable upon and against the same, unless the *owner of the same, or some other person for [480] him, shall, within a day limited, pay said amount, with a just proportion of the costs of this suit;' and also that the court would 'appoint one or more commissioners or receivers in the place and stead of the said John G. Wheelock and George W. Jones, or appoint a commissioner in the place of the said Benjamin F. Westlake, deceased; and, if one or more commissioners or a receiver or receivers are appointed in the place and stead of the said John G. Wheelock and George W. Jones, the said Wheelock and Jones may be ordered and directed to turn over and deliver to such commissioners or receivers so appointed all books, papers, documents, and property now in their possession or under their control.'

"The defendants demurred to the bill, and the demurrers were overruled. They subsequently filed answers, which put the plaintiffs upon proof of many essential allegations of their bill, without proof of which independently of the question of law arising upon the face of the bill, no part of the relief asked could have been granted. In the view which is taken of the case by this court it is unnecessary to extend this opinion by setting forth the averments and denials of the several answers.

"Upon final hearing the circuit court dismissed the bill."

Mr. Henry M. Duffield argued the cause and filed a brief for petitioners:

The Federal courts can enforce liens created by state laws, and have repeatedly done so.

Fitch v. Creighton, 24 How. 159, 16 L. ed. 596; *Idaho & O. Land Improv. Co. v. Bradbury*, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44.

The legislative power of the general assembly of Illinois "extends to everything within the sphere of that power, except as it is restricted by the Federal Constitution, or that of the state."

Pine Grove Twp. v. Talcott, 19 Wall. 666, 22 L. ed. 227.

Ill. Const. art. 9, § 9, is not such a limitation.

People ex rel. McCagg v. Chicago, 51 Ill. 30, 2 Am. Rep. 278.

The validity of statutes of this character, and the power of the legislature to provide for the payment of the cost of the common benefit by special assessments, are treated as settled law.

6 Am. & Eng. Enc. Law, pp. 12, 14; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Cooley*, Taxn. pp. 101, 402, 403; *Cooley*, Const. Lim.

636, 637; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Reeves v. Wood County*, 3 Ohio St. 333; *Ross v. Davis*, 97 Ind. 79; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Meranda v. Spurlin*, 100 Ind. 380.

An express grant of power to do a certain thing without any words of limitation or restriction carries with it all necessary and proper means to make the power effectual, and the body to whom such power is given is in such case the sole judge of the means to be employed to give it practical effect,—especially where that body, except so far as limited and restricted, has plenary power.

Huston v. Clark, 112 Ill. 344.

An equitable estoppel arises when one person has induced another to act upon the supposition that a state of facts exists which does not exist in fact, or has pursued a course of conduct in respect to his own property or rights which has led another into expenditures which are to be lost if the party so misleading is afterwards allowed to assert rights inconsistent with such course of conduct.

Morrill v. Mackman, 24 Mich. 279, 9 Am. Rep. 124; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Dann v. Cudney*, 13 Mich. 239, 87 Am. Dec. 755; *Truesdail v. Ward*, 24 Mich. 117; *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861.

This general principle of estoppel has been frequently applied in cases of invalid acts of the legislature, similar to the one at bar.

Blake v. People use of Caldwell, 109 Ill. 504; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Ferguson v. Landram*, 1 Bush, 548, 5 Bush, 230, 96 Am. Dec. 350; *Moran v. Miami County*, 2 Black, 722, 17 L. ed. 342; *Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143; *People ex rel. Bodine v. Goodwin*, 5 N. Y. 573; *Kellogg v. Ely*, 15 Ohio St. 66; *People v. Murray*, 5 Hill, 468; *Van Hook v. Whitlock*, 26 Wend. 43, 37 Am. Dec. 246; *Mots v. Detroit*, 18 Mich. 495; *Jackson v. Detroit*, 10 Mich. 248; *Wiggin v. New York*, 9 Paige, 16; *Chapman v. Mad River & L. E. R. Co.* 6 Ohio St. 119; *Re Cooper*, 93 N. Y. 507; *Bidwell v. Pittsburgh*, 85 Pa. 412, 27 Am. Rep. 662; *Dewhurst v. Allegheny*, 95 Pa. 437; *Ricketts v. Spraker*, 77 Ind. 371; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723; *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 592; *Columbus v. Sohl*, 44 Ohio St. 479, 8 N. E. 299; *Columbus v. Slyh*, 44 Ohio St. 484, 8 N. E. 302; *Muncey v. Joest*, 74 Ind. 409; *Nevins & O. C. Twp. Draining Co. v. Alkire*, 36 Ind. 189; *Flora v. Cline*, 89 Ind. 208; *State ex rel. Garrett v. Van Horne*, 7 Ohio St. 327.

These decisions are not confined in their reasoning to the rule that equity will not relieve a complainant whose conduct has estopped him to ask relief in a court of equity, for in a number of cases the estoppel was enforced against defendants, in actions to recover assessments from them.

Dewhurst v. Allegheny, 95 Pa. 437; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723; *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 592; *Columbus v. Sohl*, 44 Ohio St. 479, 8 N. E. 299; *Columbus v. Slyh*, 44 Ohio St.

484, 8 N. E. 302; *Muncey v. Joest*, 74 Ind. 409; *Nevins & O. C. Twp. Draining Co. v. Alkire*, 36 Ind. 189; *Flora v. Cline*, 89 Ind. 208; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *People v. Murray*, 5 Hill, 468.

The object of the bill is to enforce specific assessments on specific lands for specific benefits. Assessments are not taxes.

Ottawa v. Free Church, 20 Ill. 423; *McBride v. Chicago*, 22 Ill. 574; *Peoria v. Kidder*, 26 Ill. 351; *Illinois & M. Canal v. Chicago*, 12 Ill. 405; *Re New York*, 11 Johns. 77; *Bleecker v. Ballou*, 3 Wend. 263; *Northern Liberties v. St. John's Church*, 13 Pa. 104; *Reeves v. Wood County*, 3 Ohio St. 333.

The remedy is in equity.

Fitch v. Creighton, 24 How. 159, 16 L. ed. 596; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

There is no analogy between the assessments in question and ordinary taxes.

Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39.

Liens for ordinary taxes for municipal purposes and assessments for municipal local improvements are not given for the benefit of the creditors of the municipality, but are created for the benefit of the public authorities to enable them with greater certainty and facility to collect the tax without the embarrassment of other claims against the property taxed.

Barkley v. Levee Comrs. 93 U. S. 258, 23 L. ed. 893.

In cases at law, where the equities were not so strong as in this case, this court has implied an equitable assumpsit on the part of municipalities to repay the moneys which they had raised by unauthorized bonds and expended for the benefit, and upon the property, of the municipalities.

Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153; *Read v. Plattsburgh*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208.

Mr. Thomas Worthington argued the cause, and, with Messrs. Benjamin Harrison, Asa C. Matthews, Harry Higbee, and J. Otis Humphrey, filed a brief for respondents:

In cases affecting real estate, and involving the construction of the statutes and Constitution of a state, the courts of the United States will follow the decisions of the highest court of the state.

Elmwood Twp. v. Marcy, 92 U. S. 289, 23 L. ed. 710; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Post v. Kendall County*, 105 U. S. 667, 26 L. ed. 1204.

Ill. Const. 1870, art. 9, § 9, authorizing the general assembly to vest the corporate authority of cities, towns, and villages with the power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise, is a limitation of the power of the legislature, and the general assembly can only vest such power to make local improvements by special assessments or special taxation upon the municipalities therein named, and has

no power to confer such authority upon any other bodies.

Udike v. Wright, 81 Ill. 49.

A somewhat similar provision in the Constitution of 1848, art. 9, § 5, has been similarly construed.

Harward v. St. Clair & M. Levee & Drainage Co. 51 Ill. 130; *Hessler v. Drainage Comrs.* 53 Ill. 105; *Lovington v. Wider*, 53 Ill. 302; *Wider v. East St. Louis*, 55 Ill. 133; *Decker v. Hughes*, 68 Ill. 44; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People ex rel. Wilson v. Salomon*, 51 Ill. 37; *East St. Louis v. Witts*, 59 Ill. 156; *School Trustees v. People ex rel. Toledo, W. & W. R. Co.* 63 Ill. 299; *People v. McAdams*, 82 Ill. 356; *Madison County Ct. v. People ex rel. Toledo, W. & W. R. Co.* 58 Ill. 456; *Elmwood Twp. v. Marey*, 92 U. S. 289, 23 L. ed. 710; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Harter Twp. v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *Wrightman v. Clark*, 103 U. S. 256, 26 L. ed. 392.

A court of equity has no power to assume the functions of a tax collector.

Walkley v. Muscatine, 6 Wall. 481, 18 L. ed. 930; *Lee County v. Rogers*, 7 Wall. 175, sub nom. *Lee County v. United States ex rel. Rogers*, 19 L. ed. 162; *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140.

While the Federal courts will, in proper cases, compel the collection of taxes and assessments, by officers who are invested with the necessary power, and whose duty it is to exercise such power, yet such courts will not, and absolutely cannot, supply authority to persons not so empowered.

Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; *Heine v. Levee Comrs.* 1 Woods, 246, Fed. Cas. No. 6,325; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Barkley v. Levee Comrs.* 93 U. S. 265, 23 L. ed. 896.

Complainants cannot ask to be placed in any better position than they would occupy if there were no question whatever as to the constitutionality of the act of 1871. Granting, then, that such law is valid in all respects except as to the collection of the assessments, still the court will not, and cannot, give the relief prayed.

Barkley v. Levee Comrs. 93 U. S. 264, 23 L. ed. 896.

Where a lien is given by statute, and a legal mode provided for collecting the money payable thereunder, such mode must be pursued, and equity has no jurisdiction.

People v. Biggins, 96 Ill. 481.

Notice by *lis pendens* can only be kept alive by the diligent prosecution of the cause.

Herrington v. McCollum, 73 Ill. 483; *Durand v. Lord*, 115 Ill. 621, 4 N. E. 483.

It is not sufficient to convey notice by *lis pendens* to file a bill in court against persons who do not own the title to the property to be affected.

Norris v. Ile, 152 Ill. 202, 38 N. E. 762; *Bennett, Lis Pendens*, p. 153; *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537.

The rule *lis pendens* only binds claimants 184 U. S.

to the property who are impleaded, and their *pendente lite* purchasers. If they are not impleaded, they are at liberty to dispose of the res, and the purchaser will take it unaffected by the suit, although it may be pending against parties other than the real owners.

13 Am. & Eng. Enc. Law, p. 882b, note 2, p. 902, note 4; *Games v. Stiles ex rel. Dunn*, 14 Pet. 322, 10 L. ed. 476; *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 827; *Grant v. Bennett*, 96 Ill. 513; *Hallorn v. Trum*, 125 Ill. 247, 17 N. E. 823; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. 397; *Story*, Eq. Jur. § 406.

Where a bill originally so defective as not to create a *lis pendens* is subsequently cured by amendment, *lis pendens* will commence from the time of filing the amendment, where the defendant has been served with process.

Norris v. Ile, 152 Ill. 202, 38 N. E. 762; *Miller v. Sherry*, 2 Wall. 250, 17 L. ed. 830; *Clarkson v. Morgan*, 6 B. Mon. 441.

So it is with an amendment that sets up a new equity.

Miller v. Sherry, 2 Wall. 250, 17 L. ed. 830; *Clarkson v. Morgan*, 6 B. Mon. 441.

In order to create an estoppel, whether by words, or acts, or silence, the party demanding relief must show that he had a right to rely, and actually did rely, on the assurances given by the other party.

Holcomb v. Boynton, 151 Ill. 299, 37 N. E. 1031; *Story*, Eq. Jur. 1534; *Davidson v. Young*, 38 Ill. 152; *First Nat. Bank v. Rieker*, 71 Ill. 439, 22 Am. Rep. 104; *Dinet v. Ellert*, 13 Ill. App. 99; *Herman, Estoppel*, 969; *South Ottawa v. Perkins*, 94 U. S. 267, 24 L. ed. 157.

There can be no estoppel in the way of ascertaining the existence of a law.

South Ottawa v. Perkins, 94 U. S. 267, 24 L. ed. 157.

Where there is a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the city under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some instalments of interest on the bonds, or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust.

Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Citizens' Sav. & L. Asso. v. Topcka*, 20 Wall. 655, 22 L. ed. 455.

That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value, and in the belief that they have been lawfully issued.

Post v. Kendall County, 105 U. S. 667, 26 L. ed. 1204.

An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as if it had never been passed.

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121.

The mere institution of a suit does not in itself relieve a person from the charge of laches, and if he fails in the diligent prosecution of the action the consequences are the same as though no action had been begun.

Johnston v. Standard Min. Co. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585.

When adverse possession was continued for seven years, either under tax deed or any other deed, regular on its face, accompanied by the payment of taxes, the bar of the statute is complete. It has been frequently decided that a tax deed is sufficient "color of title" in this state, if regular on its face.

Stubblefield v. Borders, 92 Ill. 279; *Thomas v. Eckard*, 88 Ill. 593.

If the present bill is to be treated as a bill of review, as it states on its face, then it could be brought only within the time allowed for the bringing of a writ of error, to wit, five years.

Bell v. Johnson, 111 Ill. 374; *Allison v. Drake*, 145 Ill. 511, 32 N. E. 537.

A court of chancery follows the law in applying the statute of limitations.

Walker v. Ray, 111 Ill. 319.

But equity goes further than the law, and refuses relief on the ground of laches in many cases where there would be no bar to an action at law, usually founded upon some change in the conditions or relations of the parties or the subject-matter of the suit.

Walker v. Ray, 111 Ill. 322.

Laches is not like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change of the conditions of the property or the parties.

Gallagher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 696, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 618, 39 L. ed. 556, 15 Sup. Ct. Rep. 520; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; *Williams v. Rhodes*, 81 Ill. 571; *Walker v. Warner*, 179 Ill. 16, 53 N. E. 594.

Where the question of laches is an issue, the plaintiff is charged with such knowledge as he might have obtained upon inquiry, provided the facts known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.

Johnston v. Standard Min. Co. 148 U. S. 370, 37 L. ed. 480, 13 Sup. Ct. Rep. 585.

The bonds being unconstitutional, the right of action accrued for the original consideration when the money was parted with, and the suit was barred by the five years' statute of limitations.

Etna L. Ins. Co. v. Middleport, 31 Fed. 374.

Mr. W. H. H. Miller also argued the cause, and, with Messrs. Asa C. Matthews,

Thomas Worthington, and Harry Higbee, filed an additional brief for appellees:

These assessments, even if valid, are not collectible in the United States courts, but, being liens purely statutory, must be taken on the terms prescribed by the statute, and can be collected only by the statutory method.

People v. Biggins, 96 Ill. 481; *Cooley*, Taxn. 2d ed. pp. 449, 450.

A lien for taxes cannot be collected by suit in a court of chancery.

People v. Biggins, 96 Ill. 481.

Law cannot be made by estoppel.

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *South Ottawa v. Perkins*, 94 U. S. 267, 24 L. ed. 157; *Wilkes County v. Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; *Holcomb v. Boynton*, 151 Ill. 299, 37 N. E. 1031.

Complainants, having attempted to obtain a lien by statute, cannot now rely on a contract or equitable lien.

Vane v. Newcombe, 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. Rep. 60.

Where two parties are *in pari delicto*, as where a corporation has made a contract *ultra vires*, merely, there being no moral wrong, the courts will not help either party to assert any right under the contract, and either party may raise the question.

Holman v. Johnson, 1 Cowp. 341; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 150, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953.

There can be no estoppel as to any property owners because benefit is only indirect and common to all.

Cincinnati, S. & C. R. Co. v. Bensley, 19 L. R. A. 796, 2 C. C. A. 480, 6 U. S. App. 115, 51 Fed. 738; *Memphis, K. & C. R. Co. v. Thompson*, 24 Kan. 170; *Travelers' Ins. Co. v. Johnson City*, 49 L. R. A. 123, 40 C. C. A. 58, 99 Fed. 663; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Read v. Platts-mouth*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208; *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. Rep. 316.

The right of action to enforce repayment of money invested in the bonds issued under the act of 1871 was immediate, either upon the original advancement of the money, or, at any rate, upon the adjudication that the statute and the bonds were void.

Merrill v. Monticello, 18 C. C. A. 636, 34 U. S. App. 615, 72 Fed. 462; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153.

If it were an action at law, there would be no question that it was squarely within the terms of § 15 of the act of April, 1872 (2 Starr & C. Anno. Stat. p. 2624). It is

none the less so because it is a proceeding in equity to reach the same end.

Junker v. Rush, 136 Ill. 179, 11 L. R. A. 183, 26 N. E. 499.

So it is adjudged, in Illinois, that money advanced upon a forged note and mortgage can only be recovered back by a suit within five years from the time the same is advanced.

Lunt v. Wrenn, 113 Ill. 168; *Wilson v. Williams*, 42 Ill. App. 612.

And it has been expressly adjudged, and is the settled law of Illinois, that courts of equity do not merely follow the analogy of the statute of limitations, but that they are bound thereby the same as the courts of law.

Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833; *Story*, Eq. Jur. § 529.

Such being the law of Illinois, it is also the law for the Federal courts.

Amy v. Dubuque, 98 U. S. 470, 25 L. ed. 229; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408.

The lien is a mere incident to the debt or charge.

Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 313; *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999.

And a tax is a debt in such a sense as to be barred by the statute of limitations.

Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

This court has held that where a bank pays money upon a forged check, with a forged indorsement, both parties supposing the signatures to be genuine, the right of action to recover back the money accrues at the date of the payment, and the statute of limitations begins to run from that date.

Leather Mfrs. Bank v. Merchants' Nat. Bank, 128 U. S. 26, 32 L. ed. 342, 9 Sup. Ct. Rep. 3.

Messrs. A. G. Crawford and Jefferson Orr also filed a brief for appellees.

480] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

The circuit court held in substance, among other things, that the decretal order of that court on the bill first filed adjudging the amounts reported by the master to be due the several complainants and giving them liberty to file a supplemental bill against the owners of the lands benefited to compel them to contribute to the payment of the amounts thus reported, was not an adjudication which precluded the land-
481] owners from denying*their liability; that as it was thirteen years after the act was declared to be unconstitutional and nine years after leave was given to file the supplemental bill, before any step was taken except as against those who were originally commissioners, there had been such laches as precluded complainants from having the relief sought, the conditions of the property and the relations of the parties having in the meantime greatly changed. The circuit court of appeals held that even when exercising an independent
184 U. S.

judgment a Federal court should give effect to rules of construction previously established by the highest court of a state, and not act upon a different view unless compelled to do so to prevent an absolute denial of justice; that, applying the settled rule of construction of the state to the state Constitution relating to the subject, the act of April 24, 1871, was unconstitutional, and assessments made thereunder were not enforceable; that the fact alone that landowners advocated and used their influence to secure the passage of a law under which bonds were issued, to be paid by special assessments against their lands, which law was subsequently declared unconstitutional, and the assessments void, did not afford ground on which a court of equity should declare a lien on such lands in favor of the bondholders, in the absence of fraud, and where both the landowners and the purchasers of the bonds acted in the mistaken belief that the bonds were valid; and that where bonds issued by commissioners in payment for the construction of a levee to protect lands from overflow, were void, a court of equity had no power to determine that certain lands received the benefit of the expenditure, and on that ground to declare a lien thereon in favor of the bondholders. The decree of the circuit court was not affirmed on the ground of laches, but the circuit court of appeals nevertheless said: "The plaintiffs can take nothing, as against the individual landowners, defendants in this cause, by reason of any order made in the suit instituted by Palms in the circuit court of the United States against the commissioners designated under the act of 1871; for the present defendant landowners were not parties to that suit, and could not be concluded by any order made in it. It is evident from the orders entered in that case that Judge *Drum- [482]mond did not intend to pass upon the rights of the landowners, but was of opinion that if Palms had any ground of action against them, in respect of the lands attempted to be specially assessed under the act of 1871, he must bring them before the court by supplemental bill. He was given leave to file such a bill by an order entered in 1879. But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly \$100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889,—about nine years after it could have been filed. If the case depended alone upon the question of laches, there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the landowners that a court of equity ought to decline giving them any relief. The application of such a principle would be peculiarly appropriate, because it is provided by statute in Illinois that no execution can issue upon a judgment after the expiration of seven years from the time it becomes a lien, except upon the revival of the same by scire facias, and that an action to recover real estate shall be barred

by seven years' residence thereon under a title of record, etc.; by seven years' adverse possession under color of title and payment of taxes; or, as to unoccupied land, by seven years' payment of taxes under color of title. 2 Starr & C. Anno. Stat. (Ill.) p. 1386, chap. 77, § 6; *Id.* pp. 1538, 1539, 1547, chap. 83, §§ 4, 6, 7. In this case most of the defendants made proof of adverse possession. Besides, as said in *Johnston v. Standard Min. Co.* 148 U. S. 360, 370, 37 L. ed. 480, 485, 13 Sup. Ct. Rep. 585, 589, 'the mere institution of a suit does not of itself relieve a person from the charge of laches,' and 'if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun.'

The bill is stated by counsel to be a bill to "enforce severally against the lands of certain defendants the lien of separate assessments for the construction of the levee, with the proceeds of which the levee was built, upon the grounds, (1) that such assessments were levied in strict conformity with the terms of the statute of 1871, which was a valid law; and (2) that even if that statute was unconstitutional, many of the [483] defendants *owning such lands are estopped to deny the constitutionality of said act and attack the assessments on that ground. It is not a bill to compel contributions to, or collect proportionate amounts of, a gross sum, but is a bill in the nature of a foreclosure bill to enforce, on the several and separate parcels of land, the liens of several and specific assessments upon the faith of which the moneys which built the levees were advanced."

It is insisted that it is not a bill to collect a tax, or a bill "to hold any municipal corporation or any individual liable, directly or indirectly, at law or in equity."

The bill purports to be an original bill in the nature of a supplemental bill, supplemental to the bill originally filed by Palms, either by way of enforcing the decretal order entered on that bill, treated as a final decree, or, treating that order as interlocutory merely, of obtaining a decree on the whole case as against new parties. Which view is taken is perhaps not material, for "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill." *Lawrence Mfg. Co. v. Jancsville Cotton Mills*, 138 U. S. 561, 34 L. ed. 1008, 11 Sup. Ct. Rep. 405. And, moreover, the bill is an original bill as to the landowners.

Palms filed that bill, on behalf of himself and others similarly situated, May 4, 1878, against Wheelock, Jones, and Westlake, as commissioners appointed under the act of April 24, 1871, praying that the moneys "loaned and advanced" by complainant to those commissioners be ascertained, and a decree entered that complainant was entitled to a lien on the levee, and other works and lands, acquired by the commissioners, and the assessments for benefits to said lands, which had been made; and further

that the commissioners be decreed to proceed at once to collect the assessments, or so much thereof from time to time, as would be sufficient to pay the interest and principal payable to complainant as the same fell due, or that the court appoint a receiver or receivers with authority to collect said assessments.

The commissioners were not impleaded as representing the landowners in the litigation. Their duties were such as the *act of [484] 1871 defined, if that act were valid, and their powers were created and limited thereby, and did not include the power to bind all or any of the landowners of the district in such a suit. The suit was brought to compel the commissioners to discharge the duty, under the act, of enforcing the collection of assessments in the interest of the bondholders, as creditors, and in that sense they occupied an adverse relation to the landowners who were quasi debtors.

The commissioners had filed in the county court of Pike county their assessment roll in 1872, and objections thereto by certain landowners having been decided adversely to them by the county court, and, on appeal, by the circuit court of the county, they took the case to the supreme court of the state, which decided that the act of 1871 was unconstitutional. This judgment was pronounced at January term, 1876. It was after this that, interest being overdue on the bonds held by him, Mr. Palms filed his bill. Some other bondholders became parties complainant, and on March 13, 1879, an order was entered permitting complainants to bring the landowners into court and test the question of their liability, and the cause was referred to a master. July 7, 1880, the report of the master was confirmed and the court adjudged and decreed that there was due to Palms \$221,228.66, and to various other complainants some thousands of dollars as specified, the whole aggregate sum found due complainants being \$304,908.26, it being added: "The above amounts are found due without prejudice." It was further decreed that the sums of money found due were "a lien upon the assessments made under the order of the county court of Pike county, in the state of Illinois, upon the lands described in the bound book Exhibit A" as provided in the 27th and 37th sections of the act of April 24, 1871. The order proceeded that it appearing that the commissioners had no moneys in their hands for the payment of the amounts so found due, and that they had taken no steps for the collection of the assessments, it was further ordered by the court "that the complainants have the right and liberty to proceed in this court in the name of the said defendants as complainants as such commissioners, or in their own names as *complainants against [485] the lands described in the said Exhibit A and the owners thereof, or such of such lands and the owners thereof, or other persons, and said commissioners as they may be advised are liable for or bound to pay the sums found to be due to the complainants as aforesaid, jointly or severally, by a bill

or bills, original, supplemental, or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid and also for the costs of this suit." Both these orders show that the circuit judge was of opinion that to subject the lands to the assessments in that suit the landowners must be made parties; and even the amounts found due were in terms so found without prejudice to their rights.

No steps were subsequently taken, and Mr. Palms died November 24, 1886. His executors, on April 22, 1889, filed the present bill against some thousand landowners of the district as well as Wheelock and Jones, two of the alleged levee commissioners, Westlake in the meantime having deceased.

It was an original bill as to these new parties and they were entitled to all the defenses which existed when it was filed, and were unaffected by the principle of *lis pendens*. The supreme court of Illinois had held in 1876 that the act of April 24, 1871, was in contravention of the Constitution of the state and void. This decision was made after the bonds in question had been issued and purchased by Palms from the contractors, but the judgment was rendered on objections by the landowners to the confirmation of the assessments, the collection of which was relied on for the payment of the principal and interest of the bonds, so that it might well be held to be binding on the Federal courts. But we agree with the circuit court of appeals that even if the circuit court was not obliged to accept that decision, yet that there was so little doubt of its correctness as to require the same conclusion. The rulings of the state supreme court were that the work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, was not embraced within the act of 1871; that § 31 of article 4 of the Constitution of 1870, that "the general assembly may pass laws permitting the owners [or occupants] of lands to construct drains, [486] ditches, *and levees for agricultural, sanitary, or mining purposes across the lands of others," did not authorize the construction of a levee independent of drainage; that § 9 of article 9 of that Constitution was a limitation on the power of the legislature, which could only vest such power in such municipalities, and not in any other bodies, though other municipalities might be vested with jurisdiction to assess and collect taxes for corporate purposes subject to the rule of uniformity as to persons and property; and that the burden of taxation by special assessment could not be imposed on a locality without the consent of the taxpayers to be affected. And the court held, in respect of the act of 1871, "that neither the commissioners nor the juries selected, nor the county court, is such a body as, under the Constitution, may be given power to make local improvements by special assessments or by special taxation upon contiguous property;" and also that "under this law, the people whose property is sub-

ject to taxation or assessments have never given any consent to it, if we exclude those who may have signed the petition addressed to the county court."

Section 5 of article 9 of the state Constitution of 1848 provided: "The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with authority to assess and collect for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Section 9 of article 9 of the Constitution of 1870 read: "The general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform, in respect to persons and property, within the jurisdiction of the body imposing the same."

These provisions of the two Constitutions are substantially identical, and while, prior to the act of 1871, the clause of the Constitution of 1870 had not been construed by the supreme court of the state, the similar provision in the Constitution of 1848 *had been [487] construed in several instances. And it was ruled that the right of taxation could not be granted by the general assembly in any form to private persons, or to private corporations; that the provision limited the power of the general assembly to grant the right to assess and collect taxes to the corporate or local authorities of the municipalities or districts to be taxed; that a local burden of taxation or special assessment could not be imposed upon a locality without the consent of the taxpayers to be affected; and that corporate authorities were municipal officers directly elected by the people of the municipality or appointed in some mode to which they had given their assent. *Harward v. St. Clair & M. Levee & Drainage Co.* 51 Ill. 130; *Hessler v. Drainage Comrs.* 53 Ill. 105; *Lovington v. Wider*, 53 Ill. 302; *Wider v. East St. Louis*, 55 Ill. 133; *People ex rel. Wilson v. Salomon*, 51 Ill. 37.

The construction of the state Constitution in *Harward's Case* and others has been repeatedly recognized by this court as authoritatively established.

And as this was the settled law of the state when these bonds were issued, and the Constitution of 1870 admitted of no other construction, we concur in the opinion that the act of 1871 was repugnant to the Constitution of Illinois; the bonds due under it were void; and the lands intended to be benefited could not be specially assessed by any action taken in conformity with the provisions of that act.

The case of *Blake v. People*, 109 Ill. 504, conduces to no other result. That case arose under the act of May 29, 1879, which was passed after the amendment of the state Constitution adopted in 1878. That amendment provided that the general assembly

might pass laws permitting the owners of lands to construct drains, ditches, and levees across the lands of others, and to organize drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains, and ditches, "and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of this state, by special assessment upon the property benefited thereby." The new levee district was organized under this [488] act to repair *the levee which had been built under the invalid law of 1871. The objection was raised by a landowner, on the application of the collector of the county for judgment against his land on an assessment, that the old levee had not been built under a law of the state within the meaning of the act and of the Constitution, because the act of 1871 was no law. The court held that the point should have been raised before the confirmation of the assessment roll, and came too late. The court also held that it could not take judicial notice that the purpose for which the corporation was created was not to keep in repair levees theretofore constructed under a law of the state; but assuming the question to be properly before the court, that while the act of 1871 was unconstitutional as affecting those over whose lands the drains, levees, etc., were to be constructed without the owners' consent, and those against whose property it was proposed to assess the cost of constructing such drains and levees without their consent, yet that there might be some person so situated as to be precluded from raising the question of the validity of the law. And while, strictly speaking, there neither was nor could be any levee in Illinois constructed under a law of the state, yet that the legislature plainly meant to authorize the completion and repair of levees that had been constructed under an act purporting to be a law, though it was not. The court said: "There was no law in force authorizing the construction of levees over the lands of others (save the act of April 24, 1871) at the time *Updike v. Wright* and *Webster v. Levee Comrs.* were decided. To obviate the effect of those decisions—allow the construction of levees, as well as drains, upon the lands of others—and to authorize the formation of municipal corporations for the purpose of constructing drains and levees, the amendment to § 31, article 4, was submitted to, and adopted by, the people, at the November election, in 1878. The act of May 29, 1879, but repeats, in this respect, the language of that amendment. The levees, therefore, which must have been referred to, because none other could reasonably have been intended, were the levees which had been constructed, but could not [489] be *kept in repair because of the decisions in *Updike v. Wright* and *Webster v. Levee Comrs.*"

The act of April 24, 1871, being invalid, the corporate existence of the levee commissioners, and the assessments made at their instance, and the collection of the latter under that act, or under the act of April 9,

1872, entitled "An Act to Provide for the Registration of Drainage and Levee Bonds, and Secure the Payment of the Same," failed with it. But it is contended that while all this may be so as to the general public, yet that appellees, or some of them, have so conducted themselves that they are estopped from asserting such invalidity, and that the circuit court should have enforced the assessments exactly as if the law had been a constitutional enactment. The bill sought to collect not only the assessments already made, but asked to have further assessments made to pay the bonds in full, and to maintain and preserve the security; and the court was also asked to declare that the assessments created valid liens upon the lands, and to decree that the bonds sued on were a lien on the assessments and to enforce their collection. In other words, that the court execute the act, either as in itself wholly valid or valid as to these defendants. We are unwilling to assent to the doctrine of legislation by estoppel. The courts cannot by the execution of an unconstitutional law as a law, supply the want of power in the legislative department.

In *South Ottawa v. Perkins*, 94 U. S. 267, 24 L. ed. 157, this court said: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

In that case the invalidity of the law grew out of the fact*that the journals of the [490] senate and house did not show the passage of the bill as the Constitution required it to be shown. Bonds had been issued, bought innocently, and the town had paid one instalment of interest, but it was held that the bonds could not be sustained on the doctrine of estoppel. In this case the bonds were signed, issued, and sold by the commissioners, and the interest which was paid was paid by the commissioners. The landowners had no control of the question whether bonds should be issued, and were not in privity of contract with the purchasers of the bonds. As the act, the assessments, and the bonds were void, the landowners, when it was sought to subject their property to those assessments for the payment of the void bonds, could not be estopped on the ground that the law itself, though void, was valid as to them.

Even in the instance of contracts of a corporation beyond the scope of its corporate powers, the law is well settled in this court that nothing which has been done un-

der them or the action of the courts can infuse any vitality into them. *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187, though not precisely in point, is illustrative of the distinction between enforcing an invalid law in an executory way, and awarding relief in respect of things accomplished under it. In that case, the secession convention of the state of Virginia had passed an ordinance providing that any person whose property had been taken on execution might, by giving a bond for the payment of the judgment, have his goods released so long as the law should remain in force. Porter recovered a judgment against Daniels in the circuit court of Jefferson county, and Daniels availed himself of the ordinance by filing the required bond. To a suit brought on the bond by Tearney *et al.*, executors of Porter, after the close of the civil war, the defense was made that the law under which the bond was given was unconstitutional, and so that the bond was void. There was a difference of opinion in the court as to whether the bond was good as a voluntary bond or not, but it was held that, conceding the bond to have been wholly void, the judgment upon it ought not to be reversed, on the principle that where a party [491] has availed himself for his benefit *of an unconstitutional law he is estopped as between himself and others not occupying that position from setting up its unconstitutionality as a defense. The obligee of the bond sued on had not availed himself of the void ordinance, but was deprived of his rights by it. He had not in any way expressly or impliedly, made himself a party to the illegal proceeding, or affirmatively agreed to take any advantage from it, while the consideration of the bond had been fully received by the obligor, who could not, under such circumstances, be permitted to deny a liability put upon the obligee *in invitum*.

It follows that this bill cannot be maintained on the theory of the validity of the act of 1871, even though some other equity might have been asserted if in the exercise of reasonable diligence. The result is not inconsistent with the cases that hold that, although a law is found to be unconstitutional, a party who has received the full benefit under it, may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced.

In the case before us, the landowners did not and could not receive the benefits which it was contemplated would accrue to them from the proceedings if they had been valid. As the circuit court of appeals pointed out what the landowners, who promoted the passage of and proceeded under the act of 1871, had in view "was not simply to have a levee constructed, but to have a sufficient levee, which could be repaired from time to 184 U. S.

time and permanently maintained under legal authority." The scheme embraced not only the construction, but the maintenance of the levee, and must be looked at in its entirety. "If it be said that the plaintiffs' testator would never have purchased the bonds except in the belief that the act of 1871 was valid, with equal truth it may be said that the landowners never would have sought or desired such legislation except in the belief that the levee would be maintained by the same authority that constructed it." When the law fell, the method of maintaining it by compulsory process also failed, and if it be said that there *was [492] only a partial failure of consideration, it is plain that the consideration was indivisible, and not susceptible of apportionment, while the evidence demonstrates that the losses suffered by the landowners by reason of the breaking of the levee exceeded the amount of the bonds in question.

The grounds of estoppel claimed in this case seem to be, that one or more of the defendants secured the passage of the act of 1871; that others actively participated as petitioners and otherwise in the organization of the levee district before the bonds were issued; that others who took no part whatever in any of the proceedings, after the bonds were issued and the law was held to be unconstitutional, united in an attempt to maintain and repair the levee by voluntary contributions; that others, who neither said nor did anything, knowing that the proceedings were pending and that the levee was in course of construction, remained quiescent; that others paid interest on their assessments for the years 1873 and 1874; that others participated in the organization of the new and legal levee district after the Constitution of Illinois had been amended and a law passed authorizing the formation of levee districts; and that others purchased lands after the *Webster Case* was decided, and their deeds contained certain references to the act of 1871.

We think that the evidence fails to show that Palms relied, or had the right to rely, on the acts, or assurances, or silence, of any of these different classes of landowners, and was thereby misled. He purchased the bonds, not of the landowners, or any of them, nor from the levee commissioners, but in the open market, and on the advice of counsel as to the legality of the proceedings. The landowners who participated in any way in the creation of the drainage district were as vitally interested in the matter as any purchaser of bonds could be, and they acted equally in the mistaken belief that the law was valid. It would be a novel idea, as the supreme court of Illinois remarked in *Holcomb v. Boynton*, 151 Ill. 300, 37 N. E. 1033, "in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all." But we need not pursue the discussion, *for, in view of [493] the invalidity of the proceedings, if com-

plainants had a cause of action, that cause of action arose before May 4, 1878, when Palms filed his bill, yet the landowners were not proceeded against until the 22d of April, 1889.

The statute of limitations of Illinois provided that actions on unwritten contracts, express or implied, and all civil actions not otherwise provided for, should be commenced within five years next after the cause of action accrued. Courts of equity usually consider themselves bound by the statutes of limitation which govern courts of law in like cases. In the second aspect of their bill appellants did not rely on their bonds as legal instruments, but they sought the aid of a court of equity for the enforcement of a lien in payment of the bonds by reason of an estoppel *in pais*, and the cause of action so created would seem to have been barred by that statute. But courts of equity go farther in the promotion of justice, and where laches exist, deny the relief sought, even though the statutory period may not have run under the applicable statute.

The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief.

Palms purchased these bonds of the contractors to whom they had been delivered by the commissioners, who assumed a right to issue and make that disposition of them by virtue of the power to borrow money granted by the act of 1871. The enterprise of erecting such a barrier to the incursions of the river was, in its nature, hazardous, and the levee required not only the utmost skill in construction, but the utmost effort and vigilance in its repair and maintenance. The transaction was in its nature speculative as the value of the reclaimed lands depended on the permanency of the structure.

The enforcement of the assessments for benefits on which the payment of the cost of the work depended was resisted from the first by certain landowners, who had opposed the scheme as attempted to be authorized, [494] and their legality was brought *to the test as soon as in the orderly progress of judicial proceedings it could be done. The result was that in 1876 the act of 1871 was held void and the assessments illegal. In that same year the levee broke and the lands were devastated. In 1877 some of the landowners raised some thousands of dollars, giving trust deeds as security, for the repair of the levee, the money to be devoted to that purpose exclusively: and repairs were made.

May 4, 1878, Mr. Palms filed his bill, to which the landowners were not made parties. The principal of the first and largest assessment was payable one tenth annually beginning with 1882, but the interest, at the rate of 10 per cent per annum from October 1, 1872, was collectible annually, and the interest on the bonds was also payable year-

ly. The instalments of interest for 1875, 1876, and 1877 had not been paid, and those succeeding remained unpaid.

In 1880 the circuit court entered the order permitting Palms to bring in the landowners by filing a supplemental or an original bill; and in that same year there were numerous breaks in the levee.

During the same year a new drainage district was organized under the provisions of the act of 1879, which had been passed in accordance with the constitutional amendment of 1878. Large assessments were levied upon the lands, aggregating hundreds of thousand of dollars, and the money was put into the property. In 1881 the levee broke again, but the new drainage corporation went on with its work. The levee broke again in 1888, and additional assessments were levied.

Palms did not avail himself of the order, in the original cause, of July 7, 1880. He took no further steps, and died November 24, 1886. His executors filed this bill April 22, 1889. The record affords no explanation of the delay, and it seems to us that this was such laches as forbids relief. To enforce these bonds against those by whose courage, energy, and expenditure the lands have attained whatever value they now possess, would in our judgment be too inequitable to be permitted.

Mr. Palms knew of the decisions of the supreme court of Illinois in the *Webster* and *Udike Cases*; of the breaks in the *levee; of the efforts of the landowner to re-[495] build and maintain it by large expenditures of money; and he could not lie by until after such expenditures, and with the condition of the district and the *personnel* of its people constantly changing, and then insist that during all this time the parties were under a liability to him which, in equity, they were estopped to deny.

So far as part of the old levee became part of the new levee, the new drainage corporation used it because they could not do otherwise, and besides Palms, as a purchaser of bonds in the open market, was a stranger to the work. Even if the contractors could have claimed an equitable lien on the structure itself, Palms could not, and, indeed, any resort to subrogation is disclaimed by appellant's counsel. Such a claim could not have been successfully maintained under our decision in *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534. 31 L. ed. 537, 8 Sup. Ct. Rep. 625. There the town of Middleport had issued certain bonds to aid in the construction of a railroad; the road was constructed and the bonds delivered to the railroad company in payment of the work, and were afterwards sold to the complainant. The supreme court of the state of Illinois held the bonds void, and a bill was filed in the circuit court of the United States to enforce their collection on the theory of subrogation to the right of the railroad company to enforce the contract evidenced by a vote of the town appropriating the amount involved to pay for the railroad, and the acceptance and fulfilment of the contract by

the railroad company. But it was decided that complainant having bought the bonds as negotiable securities from the railroad company could not be substituted to any rights which it might have had against the defendants; that no right of subrogation existed; that subrogation was applicable only in cases where a junior encumbrancer was forced to pay off a superior lien for the protection of his rights, or in some similar case; and that a mere volunteer was not entitled to claim the right.

It is worthy of remark that the decree of the circuit court in that case was placed on the ground that the right of action of the railroad company, resting only in parol, was barred by the statute applicable to contracts not in writing. *Blodgett, J.*, 31 Fed. 874.

[496] *Here no bonds were ever sold by the commissioners to Palms or anyone representing him. They were delivered to the contractors and were taken in payment at 90 cents on the dollar of their face value. If the acts of any of the landowners created any equities against them it was in favor of the contractors, and these equities could not be asserted by Mr. Palms, unless by subrogation, which could not be availed of. And if it could be held that the money of Mr. Palms did enter into the construction of the levee, yet it was inextricably intermingled with that furnished by private individuals, by the new levee and drainage district, by three railroad companies, and by the United States government, the total aggregating half a million dollars, from 1877 to 1893.

In *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820, it was held that a creditor who had loaned to a municipal corporation, in excess of the amount of the indebtedness authorized by the Constitution, money which had been used in part for the construction of public works, was not entitled to a decree in equity for the return of his money, because the municipality had parted with the specific money and it could not be identified; that a bill in equity praying for the return of specific and identical moneys borrowed by a municipal corporation from complainant in violation of law would not support a general decree that there was due from the municipality to him a sum named, which was equal to the amount borrowed; and further, that a constitutional provision forbidding the municipality from borrowing money operated equally to prevent moneys loaned to it in violation of this provision and used in the construction of a public work, from becoming a lien upon the works constructed with it.

And if in this case any ground of relief on the theory of implied contract ever existed, the want of diligence presented an insuperable bar to its assertion.

Decree affirmed.

Mr. Justice **Brown** did not hear the argument and took no part in the decision of this case.

184 U. S.

*A. J. TULLOCK, *Plff. in Err.*, [497]

v.

JOAB MULVANE.

(See S. C. Reporter's ed. 497-524.)

Appeal—error to state court—Federal question—liability on injunction bond—effect of pending appeal—right to attorney's fees.

1. The question whether there can be any liability on an Injunction bond given in the course of proceedings in a Federal court, because of the alleged effect of certain stipulations dismissing a portion of the case, and of an appeal from the decree that was afterward rendered, involves a claim of an immunity from liability depending on an authority exercised under the United States, such as will constitute a Federal question for review by the Supreme Court on writ of error to a state court.
2. The withdrawal by stipulation of the only part of a case which can sustain an Injunction is the equivalent of a final determination against the right to an injunction, for the purpose of creating a right of action on the Injunction bond, notwithstanding the fact that an appeal may be taken from the decree rendered in that part of the case which is not dismissed.
3. A claim of immunity from liability for attorney's fees as one of the elements of damages under an injunction bond given in a Federal court presents a Federal question for review on writ of error to the state court from the Supreme Court of the United States.
4. The attorney's fees for procuring the dissolution of the injunction cannot be allowed as an element of damages on an injunction bond given in a Federal court, notwithstanding the fact that by the local law of the state in which the bond was executed such fees could be recovered in a suit on the bond.

[No. 59.]

Argued October 25, 28, 1901. Decided March 3, 1902.

IN ERROR to the Supreme Court of Kansas to review a decision affirming a judgment for plaintiff in an action on an injunction bond given in a Federal court. *Reversed.*

See same case below, 61 Kan. 650, 60 Pac. 749.

Statement by Mr. Justice **White**:

George P. Wescott and Samuel Hanson were complainants in a bill in equity which was filed, on January 13, 1893, in the circuit court of the United States for the district of Kansas. Joab Mulvane and various other persons and corporations were made defendants to the bill. The principal relief

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

As to damages recoverable on injunction bonds—see *Hubble v. Cole* (Va.) 13 L. R. A. 311, and note.

sought was to compel the specific performance of a contract alleged to have been entered into between the complainants and Mulvane for the sale by the latter and purchase by the former of all the capital stock of the Topeka Water Supply Company, a [498] Kansas corporation,*also a defendant to the suit. Incidentally it was sought to annul a purported sale of the waterworks plant to another of the defendants, the Topeka Water Company, a Kansas corporation, which it was asserted had been organized by Mulvane. The bill also sought to prevent the Topeka Water Company from encumbering the plant with a mortgage which, it was averred, was about to be executed, and to restrain the issuing and negotiation of bonds proposed to be secured by such mortgage and the sale or disposition of stock of both the Topeka Water Supply Company and the Topeka Water Company. The members of a copartnership, styled Coffin & Stanton, doing business in the city of New York, whom it was charged were offering to the public for sale the bonds so proposed to be issued, were likewise joined as defendants in the bill.

On February 13, 1890, the court ordered a temporary injunction to issue, as prayed, upon the giving of an approved bond. Two days later, however, it was ordered that instead of a bond the complainants "may deposit with the clerk of this court the sum of \$75,000 in cash, and that said deposit shall stand for a bond for all damages from the commencement of this suit until the further order of the court, whereby said complainants will be obligated and bound to pay to the defendants all costs and damages aforesaid, if it shall be finally held that said injunction or restraining order was improvidently granted."

On April 4, 1890, upon a hearing, the court sustained a motion which had been filed on behalf of Coffin & Stanton to dissolve the temporary injunction. The dissolution was predicated upon the ruling that an indispensable party had not been made a defendant, and could not be made without ousting the jurisdiction of the court, because such party defendant and the plaintiffs were citizens of the same state.

Thereafter, on June 3, 1890, by leave of court, a formal bond was substituted for the cash deposit which had been made under the order of the court previously stated. A. J. Tullock and W. M. D. Lee were the sureties. The bond recited the order for an injunction, the subsequent permission to deposit cash in lieu of a bond, the making of such cash deposit, the withdrawal of the deposit with the [499] sanction of the court on *the condition that a bond be executed. The fact that the injunction had been in the meanwhile dissolved by the court was also recited. The condition of the bond is reproduced in the margin.†

In October, 1890, pursuant to a stipulation made between complainants and certain of the defendants, filed in the cause, the bill was dismissed as to all the defendants except Mulvane, and so much of the bill as sought a specific performance of the alleged contract between complainants and Mulvane was withdrawn. By the stipulation the defendants who were dismissed from the cause expressly waived all right of action upon the injunction bond or otherwise, by reason of the allowance of the temporary injunction.

On September 26, 1892, upon the hearing of the cause as between complainants and Mulvane, the bill was dismissed. The case was then appealed to the circuit court of appeals for the eighth circuit. [7 C. C. A. 242, 19 U. S. App. 125, 58 Fed. 305.] That court decided the appeal on the assumption that the question for decision was whether, in view of all the circumstances attending the making of the agreement between complainants and Mulvane, it was one which a court of equity could specifically enforce. The court observed that the cause had evidently been argued and disposed of in the court below on the theory that under the stipulation, even though the right to have specific performance had been waived, nevertheless damages might be assessed by a court of equity as for a breach of the contract, if the court was of opinion that the appellants *were, at the [500] time the bill was filed, entitled to specific performance. Assuming, then, the regularity of this procedure, and its power as an equity court to execute the agreement, the court reviewed the evidence, and held that the complainants were not at the time the bill was filed entitled to the specific performance of the contract, for the reason that they had never put the defendant Mulvane in default by tendering him the sum which he was entitled to receive under the contract of sale, to enforce which the bill had been filed. The court further observed:

"It is assigned for error that the circuit court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think it is all sufficient to say, that the appellants cannot be heard to complain in this court of the order dissolving the temporary injunction after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn, the injunction necessarily shared the same fate."

Intermediate the dismissal of the bill by the circuit court and the affirmance of the decree of dismissal by the circuit court of

†"Now, therefore, if the said George P. Westcott and Samuel Hanson shall pay, or cause to be paid, to the said Joab Mulvane, the Topeka Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton,

Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, and to each of them, all damages which they, or either of them, have already

appeals, Mulvane, on November 5, 1892, instituted the present action in the state district court of Shawnee county, Kansas, against A. J. Tullock and W. M. D. Lee, the sureties upon the injunction bond above referred to. In this action recovery was sought for the sum of \$75,000 as damages sustained by reason of the injunction. Service was not made upon Lee, however, and the action was prosecuted solely against Tullock. An answer was filed, which consisted of a general denial and a plea that the action was prematurely brought because of the pendency of the appeal in the circuit court of appeals.

[501] The action in the state court was tried to a jury. Because of the ruling by the trial judge, in excluding evidence as to expenditures for attorneys' fees in procuring the dissolution of the injunction, Mulvane prosecuted error, and the judgment entered by the trial court was held by the supreme court of Kansas to be erroneous because of such ruling. 58 Kan. 622, 50 Pac. 897.

A new trial was thereupon had in the lower court. At this trial, on the offer by Mulvane, the plaintiff, of evidence tending to show payments made by him for attorneys' fees, such evidence was objected to as follows:

"The defendant further objects because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds or in such proceeding in Federal courts attorneys' fees are not included."

At the close of all the evidence, the court allowed the respective parties to amend their pleadings. The petition was amended, among other particulars, by setting out specifically the sum of asserted damage resulting from the payments alleged to have been made by Mulvane to various attorneys in resisting the allowance and procuring the dissolution of the injunction. In the amendment of the answer it was specifically pleaded that the sums paid to the attorneys by Mulvane were not elements of damage embraced within the terms of the injunction bond, if such bond was construed and enforced according to the rules applicable in the courts of the United States, as expounded by the Supreme Court of the United States. It was asserted that the bond must be measured by the principles controlling in the court where it was given, and that to hold otherwise would deprive the surety of the protection of the law of the United States, in contemplation of which he had contracted.

After the amendments and in negation of requests for instructions to the jury made by the plaintiff, the defendant asked the

court to charge in substance as follows: 1. That as by the condition of the bond liability could not arise until it had been finally determined by the United States court that the injunction ought not to have been granted, the sureties upon the bond were discharged from liability by the effect of the stipulation filed in the cause in which the injunction had been granted, whereby it resulted that a final determination by the court *whether the injunction ought not to [502] have been granted was by consent of parties prevented. 2. If the stipulation had not the effect thus claimed, then at the time the action on the bond was commenced an appeal was pending in the circuit court of appeals of the United States from the judgment rendered in the cause, wherein the injunction had been allowed and the bond given, and that the action upon the bond was premature. In addition, the immunity which had been previously asserted, arising from the rule governing in the courts of the United States on the subject of attorneys' fees, was, in view of the pleadings and the prior proceedings in the case, reiterated by a request for an instruction that no attorneys' fees could be recovered on the bonds. All the requests of the defendant having been denied and the court having charged the jury to the contrary, a verdict was returned in the sum of \$25,000, of which it may be inferred that about the sum of \$20,000 was for payments which Mulvane asserted he had made on his own behalf to the attorneys who had represented his interest in resisting the allowance of and procuring the dissolution of the injunction, albeit that most of the attorneys to whom the payments in question were made were likewise attorneys of record for the other defendants who had specifically in the stipulation waived all claims of damages growing out of the injunction. From the judgment rendered on the verdict of the jury the cause was carried to the supreme court of Kansas, and in that court it was affirmed. 61 Kan. 650, 60 Pac. 749. The opinion of the court in effect considered and disposed of the claims of alleged Federal right which have been previously referred to, and held them to be untenable. To this judgment of affirmance error was prosecuted and the cause is here for review.

Mr. W. H. Rossington argued the cause, and, with *Messrs. Charles Blood Smith and Clifford Histed*, filed a brief for plaintiff in error:

The case at bar, being upon an injunction bond given under order of the United States circuit court for Kansas in an equity case pending before said court, is, as to all of its elements, a case involving Federal questions, finally cognizable and determinable in this court.

sustained or may at any time sustain by reason of the granting or issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be finally decided that said restraining order or said temporary injunction ought not to have been granted, 184 U. S.

or the withdrawing from the hands of the clerk the said sum of \$75,000 deposited in lieu of the bond as required by the court to be given, then the above obligation shall be null and void; otherwise shall be and remain in full force and effect."

Bein v. Heath, 12 How. 168, 13 L. ed. 939; *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060; *Meyers v. Block*, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. Rep. 525; *Arnold v. Frost*, 9 Ben. 267, Fed. Cas. No. 558; *Seymour v. Phillips & Co. Constr. Co.* 7 Biss. 460, Fed. Cas. No. 12,689; *Leslie v. Brown*, 32 C. C. A. 556, 61 U. S. App. 727, 90 Fed. 171; *Tyler Min. Co. v. Last Chance Min. Co.* 32 C. C. A. 498, 61 U. S. App. 193, 90 Fed. 15; *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 76; *Coosaw Min. Co. v. Farmers' Min. Co.* 51 Fed. 107; *Lea v. Deakin*, 13 Fed. 514; *Lehman v. McQuowin*, 31 Fed. 138; *Crane v. Buckley*, 38 C. C. A. 688, 105 Fed. 401; 2 Beach, Modern Eq. Pr. § 770.

Inasmuch as this suit was subject to writ of error from the Supreme Court of the United States, it was the duty of the state supreme court to adopt, follow, and enforce the rules and decisions of this court upon the questions therein involved.

Belcker v. Chambers, 53 Cal. 635; *San Benito County v. Southern P. R. Co.* 77 Cal. 518, 19 Pac. 827.

The power to impose a bond as a condition for the injunction carried with it the power to relieve or mitigate the liability thereunder in the exercise of a sound discretion by the Federal court.

Russell v. Farley, 105 U. S. 442, 26 L. ed. 1060; *Leslie v. Brown*, 32 C. C. A. 556, 61 U. S. App. 727, 90 Fed. 171; *Tyler Min. Co. v. Last Chance Min. Co.* 32 C. C. A. 498, 61 U. S. App. 193, 90 Fed. 15.

Counsel fees are not recoverable as an element of damage for breach of injunction bonds exacted by Federal courts.

Arcambel v. Wiseman, 3 Dall. 306, 1 L. ed. 613; *Bein v. Heath*, 12 How. 168, 13 L. ed. 939; *Oelrichs v. Spain*, 15 Wall. 230, sub nom. *Oelrichs v. Williams*, 21 L. ed. 15; *Browning v. Porter*, 2 McCrary, 581, 12 Fed. 460; *The Alice*, 12 Fed. 502; *Jacobus v. Monongahela Nat. Bank*, 35 Fed. 396; *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 91 Fed. 21.

That this is the rule of the Federal court has been recognized in numerous state decisions.

Whiphint v. Mansfield, 36 Ark. 195; *Dorris v. Miller*, 105 Iowa, 569, 75 N. W. 483; *Thurston v. Haskell*, 81 Me. 306, 17 Atl. 71; *Wood v. State use of White*, 66 Md. 68, 5 Atl. 479; *Frost v. Jordan*, 37 Minn. 546, 36 N. W. 714; *Hill v. Thomas*, 19 S. C. 236; *Loeb v. Mann*, 39 S. C. 470, 18 S. E. 2; *Stringfield v. Hirsch*, 91 Tenn. 432, 29 S. W. 611; *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 50, 11 S. W. 920; *Jones v. Rescald Street R. Co.* 75 Tex. 383, 12 S. W. 998.

By the voluntary act of the parties the condition upon which the liability depended, namely, a final decision that the injunction ought not to have been granted, was rendered impossible, and except upon such condition no liability could attach to the surety.

Palmer v. Foley, 71 N. Y. 106; *Johnson v. Elwood*, 82 N. Y. 362; *Tyler Min. Co. v. Last Chance Min. Co.* 32 C. C. A. 498, 61 U. S. App. 193, 90 Fed. 15; *Large v. Steer*,

121 Pa. 30, 15 Atl. 490; 2 High, Inj. 3d ed. §§ 1638-1641; Beach, Inj. § 227; *Apollinaris Co. v. Venable*, 136 N. Y. 46, 32 N. E. 555; *Columbus, H. V. & T. R. Co. v. Burke*, 54 Ohio St. 98, 32 L. R. A. 329, 43 N. E. 282; *Cassem v. Ernst*, 84 Ill. App. 70.

A cause in chancery cannot be said to be finally decided and determined when appealed until the record in the case has been finally examined by the appellate tribunal and the whole matter reviewed and decided.

Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167; *Stewart v. Salamon*, 97 U. S. 361, 24 L. ed. 1044; *Southard v. Russell*, 16 How. 547, 14 L. ed. 1052; *Durant v. Essex Co.* 101 U. S. 555, sub nom. *Durant v. Storrow*, 25 L. ed. 961; *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; *Gaines v. Rugg*, 148 U. S. 228, sub nom. *Gaines v. Caldwell*, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545. See also *Metcalf v. Watertown*, 16 C. C. A. 37, 34 U. S. App. 107, 68 Fed. 859; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 525; *Morrin v. Lawler*, 91 Fed. 693.

No action accrued on the bonds pending appeal.

Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267; *Hamilton v. State use of Hardesty*, 32 Md. 348; *Howard v. Park*, 59 How. Pr. 344; *Musgrave v. Sherwood*, 76 N. Y. 194; *Gray v. Veirs*, 33 Md. 159; *Penny v. Holberg*, 53 Miss. 567; *Murfree, Official Bonds*, § 391; *High, Inj.* §§ 1648 et seq.

And until the appeal from the decree of the court on the question of damages was determined, no action accrued.

Thompson v. McNair, 64 N. C. 448; *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267; *Howard v. Park*, 59 How. Pr. 344; *Musgrave v. Sherwood*, 76 N. Y. 194; *Gray v. Veirs*, 33 Md. 159; *Penny v. Holberg*, 53 Miss. 567; *Murfree, Official Bonds*, § 391; *High, Inj.* §§ 1648 et seq.

The suit, being founded upon a bond exacted by the Federal court, necessarily involves a Federal question.

Bein v. Heath, 12 How. 168, 13 L. ed. 939; *Meyers v. Block*, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. Rep. 525.

The jurisdiction of the United States circuit courts to entertain original suits upon such obligations irrespective of the citizenship of the parties has been recognized in a large number of cases, and has never been questioned.

Leslie v. Brown, 32 C. C. A. 556, 61 U. S. App. 727, 90 Fed. 171.

In that class of cases in which a Federal question is involved, and on which jurisdiction of the courts of the United States depends, the character of the question is the same whether the jurisdiction exercised is appellate, original, or by removal; the jurisdiction in either form depending upon the constitutional grant of power.

Nashville, C. & St. L. R. Co. v. Taylor,
184 U. S.

86 Fed. 168. See also *Clements v. Berry*, 11 How. 398, 13 L. ed. 745; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Sonnen- theil v. Christian Mocrlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

The test of a Federal question is not the ruling of the court. The significance of an adverse ruling lies solely in the fact that thereby the aggrieved party is entitled to present the Federal question for review by this court.

Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370.

The jurisdiction of this court to review on writ of error the judgments of the state courts in this class of cases is broader than the original jurisdiction of the circuit courts of the United States.

Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 175.

The rights of the parties in this case are not to be determined by principles of general law, but are governed and controlled by the decisions of this court.

Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060; *Olcott v. Fond du Lac County*, 16 Wall. 690, 21 L. ed. 387; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

The opinion itself is to be treated as a part of the record in this case, and it may be examined in order to ascertain the fact whether these questions were so presented.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

It need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did.

Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Dewey v. Des Moines*, 173 U. S. 199, 43 L. ed. 667, 19 Sup. Ct. Rep. 379. See also *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 193; *Hagar v. California*, 154 U. S. 639, 24 L. ed. 1044, 14 Sup. Ct. Rep. 1186; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 483; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 184 U. S. U. S., Book 46.

ed. 979, 17 Sup. Ct. Rep. 581; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168.

Mr. N. H. Loomis argued the cause, and, with Mr. A. L. Williams and Messrs. Overmyer, Mulvane, & Gault, filed a brief for defendant in error:

The measure of damages upon an injunction bond is, in the absence of a statute governing the matter, a question of general law; and this court has decided, time and again, that it will not review the decisions of a state court upon questions of that sort.

Bethell v. Demaret, 10 Wall. 537, 19 L. ed. 1007; *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *United States v. Thompson*, 93 U. S. 586, 23 L. ed. 982; *New York L. Ins. Co. v. Hendren*, 92 U. S. 286, 23 L. ed. 709. See also *Marrow v. Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Sherman v. Grinnell*, 144 U. S. 198, 36 L. ed. 403, 12 Sup. Ct. Rep. 574; *New Orleans v. New Orleans Water- works Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

A question does not necessarily arise under the laws of the United States in a suit because it was brought upon a judgment rendered by a Federal court.

Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104.

A judgment of a state court cannot be reviewed in the United States Supreme Court simply because the parties are claiming rights under a Federal statute.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715. See also *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; *Carothers v. Mayer*, 164 U. S. 325, 41 L. ed. 453, 17 Sup. Ct. Rep. 106.

The decision of a state court as to the legality of permitting a suit to be brought upon an official bond of the United States marshal without suing in the name of the United States has been held not to be reviewable in this court.

Montgomery v. Hernandez, 12 Wheat. 129, 6 L. ed. 575.

A final judgment or decree by the highest court of law or equity of a state, that revenue stamps attached to a deed offered in evidence and objected to as not having stamps proportioned to the value of the land conveyed are insufficient, is not a subject for review by this court under the 25th section of the judiciary act of 1789.

Lewis v. Campan, 3 Wall. 106, 18 L. ed. 211.

So, no Federal question is presented by a decision whether a chattel mortgage of cattle, which does not identify the particular animals covered by it, is good as against the purchaser of the entire lot at a marshal's sale on execution issued out of a Federal court.

Avery v. Popper, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94.

That attorneys' fees can be recovered upon an injunction bond given in a Federal court has been decided in several cases.

Mitchell v. Hawley, 79 Cal. 301, 21 Pac. 833; *Hannibal & St. J. R. Co. v. Shepley*, 1 Mo. App. 254. To the same effect are *Wash v. Lackland*, 8 Mo. App. 122; *Elliott v. Missouri, K. & T. R. Co.* 77 Mo. App. 652; *Aiken v. Leathers*, 40 La. Ann. 23, 3 So. 357.

A writ of error to a state court brings before the Supreme Court only the Federal questions in the case. None other will be considered.

Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876.

When the case was decided on an independent ground broad enough to maintain the judgment, and not involving a Federal question, this court will dismiss the writ of error without considering the Federal question.

Beatty v. Benton, 135 U. S. 244, 34 L. ed. 124, 10 Sup. Ct. Rep. 747; *Marrow v. Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141.

The constitutional provision, or the law relied upon, must be specified by the party claiming under it in the state court, in order to warrant a review of the decision in such court by the Supreme Court of the United States.

Chappell v. Bradshaw, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Morrison v. Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 540, 40 L. ed. 252, 16 Sup. Ct. Rep. 88; *Zadig v. Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506; *Messenger v. Mason*, 10 Wall. 507, 19 L. ed. 1028; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571. See also *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

Counsel fees are a proper element of damages in an action on an injunction bond.

2 Sutherland, Damages, § 7, p. 64; *Robertson v. Smith*, 129 Ind. 422, 15 L. R. A. 273, 28 N. E. 857; *Swan v. Timmons*, 81 Ind. 243; *Miles v. Edwards*, 6 Mont. 180, 9 Pac. 814; *Ah Thae v. Quan Wan*, 3 Cal. 219; *Tyler v. Safford*, 31 Kan. 610, 3 Pac. 333.

The question as to whether a surety upon an injunction bond given in a Federal court can escape liability by the dismissal of the

injunction proceedings after a dissolution of the temporary injunction is a question of general law with which this court will not interfere upon writ of error directed to a state court.

Gyger v. Courtney, 59 Neb. 555, 81 N. W. 437; *Richardson v. Allen*, 74 Ga. 719; *Swan v. Timmons*, 81 Ind. 243; *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Dowling v. Polack*, 18 Cal. 625; *Pugh v. White*, 78 Ky. 210; *Hibbard v. McKindley*, 28 Ill. 255; *Nansemond Timber Co. v. Rountree*, 122 N. C. 45, 29 S. E. 61; *De Berard v. Prial*, 34 App. Div. 502, 54 N. Y. Supp. 534.

The dismissal of that part of the case calling for equitable relief amounted to a final determination of the question as to whether the injunction had been properly granted.

Mitchell v. Sullivan, 30 Kan. 231, 1 Pac. 518. See also *Bell v. Matthews*, 37 Kan. 686, 16 Pac. 97; *Marbourg v. Smith*, 11 Kan. 562; *Kelley v. Sage*, 12 Kan. 109; *Pugh v. White*, 78 Ky. 210; *Richardson v. Allen*, 74 Ga. 719; *Hibbard v. McKindley*, 28 Ill. 255; *De Berard v. Prial*, 34 App. Div. 502, 54 N. Y. Supp. 534; *Nansemond Timber Co. v. Rountree*, 122 N. C. 45, 29 S. E. 61; *Dowling v. Polack*, 18 Cal. 627; *Wescott v. Mulvane*, 7 C. C. A. 242, 19 U. S. App. 125, 58 Fed. 308.

When a surety goes upon an injunction bond conditioned for the payment of all damages which the defendant may sustain if it is finally determined that the injunction was improperly granted, he is liable for the damages sustained by the defendant if the injunction proceedings are dismissed.

Mitchell v. Sullivan, 30 Kan. 231, 1 Pac. 518.

*Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court: [502]

*The assignments of error, though four- [503]
teen in number, are reducible to three propositions.

1. A contention that as the bond provided for a liability only in case it was finally decided that the injunction was wrongfully granted, no recovery could be had upon the bond, because the stipulation between the complainants and certain of the defendants had the effect of rendering it impossible to have a final determination in the courts of the United States whether the injunction ought originally to have been granted.

2. A claim on the part of the defendant that as the bond for injunction was executed under the order of a court of equity of the United States, and therefore by an authority exercised under the United States, and as liability was only to arise when it had been finally decided that the injunction ought not to have been granted, action on the bond could not be brought pending an appeal to the circuit court of appeals of the United States, and the final determination by that court of the controversy.

3. An assertion that as, by the settled rule of the courts of equity of the United States, attorneys' fees were not an element

of damage covered by the terms of an injunction bond given in such court, recovery of such fees on such bond was not within the purview of the bond when construed with reference to and by the light of the authority under which the bond was given.

It is urged by the defendant in error that these contentions involve no Federal question, and that if they do they were not sufficiently set up in the lower courts, and therefore this court has no jurisdiction to review them. We dispose at once of the contention that if the propositions involve Federal questions they were not duly raised below, by referring to the statement which we have made of the case, whereby it appears that the contentions were raised below by the pleadings, by the objections to evidence, and by the requests for instructions, and indeed as so raised were expressly considered and directly passed upon by both the trial court and the supreme court of the state of Kansas, which latter fact in and of itself suffices to present the Federal question, even if it had [504] been otherwise *ambiguously raised on the record, which is not the case. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

In determining whether these Federal questions are involved we shall for the moment take it for granted that the premises upon which such asserted questions rest are well founded, and if under such hypothesis we find that there is jurisdiction it will then be our duty to put such assumption out of view and determine the merits of the contentions.

Whilst apparently the propositions involve several distinct assertions of Federal right, in their ultimate analysis they reduce themselves to one and the same contention, that is, that a bond given for an injunction in an equity cause in a court of the United States is to be construed with reference to the liability administered in the courts of the United States on that subject as settled by this court. That this fundamental proposition embraces all the contentions would seem to be clear, when it is borne in mind that the controversies as to the stipulation and as to the pendency of the cause in the circuit court of appeals both assert the generic right of the defendant to have the obligations under the bond measured and determined by the law prevailing in the courts of the United States, and the claim as to the attorneys' fees propounds but the same right as to one of the elements of damage which it was asserted the bond embraced. Whilst the unity of the propositions is thus demonstrable, as in the court below and in argument they have been separately treated and different considerations have been assumed to apply to them, we shall consider the propositions separately.

We embrace the first two contentions under one heading, as follows:

First. *Did the claim that there had been no breach of the condition of the bond because of the stipulation filed in the cause in which the bond was given and because of the pendency of the appeal in the circuit court*
184 U. S.

of appeals present Federal questions, and, if yes, were they well founded?

It may not, we think, be doubted that a bond for injunction in an equity court of the United States given under the order of such court is a bond executed in and by virtue "of an authority *exercised under the [505] United States." Rev. Stat. § 709. Certainly, the courts of the United States derive all their powers from the Constitution and laws of the United States, and their authority is therefore exercised thereunder. Being, then, an obligation entered into by virtue of such authority, the conclusion cannot be escaped that the defense specially set up, that no liability on the bond could arise until the court of the United States in which the controversy was pending had finally determined that the injunction should not have been granted, was the assertion of an immunity from liability depending on an authority exercised under the United States, and therefore necessarily involved the decision of a Federal question. To state the result which must necessarily flow from a contrary deduction is sufficient of itself to demonstrate the unsoundness of the reasoning by which the non-Federal nature of the question can alone be upheld. For it is clear that if it be true that the bond given in a Federal court of equity on the granting of an injunction is not to be construed with reference to the rules of law applicable to such bonds in such court, then there can be no certain general rule by which to determine the liability of the obligors upon the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various states, which would imply that the parties did not contract with reference to any definite rule of liability. Indeed, the argument conduces to a conclusion which necessarily cripples the power of the court under whose order an injunction bond is executed. It is settled that such court has the inherent right to set the bond aside and to determine in its discretion whether recovery could be had upon it. *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060. And yet if the liability upon the bond when given can be measured in courts other than the court requiring the execution of the bond, by a wholly different rule of liability from that which obtained in the court which had ordered the giving of the bond, it must follow that, although the latter court had decreed that the injunction had rightfully issued, yet in an action upon the injunction bond in another forum the sureties might be made to respond in damages without hope of redress.

A reference to some of the decided cases concerning what *constitutes a claim of im-[506] munity arising from an authority exercised under the United States will serve at once to refute the contention that no Federal question is here presented.

In *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588, the question for decision was whether a state court had given due effect to a decree of a court of the United States, and it was asserted that the contention that

it had not presented no Federal question. Speaking through Mr. Justice Bradley, the court said (p. 134, L. ed. p. 590):

"Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point indispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the circuit court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts."

In *Factors' & P. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679, a court of the United States sitting in bankruptcy had ordered a sale of real property of the bankrupt free from encumbrances. The property was purchased at the sale on behalf of lienholders. Subsequently one who possessed a lien on the property at the time the order was entered and sale made brought suit in a state court of Louisiana to foreclose such lien, claiming that she had not been a party to the bankruptcy proceedings, and that her lien was unaffected by the sale. The defendant, in whose name title had been taken, while averring that the plaintiff was interested in the purchase at the sale made under the order of the United States court, insisted that the lien of the mortgage of plaintiff had been extinguished by such sale. The state court having decreed in favor of plaintiff, a writ of error was prosecuted from this court. In reversing the judgment of the state court, it was said (p. 741, L. ed. p. 583, Sup. Ct. Rep. p. 680):

[507] "Counsel for defendant in error deny the jurisdiction of this court and move to dismiss the writ. But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the district court of the United States to sell the mortgaged property free from encumbrance. Both parties assert rights under this order and sale. Plaintiffs in error assert that the sale as made was valid, and, being sold free from encumbrances, extinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under Federal authority, and as the right of plaintiff in error was denied by the court the writ of error lies."

In *Avery v. Popper*, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94, the two cases last above referred to were approvingly cited, and the rule was declared to be that where a controversy in the state court presented a contention as to the validity or

proper construction of an order or decree rendered by a court of the United States, a Federal question was presented reviewable by this court. P. 314, L. ed. p. 206, Sup. Ct. Rep. p. 97.

In *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472. the facts were briefly these: Under a bill filed in a circuit court of the United States, a temporary injunction had been allowed after hearing, and a bond had been given under an order of the court; the injunction was perpetuated by the circuit court on the final hearing. The case was appealed to this court, and the decree of the circuit court was reversed. Suit was brought in a court of the state of Louisiana upon the injunction bond given in the Federal court, against the principal and surety *in solido* and against the principal alone, to recover damages for the malicious prosecution of the injunction suit in the Federal court. It was claimed by the defendants that the final decree of the circuit court of the United States, although subsequently reversed by this court, constituted probable cause, and therefore there could be no recovery on the alleged cause of action for malicious prosecution. Both the state trial court by way of instructions to the jury and the supreme court of Louisiana decided that the decree of the circuit court of the *United States did [508] not constitute probable cause, because prior to the decision of the circuit court of the United States a contrary view to that which the circuit court adopted had been announced by the highest court of the state of Louisiana. The jurisdiction of this court to review the controversy was challenged upon the very grounds now relied upon, and the court said (p. 146, L. ed. p. 617, Sup. Ct. Rep. p. 475):

"It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the circuit court of the United States sitting in Louisiana, by the courts of that state, is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final; and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States."

In *Myers v. Block*, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. Rep. 525, the case came to this court on error to a state court, and involved the correctness of the construction by that court of the terms of an injunction bond given in a court of the United States. This court treated the matter of jurisdiction as one of course, held that the parties signing the bond must be presumed to have been cognizant of the order under which the bond was given, and to have contracted in refer-

ence thereto, and that the bond should be read in the light of the order; and the court applied to the interpretation of the bond its own views of the applicable principles of law.

The cases of *New York L. Ins. Co. v. Hendren*, 92 U. S. 286, 23 L. ed. 709; *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, and others of like character, do not conflict with the rule which we apply in this cause, and which was expounded in the cases to which we have previously referred. This results when it is observed that none of the cases [509] just above referred to involved *the construction or effect of a law of the United States or a judgment, decree, or order or other act done under and by virtue of the authority of a court of the United States or a claim of immunity thereunder.

The contention as to the prematurity of the suit presenting then a Federal controversy, the question is, Was the claim of prematurity well founded?

Previous to the bringing of the suit in the state court upon the bond, by stipulation filed in the equity cause in the United States court, upon which an order of the court was entered, the bill of complaint had been dismissed as to all the defendants but Mulvane, and it was expressly agreed that all demand for relief by way of specific performance should be withdrawn. We think that the circuit court of appeals correctly decided that the necessary effect of this agreement was to withdraw from the case all controversy on the subject of the injunction. As by the stipulation Mulvane had not waived any rights of action by reason of damages caused by the injunction, if any, but, on the contrary, his rights were expressly saved, and as the stipulation was made the basis of an order of the court which had the necessary effect to dismiss from the cause all the grounds upon which alone the rightfulness of the injunction could have been asserted, we think there was a final decision, within the import of the condition of the bond, that the injunction ought not to have been granted. As respects the argument that, by reason of the execution of the stipulation, the sureties upon the injunction bond were absolutely discharged, because thereby a final determination of the rightfulness of the allowance of the injunction was prevented, we think it obvious that the sureties when executing the bond did so subject to the right of the complainants in good faith to dismiss their bill, or to make a stipulation such as that we have referred to, which was in effect the equivalent of the dismissal of the bill in so far as all equitable relief was concerned. We are thus brought to consider the second contention, which is,

Second. *Did the claim of immunity from liability for attorneys' fees, as one of the elements of damage under the injunction bond, present a Federal question; and, if yes, [510] was it correctly *decided by the court below*
184 U. S.

that it was proper to award the amount of such fees in enforcing the bond?

The first branch of this question has already been disposed of by the reasons given and authorities cited in the consideration of the proposition previously passed upon. It is insisted, however, that such is not the case, because, whilst it is true the courts of the United States exercise their authority under the Constitution and laws of the United States, that, as there is no express statutory authority regulating injunction bonds, therefore in determining the measure of liability on them no claim of immunity arising from an authority exercised under the United States can arise. But this is a mere form of restating the contention we have already disposed of. The test is not the particular source or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it.

Besides, by express provision of the Revised Statutes (§ 617) proceedings of the courts of the United States in equity causes are subject to regulation by this court, with power to modify and change such rules. And rule No. 90, promulgated under the authority thus conferred, provides as follows:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

And it is by the force and effect of this rule that the equity courts of the United States exercise their power with respect to the exaction of security when granting writs of injunction. *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060.

It follows that proceedings in courts of equity of the United States are regulated by rules promulgated by this court deriving their force from statutory authority, and the argument which we have just considered, even if it were not erroneous, *would be in- [511] apposite. The jurisdiction to review being then established, it remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the bond. That they were not is settled.

In *Oelrichs v. Spain*, 15 Wall. 211, *sub nom. Oelrichs v. Williams*, 21 L. ed. 43, this court, speaking through Mr. Justice Swayne, said (p. 230, L. ed. p. 45):

"The decree of the court below was preceded by the report of a master, which the decree affirmed and followed. Upon looking into the report we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as a part of the damages covered by the bonds.

"In *Arcambel v. Wiseman*, 3 Dall. 306, 1 L. ed. 613, decided by this court in 1796, it appeared 'by an estimate of the damages upon which the decree was founded, and which was annexed to the record, that a charge of \$1,600 for counsel fees in the courts below had been allowed.' This court held that it 'ought not to have been allowed.' The report is very brief. The nature of the case does not appear. It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent. *Teese v. Huntingdon*, 23 How. 2, 16 L. ed. 479; *Whittmore v. Cutter*, 1 Gall. 429, Fed. Cas. No. 17,600; *Stimpson v. The Railroads*, 1 Wall. Jr. 164, Fed. Cas. No. 13,456. They cannot be allowed to the gaining side in admiralty as incident to the judgment beyond the costs and fees allowed by the statute. *The Baltimore*, 8 Wall. 378, *sub nom. The Baltimore v. Rowland*, 19 L. ed. 463.

"In actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions *ex delicto* vindictive damages may be given by the jury. In regard to that class of cases this court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.' *Day v. Woodworth*, 13 How. 370, 371, 14 L. ed. 185.

[512] "The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

"We think the principle of disallowance rests on a solid foundation, and that the op-

posite rule is forbidden by the analogies of the law and sound public policy."

It is strenuously urged, however, and this was in effect the view taken by the court below, that although the rule against allowing attorneys' fees in actions on injunction bonds was thus settled by this court adversely to the right to recover such fees, as the local law was to the contrary, the injunction bond given in the Federal court must be enforced, not by the law of the forum in which it was given, but according to the rule of the local law. This proposition, again, however, but embodies the contention that the question of the allowance of attorneys' fees involved no Federal question, which has already been disposed of. For if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with *reference to the author-[513] ity under which it was given and the principles of jurisprudence controlling such authority, and not by the local law. To hold the contrary, as we have previously pointed out, would be but to declare that although the power conferred by Congress upon this court to adopt equity rules is controlling, nevertheless the interpretations of the rules and the limitations which arise from a proper construction of them, as expounded by this court and enunciated in its decisions, are without avail. And this yet further points out the fallacy involved in the contention that the lower court, in passing upon the issues, decided merely a question of general law involving no Federal controversy. Now it is at once conceded that the decision by a state court of a question of local or of general law involving no Federal element does not as a matter of course present a Federal question. But where, on the contrary, a Federal element is specially averred and essentially involved, the duty of this court to apply to such Federal question its own conceptions of the general law we think is incontrovertible. *Avery v. Popper*, 179 U. S. 305, 315, 45 L. ed. 203, 207, 21 Sup. Ct. Rep. 94.

Whilst, in the absence of authority, the foregoing considerations suffice to dispose of the case, it is also effectually concluded by authority. *Bein v. Heath*, 12 How. 168, 13 L. ed. 939. In that case, as in this, it was insisted that the local law should have been applied in construing and enforcing an injunction bond given in a court of the United States. But the court, in negating the contention, speaking through Mr. Chief Justice Taney, said (p. 178, L. ed. p. 944):

"Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the state. The proceeding in a circuit court of the United States in equity is regulated by the laws of Congress and the rules of this court made under the authority of an act of Congress. And the 90th rule declares that, when not otherwise directed, the prac-

514] tice of the High Court of Chancery in England shall be followed. The 8th rule authorizes the circuit court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and *mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.

"And when an injunction is applied for in the circuit court of the United States sitting in Louisiana, the court [may] grant it or not, according to the established principles of equity, and not according to the laws and practice of the state in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

"In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the state."

Indeed, the principles announced in *Bein v. Heath* were in effect but the reiteration of the doctrine previously established by this court, that a bond given in pursuance of a law of the United States was governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by this court, and operative throughout the courts of the United States. *Cox v. United States*, 6 Pet. 172, 8 L. ed. 359; *Duncan v. United States*, 7 Pet. 435, 8 L. ed. 739.

It follows from what we have stated that there was error committed in allowing the recovery of attorneys' fees as an element of damage upon the bond in question. *The judgment of the Supreme Court of Kansas must be reversed*, and the case remanded to that court for further proceedings not inconsistent with this opinion, and it is so ordered.

[515] *Mr. Justice Harlan dissenting:

This was an action in one of the courts of the state of Kansas upon an injunction bond executed in a suit in equity in the circuit court of the United States for the district of Kansas—the condition of the bond being that the obligors would pay, or cause to be paid, to the obligees, and to each of them, "all damages which they, or either of them, have already sustained, or may at any time sustain, by reason of the granting and issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be finally decided that

said restraining order or said temporary injunction ought not to have been granted."

There was a verdict and judgment against Tullock, one of the sureties in the bond. Mulvane, the plaintiff, being dissatisfied with the amount of the verdict and the rulings of the trial court, prosecuted a writ of error to the supreme court of Kansas, where the judgment was reversed and the cause remanded for another trial. *Mulvane v. Tullock*, 58 Kan. 622, 50 Pac. 897. That court said:

"That counsel fees are recoverable as damages upon an injunction bond has been the uniform holding of this court from the beginning, and this appears to be the view taken by most of the courts of the country. *Underhill v. Spencer*, 25 Kan. 71; *Loofborow v. Shaffer*, 28 Kan. 71; *Loofborow v. Shaffer*, 29 Kan. 415; *Nimocks v. Welles*, 42 Kan. 39, 21 Pac. 787; 10 Am. & Eng. Enc. Law, p. 999, and cases cited. It appears, however, that there are some decisions of the Federal courts to the contrary, holding that the obligation of an injunction bond imposes no duty upon the obligor to pay the attorney's fees if the injunction is wrongfully obtained. *Arcambel v. Wiseman*, 3 Dall. 306, 1 L. ed. 613; *Oelrichs v. Spain*, 15 Wall. 211, *sub nom. Oelrichs v. Williams*, 21 L. ed. 43. It is contended that, as the bond was given in a case in one of the Federal courts, the obligation must be interpreted in accordance with the decisions of those courts. The claim is that the rules and decisions of the Supreme Court of the United States have the force of legislative declarations; that they enter into, and become a part of, the *contract of the sureties, [516] who can only be held liable for such consequences as are the direct result of the breach and were within their contemplation at the time the bond was executed. No statute, however, prescribed the conditions of the bond nor limited the extent of liability thereon. It is true that it was within the general equitable power of the Federal court to prescribe the conditions upon which the injunction should issue. It could have granted an injunction without requiring a bond, or it might, in its discretion, have imposed such terms as it saw fit as a condition of granting the injunction. It did require the giving of a bond, and the bond was executed in accordance with the order of the court. The bond executed is in the ordinary form; is in the nature of a contract; and the liability of the obligors depends, not on the Federal Constitution or a congressional act, but on the proper interpretation of the bond itself. In the absence of a statute fixing the measure of damages or limiting the recovery, we think the bond should be viewed in the light of an independent contract, and is to be interpreted by the general principles of the common law. It is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal court. Being an independent contract, actionable in any state court where service upon the sureties

can be obtained, the interpretation of the forum applies. As the action on the bond could be brought in the state court,—and, indeed, the present action could not have been brought in any other,—it cannot be said that the sureties contracted with reference to the view of the law taken by the Federal courts. They knew that the obligation was enforceable in the courts of the state of which the plaintiff and defendants were all residents, and that the highest court of that state had consistently held that counsel fees were recoverable upon an injunction bond. That the bond was given in a Federal court, where a different rule of interpretation obtains, has not been deemed to affect the state court in determining the liability upon such bond when suit was brought thereon. *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833; *Hannibal & St. J. R. Co. v. Shepley*, 1 Mo. App. 254; **Wash v. Lackland*, 8 Mo. App. 122; *Aiken v. Leathers*, 40 La. Ann. 23, 3 So. 357; *Corcoran v. Judson*, 24 N. Y. 106.” In addition to *Corcoran v. Judson*, 24 N. Y. 106, cited by the state court, see *Coates v. Coates*, 1 Duer, 664; *Edwards v. Bodine*, 11 Paige, 224, and *Sedgw. Damages*, 177; also *Barton v. Fisk*, 30 N. Y. 171; *Behrens v. McKenzie*, 23 Iowa, 342, 92 Am. Dec. 428; *Ford v. Loomis*, 62 Iowa, 588, 16 N. W. 193, 17 N. W. 910; *Cook v. Chapman*, 41 N. J. Eq. 154, 2 Atl. 286; *Noble v. Arnold*, 23 Ohio St. 270; *Morris v. Price*, 2 Blackf. 457; *Derby Bank v. Heath*, 45 N. H. 524; *Ryan v. Anderson*, 25 Ill. 372; *Garrett v. Logan*, 19 Ala. 344.

[517] At the second trial Mulvane obtained a verdict and judgment which embraced his counsel fees in the injunction suit, and that judgment having been affirmed by the supreme court of Kansas (61 Kan. 650, 60 Pac. 749), it is sought to have it reviewed by this court under § 709 of the Revised Statutes, upon the ground that by the action of the supreme court of Kansas the plaintiff in error, Tullock, was denied an “immunity” belonging to him under an “authority exercised under the United States.” The immunity so claimed is that he, Tullock, was erroneously held to be liable for the attorneys’ fees which the obligee in such bond paid or became bound to pay in or about obtaining or dissolving the injunction in the suit in the Federal court.

Can this court review the action of the state court upon any such a question? Is it true that the alleged “immunity” arises from an “authority exercised under the United States?”

In *Avery v. Popper*, 179 U. S. 305, 314, 315, 45 L. ed. 203, 207, 21 Sup. Ct. Rep. 94, 97, 98, this court, speaking by Mr. Justice Brown, said: “With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and those proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property, as between the defendant *in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented—in other words, it must appear that the decision was made against a right claimed under Federal authority, in the language of Rev. Stat. § 709.” Again: “This was a question either of local law or of general law. If of local law, of course the decision of the supreme court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to state courts. Conceding that, if the question had arisen on appeal from a circuit court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a state court, whose opinion upon a question of general law is not reviewable here.”

Surely this case does not involve a Federal immunity simply because the bond in suit was taken under the authority of the circuit court of the United States. If it does, then this court erred in its decision in *Provident Sav. L. Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104 (reaffirmed in many subsequent cases), in which it was contended that a suit upon a judgment rendered by a Federal court necessarily involved questions arising under the laws of the United States. That contention was overruled. This court, speaking by Mr. Justice Bradley, said: “What is a judgment but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not, therefore, a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not, therefore, a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might *be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States.”

In *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, it was held that the judgment of the

supreme court of a state could not be reviewed simply because the case involved a contest between rival claimants of a mine under certain sections of the Revised Statutes. To the same effect are *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

There is no question in this case as to the validity of any authority exercised under the United States. The only question is as to the rights of one party and the liabilities of the other party under an ordinary injunction bond. What those rights and liabilities are cannot be determined by reference to the Constitution or any statute of the United States. Nor has any rule been adopted by the circuit court of the United States limiting the legal effect of the words of the bond or declaring what damages should be covered by it. Of course, if Congress had enacted a statute prescribing the form of injunction bonds, and directing what liabilities should arise thereon against the obligors, that statute would control. But no such statute has been passed, and the question is left to be determined by the principles of general law.

Reference has been made to *Oelrichs v. Spain*, 15 Wall. 211, *sub nom. Oelrichs v. Williams*, 21 L. ed. 43, in support of the proposition that the question presents an "immunity" which exists under Federal authority. That case was brought in a circuit court of the United States. It does decide that attorneys' fees should not be allowed in a suit on injunction bonds. But there is in the opinion no hint even that the decision as to what damages can be allowed in such a suit rests upon a Federal ground. On the contrary, the court, after citing some authorities, says that "the principle of disallowance rests on a solid foundation, and that the opposite view is forbidden by the analogies of the law and sound policy."

[520] *We have been referred also to equity rule 90 of this court, which declares that "the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." I cannot perceive that this rule has any pertinency, as it relates merely to *practice*, and not to the principles of law by which the rights and obligations of parties to injunction bonds are determinable.

Bein v. Heath, 12 How. 168, 179, 13 L. ed. 939, 943, has been cited as showing that in allowing attorneys' fees the state court invaded a Federal right. That was a suit in the circuit court of the United States on an injunction bond taken in the same court. The trial court determined the case according to a statute of Louisiana defining the rights and obligations of the parties. This 184 U. S.

court held that "in proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the state. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit." Absolutely nothing is to be found in the opinion of the court sustaining the proposition that the rights and obligations of the parties to an injunction bond are determinable upon any principle of a Federal nature. The court referred to the 90th and 8th equity rules, as furnishing authority for the taking of injunction bonds, but took care to say that those rules relate only to "forms of proceeding and mode of practice," and not to "the rights and obligations of parties to injunction bonds." And what was said in that case touching the rights and obligations of parties to injunction bonds was an expression of the views of the state court as to the general principles of law applicable in such cases. This is apparent from the extract given in the opinion of the court *from the opinion in *Bein v. Heath*. [521] In *Meyers v. Block*, cited in the opinion in this case, 120 U. S. 206, 214, 30 L. ed. 642, 644, 7 Sup. Ct. Rep. 525, 529, the court said that there was no question "as to the power of a court of equity to impose any terms, in its discretion, as a condition of granting or continuing an injunction." *Russell v. Parley*, 105 U. S. 433, 26 L. ed. 1060. Consequently, the terms being prescribed, their meaning, in the absence of a statute, depends upon general, not Federal, law.

Cases have been cited which show that this court can re-examine the final judgment of the highest court of a state which fails to give due effect to a judgment, decree, or order of a court of the United States. But such cases have no pertinency to the present discussion; for in the present case the state court did not disregard any judgment, decree, or order of the Federal court. It did nothing more than enforce its view as to the rights and obligations of parties under a bond theretofore taken in a suit in a Federal court.

Meyers v. Block, cited in the opinion, shows that our jurisdiction in that case was maintained solely because the case involved the question whether the injunction bonds there in suit were in conformity with the order of the Federal court in which they were taken.

In *New York L. Ins. Co. v. Hendren*, 92 U. S. 287, 23 L. ed. 709, which was brought here from the highest court of Virginia, it was said: "The case, therefore, having been presented to the court below for decision upon principles of general law alone, and it nowhere appearing that the Constitution, laws, treaties, or executive proclamations of the United States were necessarily involved in the decision, we have no jurisdiction."

tion." In *United States v. Thompson*, 93 U. S. 586, 23 L. ed. 982, which came here from the highest court of Maryland, and in which suit the United States was a party, seeking payment of a debt it held against an insolvent partnership, the court said: "It is not contended that this decision is repugnant to the Constitution, or any law or treaty of the United States; but the argument is that, as the check of McFreely & Hopper was not paid, it did not pay their debt. Whether this is so or not does not depend upon any statute of the United States, but upon the principles of general law alone. We have *many times held that we have no power to review the decisions of the state courts upon such questions. *Bethell v. Demarct*, 10 Wall. 537, 19 L. ed. 1007; *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 666, 20 L. ed. 757; *New York L. Ins. Co. v. Hendren*, 92 U. S. 287, 23 L. ed. 709; *Rockhold v. Rockhold*, 92 U. S. 130, 23 L. ed. 507." In *San Francisco v. Scott*, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688, referring to the question as to the effect of an alcalde grant of the pueblo title, and which was decided by the supreme court of California, it was said: "This does not depend on any legislation of Congress, or on the terms of the treaty, but on the effect of the conquest upon the powers of local government in the pueblo under the Mexican laws. That is a question of general public law, as to which the decisions of the state court are not reviewable here. This has been many times decided."

Let it be observed that the jurisdiction of the state court, as between the parties and as to the subject-matter, is not disputed. The question before it was as to the extent of the liability of the sureties in the injunction bond. The decision of that question did not depend, in any degree, upon the Constitution or statutes of the United States. It depended entirely upon the meaning of the words of the bond, and the principles of law applicable to such an instrument. It was manifestly, therefore, a question of general law as distinguished from Federal law. Upon such a question the state court was entitled to give effect to its own views. The question could not become a question of Federal law by reason alone of the fact that the bond was executed under the authority of the circuit court; for, as already said, neither the *order* under which the bond was taken, the validity of the bond, nor the authority of the court was disputed. Nor could it become a Federal question because of any decision by this court in cases therefore decided between other parties. Suppose this court had not, prior to the trial of this case, expressed any opinion upon that question of general law. Could it then have been contended that the judgment complained of denied any Federal immunity? If not, then the Federal immunity now claimed arises entirely from the failure of the state court to take the same view of a question of general law which this court took in prior cases between other parties. There has been a wide difference of opinion

between this court and some of the state *courts upon certain questions of general law. [523] But it has never been supposed that anyone has such a vested interest in the views of this court upon questions of general law that he may complain of the refusal of a state court to accept those views as denying him an "immunity" existing or belonging to him, in virtue of an "authority exercised under the United States." In *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 390, 36 L. ed. 193, 199, 12 Sup. Ct. Rep. 530, 536, which came to this court from the highest court of Minnesota, it was said: "The fact that the supreme court of Minnesota, in the present cases, did not acquiesce in the correctness of the decision of the circuit court of the United States, did not constitute a Federal question. Neither the Constitution of the United States nor any act of Congress guarantees to a suitor that the same rule of law shall be applied to him by a state court which would be applied if his citizenship were such that his suit might be brought in a Federal court."

Or, suppose two actions were brought in the Federal court (there being diversity of citizenship in each case), one on an injunction bond, executed in a circuit court of the United States, and the other upon a like bond executed in a state court. What would be the ruling as to the measure of damages? Would the court disallow counsel fees in the first case and allow them in the second case where the highest court of the state had established the principle that counsel fees could be recovered? Each branch of the latter question must, upon the principles of the opinion just delivered, be answered in the affirmative. But they cannot be so answered without placing the decisions of the courts upon a question of general law on the same basis as a legislative enactment prescribing the measure of damages in suits on injunction bonds.

Being unable to assent to the principle that a Federal immunity arises when a state court, in determining a question not involving the Constitution or laws of the United States nor the validity of an authority exercised under the United States, reaches a conclusion upon a question of general law different from that announced in prior cases by this court, and denying our authority to compel a state court to disregard its own views *upon a question of general law, I am [524] constrained to dissent from the opinion and judgment.

Mr. Chief Justice **Fuller** and Mr. Justice **Brown** concur in this opinion.

SAMUEL MONROE and David M. Richardson, Late Copartners Trading as Monroe & Richardson, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 524-530.)

Public contracts—approval of chief engineer of army.

The approval of the chief of engineers of the

United States army, required by a contract for constructing a canal, which contains an express provision that the contract "shall be subject to the approval" of such engineer, is a future approval of the contract as written, and cannot be satisfied by the engineer's previous acts, such as his authorization of the acceptance of the contractor's bid, and the furnishing of a blank on which to make the contract.

[No. 98.]

Submitted January 14, 1902. Decided March 10, 1902.

APPEAL from a judgment of the Court of Claims dismissing a petition by contractors against the United States. *Affirmed.*

See same case below, 35 Ct. Cl. 199.

Statement by Mr. Justice **McKenna**:

The appellees brought suit against the United States in the court of claims for the sum of \$25,485.89, for expenses incurred and for damages. The latter consisted of losses suffered by them by the breach of a contract entered into by the United States through W. S. Marshall, captain in the corps of engineers. The contract was made in pursuance of an advertisement made by the United States, inviting proposals for constructing a canal to be known as the Illinois & Mississippi Canal, upon the terms, conditions, and specifications set forth in an exhibit which was attached to and made a part of the petition.

The contract contained the following clause: "This contract shall be subject to approval of the chief of engineers, United States army." There was no averment that the contract had been so approved, and the United States demurred. The demurrer stated: "Not only does the contract itself, a copy of which is attached as above, fail to show that the same was ever approved by the chief of engineers, U. S. A., but the [525] testimony in the case fully and conclusively shows, and the same is not denied by the claimant, that said contract has never been approved by the said chief of engineers, U. S. A., in any manner whatsoever."

It was prayed that the petition "be quashed and the action be dismissed accordingly."

The action of the court is expressed in the following order: "Allowed in part and judgment for defendants on findings of fact filed."

As a conclusion of law from the findings the court ordered the petition dismissed and a formal judgment was entered accordingly. 35 Ct. Cl. 199. This appeal was then taken.

The findings of fact are as follows:

On or about the 25th of May, 1892, the United States through W. S. Marshall, a captain in its corps of engineers, advertised for proposals for constructing a canal to be known as the Illinois & Mississippi Canal. The claimants submitted a bid to do certain parts of the work. The bid was accepted by
184 U. S.

Captain Marshall, acting under an authority contained in a letter from the chief of engineers of the United States army.

"On the 20th day of July, 1892, Captain Marshall forwarded to claimants the formal contract annexed to and forming part of the petition, and bonds to be executed within ten days thereafter, all which claimants fully executed and returned to the said engineer on the 28th day of July, 1892, which formal contract was duly signed by Captain Marshall. The form of the contract had been prepared by the chief of engineers and forwarded to Captain Marshall for use in such cases.

"Immediately upon receiving notice of the acceptance of their said bid, claimants began preparation for the commencement of said work. They shipped their plant from Portsmouth, Ohio, to Rock Island, Illinois; rented and furnished a boat and had the same taken to Rock river, in the vicinity of the work, to be used as a boarding house for men employed on the work; built stables for their teams; hired men and teams; purchased a large amount of plant, consisting of shovels, plows, scrapers, and the like; and generally equipped themselves in a proper manner to expeditiously perform the [526] work; and commenced the work with men and teams about the 1st day of August, 1892.

"On the 6th day of August, 1892, without fault on their part and while the work was progressing, claimants were stopped by the United States and their contract abrogated against their consent, and the work that they had contracted to do readvertised, for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract binding the contractor not to permit his workmen to labor more than eight hours per day, and the United States refused to permit claimants to continue the work either under the terms of the contract or under the terms of the law of August 1, 1892, but immediately, and against the protest of claimants, readvertised and let the said work to other parties.

"In the prosecution of said work under said contract, prior to the abrogation thereof on August 6, 1892, claimants expended the sum of \$678.21, which has not been paid to them.

"By reason of the abrogation of said contract claimants lost the following sums expended and were deprived of the following profits which they would have made in the execution of said work:

Expenses incurred	\$678 21
Profits if they had been permitted to perform	7,150 00"

Mr. John C. Fay submitted the cause for appellants.

Assistant Attorney General Pradt and **Mr. Franklin W. Collins** submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

[526] *Mr. Justice McKenna delivered the opinion of the court:

We agree with counsel that the question in the case is a narrow one. It is not denied that the approval of the chief of engineers was necessary to the legal consummation of the contract. It is, however, insisted that the approval was not required to be formally expressed, but could and did

[527] consist of *acts preceding the written instrument, though the latter contained the terms and covenants of the parties. In other words, it is contended that the advertisement, claimant's bid made under competition, which was submitted to the chief of engineers, who, after some correspondence with the engineer in Chicago in relation thereto, had in writing directed it to be accepted, the preparation of the formal contract on a blank furnished by the chief of engineers, its execution by both the officer in charge and the claimants, in due form and in strict accordance with the provision of § 3744 of the Revised Statutes, constituted an approval.

We are unable to assent to this view. It is the final written instrument that the statute contemplates shall be executed and signed by the parties, and which shall contain and be the proof of their obligations and rights. And it was such written instrument that was to be approved by the chief of engineers. The approval was to be a future act. The provision of the contract was: "This contract" (that is, the instrument to which the contracting officer and the claimants attached their signatures and seals) "shall be subject to approval of the chief of engineers of the United States army." The approval, therefore, did not consist of something precedent, but was to consist of something subsequent. That which preceded was inducement only, and contemplated an instrument of binding and remedial form, and hence to contain covenants imposing obligations and giving rights and remedies, containing provisions for the time of performance and the manner of it; provisions for changes and for extra work—indeed, of the provisions which prudence and necessity require and those which the statutes of the United States might require. And the final right to see that this was done, the parties agreed, should be devolved on the chief of engineers, and it was not satisfied by prior instructions. In other words, a final reviewing and approving judgment was given to the chief of engineers, and was given by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract. If the covenant did not mean that, it was idle. Construed as prospective, it had a natural purpose. The engagement of the

[528] parties *did not end with the bid and its acceptance. The performance of the work was to be secured, and the final judgment of what was necessary for that, as we have already said, was to be given by the chief of engineers.

The case of *United States v. Speed*, 8 Wall. 78, 19 L. ed. 449, cited by appellant,

is not apposite. In that case the facts were that the Secretary of War, through the Commissary General, "authorized Major Simonds, at Louisville, in October, 1864, and during the late Rebellion, to buy hogs and enter into contracts for slaughtering and packing them to furnish pork for the army. On the 27th of October, Simonds, for the United States, and Speed, made a contract by which the live hogs, the cooperage, salt, and other necessary materials, were to be delivered to Speed by the United States, and he was to do the work of slaughtering and packing. The contract was agreed to be subject to the approval of the Commissary General of Subsistence. No advertisements for bids or proposals were put out before making the contract, nor did the contract contain a provision that it should terminate at such times as the Commissary General should direct. After the contract was made, Simonds wrote—as the facts were found under the rules, by the court of claims, to be—to the Commissary General, informing him substantially of its terms; but no copy of it nor the contract itself was presented to the Commissary General for formal approval. The Commissary General thereupon wrote to Simonds, expressing his satisfaction at the progress made, and adding: "The whole subject of porkpacking at Louisville is placed subject to your direction under the advice of Colonel Kilburn."'

After reciting those facts this court said by Mr. Justice Miller: "We are of the opinion that, taking all this together, it is a finding by the court as a question of fact that the contract was approved by that officer; and inasmuch as neither the instrument itself nor any rule of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did."

In *United States v. Speed*, therefore, the acts which were held to constitute an approval of the contract relied upon were *subsequent to the contract, and referred to it. [529] In the case at bar it is stated in the opinion of the court of claims that after the contract was signed it was mailed "to the chief of engineers in Washington for his approval," and that "it was immediately disapproved and returned to the officer (engineer in charge at Chicago) with instructions to readvertise the work."

The declaration, in the opinion of the court of claims, that the contract was disapproved, is asserted to be incorrect by claimants, and the findings are quoted to show that the contract was abrogated, not disapproved. That is undoubtedly the expression of the finding, but its meaning is manifest. An order to the officer in charge to abrogate the contract was certainly a very definite and unmistakable disapproval of it. At any rate, there was no approval of it, and that was a necessary condition to its final effect and obligation.

It is further urged that the terms of the contract were not disapproved, and that the action of the chief of engineers was "for the

alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract binding the contractor not to permit his workmen to labor more than eight hours per day." It may be assumed that the chief of engineers considered that the contract took effect by his approval, and that if he approved it he would incur the penalties of the statute. But, however that may be, the reasons for his action is not open to our inquiry. The contract was not approved, and how can the legal consequence of that be escaped? We could not have compelled the approval of the contract, and we cannot treat it as approved, and adjudge rights as upon the performance of a condition which was not performed.

This case has some features of hardship. They are, however, explained and somewhat lessened by the facts stated in the opinion of the court of claims. It is there stated:

"The contract bears date the 19th July, 1892. It provides in terms that the contractors 'shall commence work on or before the 1st day of August, 1892,' but it appears by evidence *aliunde* that the instrument was not mailed to the contractors for signature until the 20th July, 1892; that it was [530] returned for corrections; *that it was not finally mailed for signature until the 27th of July, 1892, and that it was not signed by the contractors until some day between the 27th of July and the 1st of August, 1892. On the faith of the agreement executed by the contracting officer, but without his knowledge or direction, the contractors proceeded to make ready for their work and, indeed, performed, to some extent, incurring thereby a loss of \$678.21."

And, further, that "the work was done without the knowledge or direction of the officer in charge, and no benefit resulted thereby to the defendants" (United States).

Judgment affirmed.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, *Plff. in Err.*,

v.

JOHN S. ELLIOTT.

(See S. C. Reporter's ed. 530-540.)

Appeal—highest state court to which writ of error may issue—injunction bond—allowance of attorneys' fees—rule of Federal courts.

1. The actual decision of a Federal question in denying a rehearing is sufficient to give jurisdiction on writ of error to a state court from the Supreme Court of the United States, although an attempt to raise that question

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

184 U. S.

for the first time on motion for rehearing is usually too late.

2. The fact that a state court, in deciding a Federal question, erroneously declares that no Federal question exists, does not preclude a review of its decision on writ of error from the United States Supreme Court.
3. The Kansas city court of appeals is the court to which a writ of error will be issued by the Supreme Court of the United States to review a Federal question decided by it, when the supreme court of the state has decided that it cannot review the decision.
4. Attorneys' fees cannot be allowed as damages on an injunction bond given in a Federal court.
5. The rule of the Federal courts must govern as to the allowance of attorneys' fees on an injunction bond given in a Federal court, though the action on the bond is brought in a state court.

[No. 148.]

Argued and Submitted January 29, 30, 1902. Decided March 10, 1902.

IN ERROR to the Kansas City Court of Appeals for the State of Missouri to review a decision in favor of the plaintiff in an action on an injunction bond. *Reversed.* See same case below, 77 Mo. App. 652.

Statement by Mr. Justice White:

The action below was brought by Elliott in the state circuit court of Cooper county, Missouri, against the railway company, plaintiff in error herein. Recovery was sought upon an injunction bond given in an equity cause in a suit in the circuit court of *the United States for the central division [531] of the western district of Missouri. The railway company was complainant in the equity cause, and Elliott was defendant. The circuit court of the United States, as the result of a mandate of the circuit court of appeals, entered an order dissolving the injunction, and thereupon this action was commenced. The damages which it was alleged were embraced in the condition of the bond were averred to consist of payments made for attorneys' fees, traveling and other similar expenses of the plaintiff, asserted to have been disbursed during the course of the litigation in the United States court.

The answer consisted of a general denial, and alleged that the equity suit in which the bond was given was made necessary to enable the defendant to make its defense to an action at law, which had prior to the equity suit been brought against the railway company by Elliott. The cause was tried by the court without a jury. It appeared on the trial that in dismissing the bill in the equity cause the statutory allowance to attorneys and other costs had been taxed, and paid by the complainants in the equity cause in the United States circuit court. No objection was interposed at the trial to evidence introduced for the plaintiff as to the value of attorneys' services and the other sums disbursed for the expenses alleged in the petition. At the close of the

trial the court, over the objection of the defendant, declared the law to be that the plaintiff was entitled to recover his reasonable personal expenses and reasonable attorneys' fees incurred for the services of attorneys in procuring the dissolution of the injunction. The following, among other prayers asked by the defendant, were refused:

"2. The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on any sum which he may have paid out or become liable for as attorneys' fees."

"5. The court declares the law to be that the plaintiff, having received the amount taxed in his favor as attorneys' fees as part of the costs in the equity suit mentioned in the pleadings and evidence in this case, he cannot now recover anything on account of attorneys' fees in this case."

532] *Judgment having been entered in favor of plaintiff and a motion for a new trial having been overruled, an appeal was taken to the Kansas City court of appeals, and the judgment was affirmed. In the course of its opinion the court recited the contentions of the defendant, and held each of them to be untenable. These contentions were thus stated by the court:

"1. Defendant's objections to the judgment below may be thus stated: First, that there was no breach of the conditions of the bond in that it was not alleged or proved that any damages had been previously adjudged against the defendant, whereas the condition of the bond is that defendant 'should pay all sums of money damages and costs that shall be adjudged against it,' etc.; and, secondly, it is contended that as the injunction bond was given in a proceeding pending in the United States court, the damages must be fixed and determined according to the rules and practice of the Federal courts; that attorneys' fees are not there considered elements of damage in suits on injunction bonds, and that therefore our state courts should apply the same rule in suits on bonds given in the Federal courts; and thirdly, it is insisted that the trial court erroneously allowed as damages attorneys' fees for defending the entire case—that the injunction was merely incidental to the principal case, and no attorneys' fees were paid to secure its dissolution." [77 Mo. App. 659.]

A motion for a rehearing was thereafter filed, in which, among other things, it was contended that the cause involved a Federal question, "for the reason that the controversy in this suit arises under the authority of the United States, and under the laws of the United States governing and applicable to United States courts," and the court was asked in the event that it should refuse to grant a rehearing, to transfer the case to the supreme court of the state of Missouri. "for the reason that a Federal question is involved, and because the subject of the controversy of this suit arises under the authority of the United States and under the exercise of such authority, and under the laws of the United States governing and

controlling the courts of the United States and the proceedings therein." The motion for a rehearing having been overruled, it appears *from a stipulation contained in the record that an application was made to the supreme court of the state of Missouri for a writ of prohibition against the judges of the said Kansas City court of appeals to restrain the further exercise of jurisdiction in the cause, and to require the record and proceedings to be certified to the supreme court. This application was denied. 154 Mo. 300, 55 S. W. 470.

Thereupon the present writ of error was allowed, and the record of the cause was brought here from the Kansas City court of appeals.

Mr. George P. B. Jackson argued the cause and filed a brief for plaintiff in error:

The case involves a Federal question, because the construction of the contract evidenced by the injunction bond draws in question an authority exercised under the United States, and because the measure of liability upon that bond depends upon the laws of the United States, and rules of court made by authority of such laws.

Bein v. Heath, 12 How. 168, 13 L. ed. 939; *Osborn v. Bank of United States*, 9 Wheat. 817, 6 L. ed. 223; *Meyers v. Block*, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. Rep. 525; *Aiken v. Leathers*, 40 La. Ann. 23, 3 So. 357; *Leslie v. Brown*, 32 C. C. A. 556, 61 U. S. App. 277, 90 Fed. 171; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820, 8 Sup. Ct. Rep. 989, 1135; *Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659; *Southern Kansas R. Co. v. Briscoe*, 144 U. S. 133, 36 L. ed. 377, 12 Sup. Ct. Rep. 638; *Northern P. R. Co. v. Anato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Carey v. Houston & T. C. R. Co.*, 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Wood v. Drake*, 70 Fed. 881; *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 76; *Houser v. Clayton*, 3 Woods, 273, Fed. Cas. No. 6,739; *Johnson v. New Orleans Nat. Bkg. Asso.*, 33 La. Ann. 479; *Boek v. Perkins*, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677; *Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 319; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. II. & L. S. L. Co.*, 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472.

It is not necessary to deny the validity of the authority invoked as a protection.

Clements v. Berry, 11 How. 398, 13 L. ed. 745; *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679; *Dupasseeur v. Rohercau*, 21 Wall. 130, 22 L. ed. 588; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Palmer v. Hussey*, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep.

565; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

Attorneys' fees are not recoverable on injunction bonds given in the United States courts.

Oelrichs v. Spain, 15 Wall. 211, *sub nom. Oelrichs v. Williams*, 21 L. ed. 43; *Bein v. Leath*, 12 How. 168, 13 L. ed. 939.

There can be no recovery of damages in an injunction suit except on the injunction bond. The right of recovery depends entirely upon the bond.

St. Louis v. St. Louis Gaslight Co. 82 Mo. 349; *Teasdale v. Jones*, 40 Mo. App. 243; *Campbell v. Carroll*, 35 Mo. App. 640; *Keber v. Mercantile Bank*, 4 Mo. App. 195.

The law in force at the time the bond is made is to be considered as incorporated in it, and a part of the contract.

Mix v. Vail, 86 Ill. 40; 2 Am. & Eng. Enc. Law, pp. 466g, 466i.

The law and the rules of procedure existing and controlling in a Federal court, where an injunction bond is given, afford the proper guide for any court in which a suit upon that bond may be brought.

Schuster v. Weiss, 114 Mo. 158, 19 L. R. A. 182, 21 S. W. 438; *Olcutt v. Fond du Lac County*, 16 Wall. 690, 21 L. ed. 387; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Cox v. United States*, 6 Pet. 172, 8 L. ed. 359; *Duncan v. United States*, 7 Pet. 435, 8 L. ed. 739; *Bank of United States v. Donnally*, 8 Pet. 361, 8 L. ed. 974; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822.

Where there is no statute prescribing the conditions of the bond, they are determined by the rules of the court and the discretion of the chancellor.

Murfree, Official Bonds, § 401; *Newell v. Partee*, 10 Humph. 325; *Nolan v. Johns*, 27 Mo. App. 502; *Rubelman Hardware Co. v. Greve*, 18 Mo. App. 6; *Teasdale v. Jones*, 40 Mo. App. 243; *Kincaly v. Staed*, 55 Mo. App. 176.

The bond is a part of the record in the case and of the court in which it is given.

Pickett v. Boyd, 11 Lea, 498; *Murfree*, Official Bonds, § 401.

The Federal question was so necessarily involved in the case stated in the petition and in the defense relied upon that the court could not render judgment without passing upon the effect of the authority exercised by the United States circuit court in which the bond sued on was given.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Kipley v. Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; 184 U. S.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370.

Since the Federal question was presented to the court of appeals, and since that court entertained the question, considered it, and decided it, and since that was the highest court of the state in which a decision could be had, under the rulings of both that court and the supreme court of the state, it is sufficient for the purpose of having the case reviewed in this court.

Davis v. Packard, 6 Pet. 41, 8 L. ed. 312; *Armstrong v. Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Morrison v. Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Tregoe v. Modesto Irrig. Dist.* 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 952; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Marehant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

By virtue of the statutory provisions of the state governing the practice of the appellate courts, and of the reasoning of this court with reference to the opinions of the state courts, the briefs of counsel become part of the record for the purpose of ascertaining what questions were presented in the state court.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

The opinion of the state court is a part of the record for the purpose of ascertaining what points were presented to and decided by that court.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

The Kansas city court of appeals is the highest court in the state of Missouri in which a decision could be had. That court denied the motion to transfer the case to the supreme court, while the supreme court refused to cause the case to be certified from the court of appeals upon a petition for that purpose.

Gregory v. McVeigh, 23 Wall. 294, 23 L. ed. 156; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

Mr. William M. Williams submitted the cause for defendant in error:

A constitutional question cannot be injected into a case by the briefs and argument of counsel.

Kirkwood v. Johnson, 148 Mo. 632, 50 S. W. 433; *Parlin & O. Co. v. Hord*, 145 Mo. 119, 46 S. W. 753.

The record must show that the point was

raised in the trial court, and the protection of the Constitution claimed by the losing party was denied him.

Parlin & O. Co. v. Hord, 145 Mo. 119, 46 S. W. 753; *Hulett v. Missouri, K. & T. R. Co.* 145 Mo. 35, 46 S. W. 951; *James v. Mutual Reserve Fund Life Assn.* 148 Mo. 18, 49 S. W. 978.

And this same is true as to Federal questions.

Shewalter v. Missouri P. R. Co. 152 Mo. 544, 54 S. W. 224.

Cases must be tried in the appellate courts on the issues raised and decided in the trial courts.

Clark v. Porter, 162 Mo. 523, 63 S. W. 89.

The exemption claimed from liability for counsel fees, on the ground that the bond sued upon was given in an equity proceeding in the Federal courts, and that in those courts such fees are not allowed as damages on injunction bonds, and therefore cannot be allowed in a suit upon the bond in any other court, is not available, even if well founded, unless "specially set up or claimed."

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Eastern Bldg. & L. Assn. v. Welling*, 181 U. S. 49, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *F. G. Oxley Slave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

Attorneys' fees as damages upon an injunction bond given in the Federal courts have been allowed.

Corcoran v. Judson, 24 N. Y. 106.

If the question was properly presented by this record, the judgment nevertheless was right. The state court had jurisdiction of the suit upon the bond, notwithstanding the bond was given in a proceeding in a Federal court. This is not an open question.

Meyers v. Block, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. Rep. 525.

The correct measure of damages was a matter of general law to be determined by the court where the case was tried. Reasonable attorneys' fees, necessarily incurred in the dissolution of the injunction, are allowed under the rule in Missouri, and the trial court had the right to include the same in the assessment of damages on the bond.

Ibid.; 1 *Spelling*, Extraordinary Legal Rem. 2d ed. § 954; *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833; *Eastern Kentucky R. Co. v. Brown*, 99 Ky. 540, 36 S. W. 555; *Aiken v. Leathers*, 40 La. Ann. 23, 3 So. 357; *Corcoran v. Judson*, 24 N. Y. 106; *Hannibal & St. J. R. Co. v. Shepley*, 1 Mo. App. 254; *Wash v. Lackland*, 8 Mo. App. 122; *Missouri, K. & T. R. Co. v. Smith*, 154 Mo. 300, 55 S. W. 470.

[533] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The proposition relied upon to secure the

reversal of the judgment below is that the state court erroneously allowed, as an element of damage upon an injunction bond given in a court of the United States, the sum of alleged counsel fees for procuring a dissolution of the injunction, and that as such fees under the rule prevailing in the equity courts of the United States are not properly allowable, therefore the state court denied an immunity asserted in favor of the defendant below and arising from an authority exercised under the United States.

We are at the outset met by an objection that there is no jurisdiction to review the judgment of the Kansas City court of appeals. It is contended on behalf of the defendant in error that the Federal question relied upon was not raised below, and therefore is not reviewable here.

The general rule undoubtedly is that those Federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court intended to and did assert such a Federal right in the state court. But *it is equally true that [534] even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a Federal question, although arising on ambiguous averments, then, a Federal controversy having been actually decided, the right of this court to review obtains. *F. G. Oxley Slave Co. v. Butler County*, 166 U. S. 648, 660, 41 L. ed. 1149, 1153, 17 Sup. Ct. Rep. 709. All that is essential is that the Federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. And of course where it is shown by the record that the state court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a Federal question in a petition for rehearing in the highest court of the state is too late, yet when a question is thus raised, and it is actually considered and decided by the state court, the right to review exists. *Mollett v. North Carolina*, 181 U. S. 589, 592, 45 L. ed. 1015, 1017, 21 Sup. Ct. Rep. 730.

Now, it plainly appears that the Kansas City court of appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, viz., that attorneys' fees are

[535] not a proper element of damage. We say this is undoubted, since the opinion of the Kansas City court of appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock v. Mulvane*, 184 U.S. 497, ante, 657, 22 Sup. Ct. Rep. 372. True it is that the Kansas City court of appeals held, contrary to the rule announced in the *Tullock Case*, that the state court was not bound to apply the rule of damages prevailing *in the courts of the United States, and in effect while so concluding decided that the claim that the bond should be enforced according to the rule prevailing in the courts of the United States involved no Federal question, but the fact that the state court, whilst deciding the Federal question, erroneously held that it was not a Federal one, does not take the case out of the rule that, where a Federal question has been decided below, jurisdiction exists to review. The result of the contrary doctrine would be this, that no case where the question of Federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was non-Federal in its character. The assertion that a Federal right was not raised below is therefore without merit.

It is, however, insisted that as the writ of error in this case was directed to the Kansas City court of appeals there is no jurisdiction, because if there was a Federal question presented that court was not, under the Constitution of the state of Missouri, the highest court of the state in which a decision on such question could have been had.

The Kansas City court of appeals was created by an amendment to the Constitution of Missouri adopted in 1884. 1 Mo. Rev. Stat. 1899, p. 92. By § 4 of the amendment the said court was given the same jurisdiction over lower courts within certain territory—embraced within which was Cooper county—as was possessed by the St. Louis court of appeals. As provided by a prior Constitution, that of 1865, and continued by the Constitution of 1875, the St. Louis court of appeals was a court of general appellate jurisdiction, but its judgments were not final in certain cases, among which were: a, cases where the amount in dispute, exclusive of costs, exceeded the sum of \$2,500; b, cases involving the construction of the Constitution of the United States or of the state of Missouri; c, cases where “the validity of a treaty or statute of or authority exercised under the United States is drawn in question;” as well as in other enumerated cases, not necessary to be particularly referred to. In such cases, where the jurisdiction of the St. Louis court [536] of appeals was not final, the judgment *of the St. Louis court of appeals was reviewable by the supreme court of Missouri. Ibid. art. 6, § 12, p. 87.

184 U. S. U. S. Book 46.

By the amendment to the Constitution of 1884, by which the Kansas City court of appeals was created, in cases where the action of the St. Louis court of appeals had been theretofore reviewable by the supreme court of Missouri, it was provided that the St. Louis court of appeals should no longer have appellate jurisdiction, but that writs of error, in such cases, should run directly from the supreme court to the trial courts, and this provision was made applicable to the Kansas City court of appeals which the amendment created. By the amendment in question superintending control over the trial courts in such cases was conferred upon the supreme court. Ibid. § 5, p. 93. It thus resulted that the Kansas City court of appeals, within the area of territory over which its jurisdiction extended, had no appellate jurisdiction in cases where the amount in dispute, exclusive of costs, exceeded \$2,500, and where the cases involved the construction of the Constitution of the United States or of the state, and cases where was drawn in question the validity of a treaty or statute of or authority exercised under the United States, and in other cases not necessary to be mentioned.

By the amendment to the Constitution of 1884, the supreme court of Missouri was expressly, moreover, given general superintending control over the courts of appeal, by mandamus, prohibition, and certiorari. Ibid. § 8, p. 94.

After the Kansas City court of appeals had affirmed the judgment of the Cooper county circuit court, the railway company filed a motion for a rehearing, and prayed therein that in the event a rehearing was not granted the case should be transferred to the supreme court of Missouri. The motion for the transfer of the case to the supreme court was pressed upon two grounds, the second of which was, in substance, that the decision of the cause involved a Federal question, of which the supreme court of Missouri should take exclusive cognizance, because of its appellate jurisdiction, “in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question.”

The court, in overruling this motion, necessarily decided that *the case came within [537] its appellate jurisdiction, and not within the exclusive appellate power conferred by the Constitution on the supreme court of the state. This doubtless rested upon the predicate upon which the court had based its opinion, which was not that the issue whether attorneys’ fees could be allowed upon the bond given in the Federal court had not been raised, but because, although that question had been raised and been decided, it was not one of the class of questions within the purview of the exclusive jurisdiction of the supreme court of the state. And this seems to us to be the view held by the supreme court of Missouri, when, in consequence of the refusal to transfer the cause to it, its superintending power over the Kansas City court of appeals was invoked through the medium of the application for

writs of prohibition and certiorari. We so conclude, because, although in its elaborate opinion overruling the application for the writs named, the supreme court declared that the question of the power of the state court to award attorneys' fees on the injunction bond given in a court of the United States, contrary to the rule of damages prevailing in the courts of the United States, had been raised in the case and had been decided by the Kansas City court of appeals, the writs of prohibition and certiorari would not be allowed, because such a question was not within the appellate jurisdiction of the supreme court of Missouri, but was within the jurisdiction of the lower appellate court. After fully stating the contention below and its decision by the Kansas City court of appeals, the supreme court of Missouri said:

"We fail to discover from the record, anywhere, how 'the validity of a treaty or statute of, or authority exercised under, the United States, is drawn in question,' or that a Federal question may be said to have been involved in the case."

In other words, as the exclusive appellate jurisdiction of the supreme court of Missouri over cases which, by the amount involved, would otherwise have gone to the Kansas City court of appeals, was conferred only in special cases, among other cases involving the construction of the Constitution of the United States and cases where "the validity of a treaty or statute of or authority exercised under the United States is drawn in question," the court held that as the validity of the bond given in the circuit court of the United States was not questioned, no claim made by the defendant of immunity under an authority exercised under the United States was embraced within the exclusive appellate jurisdiction conferred by the Constitution upon the supreme court of Missouri, and therefore such question had been properly determined by the Kansas City court of appeals. We are constrained to this construction of the opinion of the learned court from the fact that it elaborately discusses and demonstrates that the defense of immunity from liability for attorneys' fees under the bond given in a court of the United States was not an attack on the validity of the bond, and therefore not within the cognizance of the supreme court of Missouri, and from the further fact that in the course of the opinion the court said:

"Neither the rules, the practice or procedure, nor the mode and manner of administering the law in the United States court, applicable to the liability of bondsmen on an injunction bond given in that court, can in anywise be drawn in question, so as to present a Federal question, in a suit in a state court on the bond, when its validity, as in the case of *Elliott v. Missouri, K. & T. R. Co.*, begun in the Cooper county circuit court, and now pending on appeal in the Kansas City court of appeals, is admitted, and where no question as to the court's au-

thority to order the bond as given is or was made by the relator."

It results, therefore, under the view we take of the opinion of the supreme court of Missouri, the court decided that as the case presented merely a claim of immunity under an authority exercised under the United States, and did not involve, to quote the language of the Missouri Constitution, the drawing in question "the validity of an authority" so exercised, therefore, the Kansas City court of appeals was vested under the Constitution and laws of Missouri with final jurisdiction. But if, however, we were to give to the opinion of the supreme court of Missouri the contrary construction, the finality of the judgment of the Kansas City court of appeals in this case would be none the less apparent. It is manifest, we conceive, *from the opinion of the supreme court of Missouri, that if it had been deemed that a Federal question not within the cognizance of the Kansas City court of appeals had been decided by that court, the superintending power of control conferred by the state Constitution on the supreme court of Missouri would have been exerted for the purpose of preventing the Kansas City court of appeals retaining jurisdiction of the cause. If, then, the action of the supreme court of Missouri can be held not to have been rested on the phraseology of the Missouri Constitution, including within the exclusive appellate power of the Supreme Court of Missouri not claims of immunity arising from an authority exercised under the United States, but only cases where was drawn in question the validity of an authority exercised under the United States, then the necessary effect of the action of the supreme court of Missouri was this, that because it held to the opinion that it was impossible for a Federal question ever to arise from a claim of immunity resulting from the exercise of an authority under the United States in the giving of an injunction bond in the courts of the United States, therefore, under the Constitution and laws of Missouri, the action of the Kansas City court of appeals was final. [539]

It being then demonstrated that whatever view may be taken of the opinion of the supreme court of Missouri, that court necessarily decided that the Kansas City court of appeals, in passing upon the claim of immunity, was the final court in Missouri where such question could be decided, it follows that the writ of error properly ran to the Kansas City court of appeals, and the claim of the absence of jurisdiction is without foundation.

Having thus disposed of the question of jurisdiction, we come to the merits of the case. It suffices to say, for the reasons given in the opinion in *Tullock v. Mulvane*, before referred to, 184 U. S. 497, ante, 657, 22 Sup. Ct. Rep. 372, that there was error committed by the Kansas City court of appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of

[540] damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments.

The judgment of the Kansas City Court of Appeals must be reversed, and the cause remanded to that court, with directions for further proceedings in conformity with this opinion.

And it is so ordered.

THOMAS CONNOLLY and William E. Dee, *Plffs. in Err.*,
v.

UNION SEWER PIPE COMPANY.

(See S. C. Reporter's ed. 540-571.)

Appeal—contracts—illegal combinations—anti-trust laws—set-off—constitutional law—invalid portion of statute.

1. The jurisdiction of the Supreme Court of the United States on writ of error to a circuit court, under the circuit court of appeals act, when the constitutionality of a state statute is in question, extends to all cases in which such a question is decided against the claim of either party, and therefore includes a case in which the writ of error is taken by a defendant who set up in defense of the action a statute which the court held unconstitutional.
2. The illegality, at common law, of a combination formed by corporations and persons in restraint of trade, does not preclude it from recovering the purchase price of goods sold in the course of business.
3. A violation of the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647), by the formation of a combination in restraint of trade, by which a penalty is incurred under the statute, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods.
4. A recovery of the treble damages authorized by the Sherman anti-trust act of July 2, 1890, § 7 (26 Stat. at L. 209, chap. 647), in case of injury sustained by violation of the act, can be had only by direct action, and not by way of set-off in an action brought for the price of goods by a company illegally formed in violation of the act,—especially when the state practice does not permit the set-off of unliquidated damages.
5. A discrimination in favor of agricultural products or live stock in the hands of the

producer or raiser, made by the Illinois trust act of June 20, 1893, exempting them from the provisions which prohibit a recovery of the price of articles sold by any trust or combination formed in restraint of trade or competition in violation of that act, renders the act repugnant to the provisions of U. S. Const. 14th Amend., in respect to equal protection of the laws.

6. An elimination of the unconstitutional portion of the Illinois trust act of June 20, 1893, which exempts agriculturists and live-stock dealers from the provisions which prohibit combinations in restraint of trade, cannot be made without bringing these classes of persons within the prohibitions of the statute, in contravention of the legislative intent, and therefore the entire act must be held invalid.

[No. 46.]

Argued April 22, 23, 1901. Decided March 10, 1902.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a decision in favor of the plaintiff in an action for the purchase price of goods bought of an illegal trust combination. *Affirmed.*

. See same case below, 99 Fed. 354.

The facts are stated in the opinion.

Mr. Henry D. Coghlan argued the cause, and, with Mr. Joseph A. O'Donnell, filed a brief for plaintiffs in error:

The defendant in error is a pool, trust, and combine directly and expressly contrary to and prohibited by the Illinois statutes, also the Federal statutes and the common law.

People v. Sheldon, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728, 21 N. E. 707; *De Witt Wire Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 529, 14 N. Y. Supp. 277; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Nester v. Continental Brewing Co.* 161 Pa. 473, 24 L. R. A. 247, 29 Atl. 102; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Emery v. Ohio Candle Co.* 47 Ohio St. 320, 24 N. E. 660; *Hoffman v. Brooks*, 11 Ohio L. J. 258; *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670; *Chapin v. Brown Bros.* 83 Iowa, 156, 12 L. R. A. 428, 48 N. W. 1074; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, 29 N. E. 888; *Ford v. Chicago*

NOTE.—On contracts in restraint of trade—see notes to *Leslie v. Lorillard* (N. Y.) 1 L. R. A. 458; *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 33; *Bowman v. Phillips* (Kan.) 3 L. R. A. 632; *Richardson v. Buhl* (Mich.) 6 L. R. A. 457; *People ex rel. Peabody v. Chicago Gas Trust Co.* (Ill.) 8 L. R. A. 500; *National Benefit Co. v. Union Hospital Co.* (Minn.) 11 L. R. A. 437; *Western Wooden Ware Asso. v. Starkey* (Mich.) 11 L. R. A. 503; *Lovejoy v. Michaels* (Mich.) 13 L. R. A. 770; *People v. North River Sugar Ref. Co.* (N. Y.) 9 L. R. A. 39; *Oregon Steam Nav. Co. v. Winsor*, 22 L. ed. U. S. 315; *Fowie v. Park*, 33 L. ed. U. S. 67; *United States v. Trans-Missouri Freight Asso.* 41 L. ed. U. S. 1008; *Chicago*, 184 U. S.

M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 9 C. C. A. 663, and *Cravens v. Carter-Crume Co.* 34 C. C. A. 486.

On set-off of unliquidated demands—see notes to *Memphis & C. R. Co. v. Greer* (Tenn.) 4 L. R. A. 858, and *Helwig v. Laschowski* (Mich.) 10 L. R. A. 378.

As to the validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note, and *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

On statutes part valid and part invalid—see notes to *Titusville Iron Works v. Keystone Oil Co.* (Pa.) 1 L. R. A. 363, and *Fayette County v. People's & D. Bank* (Ohio) 10 L. R. A. 196.

Milk Shippers' Asso. 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765; *People ex rel. Melhany v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1062; *Milwaukee Masons' & Builders' Asso. v. Niczerowski*, 95 Wis. 129, 37 L. R. A. 127, 70 N. W. 166; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Pac. 581; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274; *India Bagging Asso. v. Kock*, 14 La. Ann. 164; *Hilton v. Eckersley*, 6 El. & Bl. 47; *Urmston v. Whitelegg Bros.* 63 L. T. N. S. 455; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *People v. North River Sugar Ref. Co.* 54 Hun, 366, 5 L. R. A. 386, 7 N. Y. Supp. 406; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. 721; *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 448, 41 N. E. 188; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. 530; *National Harrow Co. v. Hench*, 39 L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391; *Davies v. Davies*, L. R. 36 Ch. Div. 359; *Egerton v. Brownlow*, 4 H. L. Cas. 1; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 549; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *Cook, Corp.* §§ 503a-503d, and notes. See also *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah. G. & N. A. R. Co.* 43 Ga. 13.

The defendant in error is a foreign corporation doing business in Illinois and amenable to the laws of the state.

1 Starr & C. (Ill.) Stat. p. 1017; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 173 Ill. 439, 51 N. E. 55; *Stevens v. Pratt*, 101 Ill. 206; *Pennsylvania Co. for Ins. on Lives & G. A. v. Bauerle*, 143 Ill. 459, 33 N. E. 166; *Rhodes v. Missouri Sav. & L. Co.* 173 Ill. 621, 42 L. R. A. 93, 50 N. E. 998; *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839; *Walter v. Whitlock*, 9 Fla. 86, 76 Am. Dec. 607; *Story, Conf. L. § 527*; *Faulkner v. Hyman*, 142 Mass. 53, 6 N. E. 846; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Fisher v. Lord*, 63

N. H. 514, 3 Atl. 927; *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Rep. 62; *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525; *Evans v. Anderson*, 78 Ill. 558; *Anstedt v. Sutter*, 30 Ill. 164; *Yeatman v. Cullen*, 5 Blackf. 240; *Woodruff v. Hill*, 116 Mass. 310.

By a long series of decisions it has been fully established that, through an exercise of comity, foreign corporations will be recognized and allowed to enforce their rights in a state, except so far as state statutes or clear public policy of the state prohibit it.

Clarke v. Central R. & Bkg. Co. 15 L. R. A. 683, 50 Fed. 338; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Chewning v. Johnson*, 5 La. Ann. 678, 52 Am. Dec. 610; *Greenwood v. Curtis*, 6 Mass. 358, 4 Am. Dec. 145; *Mumford v. Canty*, 50 Ill. 375, 99 Am. Dec. 525; *Mandel v. Swan Land & Cattle Co.* 154 Ill. 177, 27 L. R. A. 313, 40 N. E. 462; *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746, 38 N. E. 122; *Granite State Provident Asso. v. Lloyd*, 48 Ill. App. 429; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183; *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477; 2 Story, Conf. L. 7th ed. pp. 567-571.

A corporation is a person within the constitutional guaranty of equal protection of the laws, but is not a citizen within the guaranty of equal privileges and immunities.

See note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 580; *Guthrie*, 14th Amend. to U. S. Const. p. 53; *Illinois C. R. Co. v. Bloomington*, 76 Ill. 477.

Corporations created within the state are amenable to the police power of the state to the same extent as natural persons.

Ruggles v. People, 91 Ill. 256.

A citizen of one state, going into another, is entitled, under the Federal Constitution, to no greater privileges and immunities than are possessed by the citizens of that state.

Detroit v. Osborne, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012.

The Illinois anti-trust laws of 1891, and the amendatory act of 1893, are constitutional, and not class and special legislation in contravention of the Federal and state Constitutions.

Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Harding v. American Glucose Co.* 182 Ill. 551, 55 N. E. 577; *Re Oberg*, 21 Or. 406, 14 L. R. A. 577, 28 Pac. 130; *State ex rel. Chandler v. Main*, 16 Wis. 399; *Minneapolis & St. L. R. Co. v. Herriek*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Missouri v. Lewis*, 101 U. S. 22, sub nom. *Bowman v. Lewis*,

25 L. ed. 989; *Sullivan v. Haug*, 82 Mich. 548, 10 L. R. A. 263, 46 N. W. 795; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Ames v. Union P. R. Co.* 4 Inters. Com. Rep. 835, 64 Fed. 165; *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Lowe v. Kansas*, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, 69 Ill. 80.

Equal protection cannot be said to be denied whenever the law operates alike upon all persons' and property similarly situated.

Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *State v. Schlemmer*, 42 La. Ann. 1166, 10 L. R. A. 135, 8 So. 307; *State v. Moore*, 104 N. C. 714, 10 S. E. 143; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730.

Legislation limited as to objects or territory does not infringe on the constitutional right of equal protection where all persons subject to it are treated alike, under like circumstances and conditions.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

The sale of goods by a foreign corporation within the state, and sent from another state, is an act of interstate commerce.

Cook v. Rome Brick Co. 98 Ala. 409, 12 So. 918.

Because one section of an act is unconstitutional it does not follow that the other sections of the same act, which are within the power given by the Constitution, should not be enforced.

Nelson v. People, 33 Ill. 390; *Donnersberger v. Prendergast*, 128 Ill. 229, 21 N. E. 1; *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 426, 23 L. R. A. 139, 36 N. E. 76; *Belleville v. Citizens' Horse R. Co.* 152 Ill. 188, 26 L. R. A. 681, 38 N. E. 584; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Unity v. Burrage*, 103 U. S. 459, 26 L. ed. 409; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; 6 Am. & Eng. Enc. Law, p. 1088. See *Penniman's Case*, 103 U. S. 714, sub nom. *Vial v. Penniman*, 26 L. ed. 602; *Hills v. National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052; *Florida C. R. Co. v. Schutte*, 103 U. S. 118, 26 L. ed. 327; *Edwards v. Pope*, 4 Ill. 465; *People ex rel. Miller v. Cooper*, 83 Ill. 585; *Hinze v. People ex rel. Halbert*, 92 Ill. 406; *Van Horne v. Dorrance*, 2 Dall. 309, 1 L. ed. 393; *Caldar v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Cooly*, Const. Lim. 182; *Ogden v. Saunders*, 12 184 U. S.

Wheat, 270, 6 L. ed. 625; *Clarke v. Rochester*, 24 Barb. 471.

State laws as rules of decision are binding on the Federal courts.

Burgess v. Seligman, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10.

The power of annulment of a statute is exercised only in cases where it is impossible to dispose of a cause on its merits.

Ex parte Randolph, 2 Brock. 447, Fed. Cas. No. 11,558; 6 Am. & Eng. Enc. Law, p. 1084. notes.

Where defendant in an action seeks to recoup damages from plaintiff for breach of contract, it is immaterial that the damages alleged are unliquidated.

Harlan v. St. Paul, M. & M. R. Co. 31 Minn. 427, 18 N. W. 147; *Ward v. Fellers*, 3 Mich. 281; *Batterman v. Pierce*, 3 Hill, 172.

On the trial of such a case it stands as though two separate suits were brought to determine rights of parties. In reality two suits are pending to be tried at the same time.

Merchants' Bank v. Schulenberg, 54 Mich. 49, 19 N. W. 741; *Francis v. Edwards*, 77 N. C. 271.

Where a counterclaim is pleaded, and raises issues of fact, the issues should be tried by a jury, and a motion by plaintiff for judgment on the pleadings should be refused.

Wilson v. Hughes, 94 N. C. 182.

An amendment of pleadings when necessary to present an issue on the merits is not discretionary, but a legal right.

Ill. Rev. Stat. p. 144; *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015; *Davis v. Bean*, 114 Mass. 358; *Powell v. Love*, 36 W. Va. 97, 14 S. E. 405; *M'Hardy v. Wadsworth*, 8 Mich. 349; *Drake v. Drake*, 83 Ill. 526; *Shufeldt v. Fidelity Sav. Bank*, 93 Ill. 597; *Kirkpatrick v. Cooper*, 77 Ill. 565; *Empire F. Ins. Co. v. Real Estate Trust Co.* 1 Ill. App. 391.

Messrs. **Herbert Hamlin and Edwin Walker** argued the cause and filed a brief for defendant in error:

To maintain the jurisdiction of this court, by direct appeal or writ of error, it must appear that the construction or application of the Constitution of the United States must be involved, and, necessarily, controlling.

Carey v. Houston & T. C. R. Co. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 653, 34 L. ed. 1116, 11 Sup. Ct. Rep. 435; *Green v. Mills*, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 857; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

Defendants' claim for treble damages under the Federal statute of July 2, 1890, and for damages by reason of plaintiff's alleged violation of the statute of the state of Illinois of July 1, 1893, defining trusts and conspiracies, is not permissible, either as a defense, or set-off, to the plaintiff's demand.

Robison v. Hibbs, 48 Ill. 408; *Hubbard*

v. Rogers, 64 Ill. 434; *Evans v. Hughey*, 76 Ill. 115; *Clause v. Bullock Printing Press Co.* 118 Ill. 612, 9 N. E. 201; *United States v. Buchanan*, 8 How. 83, 12 L. ed. 997; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; *Scammon v. Kimball*, 5 Biss. 431, Fed. Cas. No. 12,435.

It does not appear that any agreements or contracts made by the defendant in error, and relating to the conduct of its business, are in restraint of interstate commerce.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Re Greene*, 52 Fed. 113.

Defendant in error is a corporation, organized under the laws, and is a citizen of the state of Ohio. The contract for the sale of the sewer pipe was made in the state of Ohio, and the property was delivered to plaintiffs in error free on board of cars at Akron, Ohio, and therefore the statutes of the state of Illinois cannot be pleaded as a defense. The title to the property passed from the vendor to the vendee on delivery.

Parsons, Contr. p. 754; *Adams v. Coul-liard*, 102 Mass. 167; *Roundtree v. Baker*, 52 Ill. 241, 4 Am. Rep. 597; *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

The state statute of 1893 is void as being in contravention of art. 2, § 2, of the Constitution of the state of Illinois.

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Cooley*, Const. Lim. § 393.

State legislation of this character is also inhibited by the 14th Amendment to the Constitution of the United States.

Smyth v. Ames, 169 U. S. 522, 42 L. ed. 840, 18 Sup. Ct. Rep. 418; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Re Grice*, 79 Fed. 627.

It is no defense to an action for goods sold and delivered that plaintiff is a member of an illegal trust or combination to interfere with the freedom of trade and commerce, since the illegality of the combination is collateral to the contract of sale, and cannot taint it with illegality, or make it contrary to public policy.

National Distilling Co. v. Cream City Importing Co. 86 Wis. 352, 56 N. W. 864; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; *Planters' Bank v. Union Bank*, 16 Wall.

483, 21 L. ed. 473; *Dennehy v. McNulta*, 41 L. R. A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825; *Jackson v. Akron Brick Asso.* 53 Ohio St. 303, 35 L. R. A. 287, 41 N. E. 257; *Greenhood*, Pub. Pol. Rules 108, 109; *Norton v. Blinn*, 39 Ohio St. 145; *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765.

The contracts between the defendant in error and the manufacturers within the "Akron district," did not operate either in restraint, or partial restraint, of trade, nor did they amount to a conspiracy between the parties, to control prices, by creating a monopoly.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Dolph v. Troy Laundry Mach. Co.* 28 Fed. 553; *Re Greene*, 52 Fed. 104; *Coquard v. National Linsced Oil Co.* 171 Ill. 484, 49 N. E. 563; *Brown v. Rounsavell*, 78 Ill. 589; *Linn v. Sigsbee*, 67 Ill. 80; *Hursen v. Garin*, 162 Ill. 377, 44 N. E. 735; *Cook v. Meyers*, 166 Ill. 289, 46 N. E. 765; *Hudson v. Green Hill Seminary Corp.* 113 Ill. 618.

*Mr. Justice Harlan delivered the opinion of the court: [541]

The Union Sewer Pipe Company—a corporation organized under the laws of Ohio and doing business in Illinois—brought its action against Thomas Connolly, a citizen of Illinois, in the circuit court of the United States for the northern district of Illinois, on two negotiable promissory notes both executed at Chicago by the defendant; one, dated December 15th, 1894, the other dated January 15th, 1895, and each payable to the order of the plaintiff corporation ninety days after date at the First National Bank of Chicago.

These notes were given on account of the purchase by the defendant from the plaintiff of sewer pipe commonly known as standard Akron pipe, at prices agreed upon between the parties.

The pipe company also brought an action in the same court against William E. Dee, a citizen of Illinois, upon an open account for \$2,389.26, the value at agreed prices of certain pipe purchased by him from the plaintiff in June, 1896. The plaintiff supplied the pipe under a written contract executed between it and the defendant in Illinois under date of August, 1895.

Each of the defendants filed a plea of the general issue, with notice of special defenses and of set-off.

The special defenses in each case were substantially the same. The notice in the *Connolly Case* was that the defendant on the trial of the action would rely on these special matters:

"First. That the plaintiff is, and at all times since about the 1st day of January, 1893, has been, a trust or combination of the capital, skill, and acts of divers persons and corporations carrying on a commercial business in the states of Ohio and Illinois and between said states and elsewhere in

the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to wit, in the trade of buying, selling, and otherwise dealing in certain articles of merchandise, to wit, sewer, and drainage pipes, [542] and also for the express purpose of *unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacture, making, transportation, sale, or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use, and consumption in this state should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff, or being the pretended stockholders thereof, to wit, have bound themselves not to sell, dispose of, or transport said articles of commerce below certain common standard figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others, so as to preclude a free and unrestricted competition among themselves and others in the sale and transportation of said articles of commerce, and by which they have agreed to pool, combine, and unite any interests they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all of the claims of the plaintiff against the defendant in this action arise wholly out of, and are in respect of, sales of said articles of merchandise made between the 1st day of January, A. D. 1893, and the 1st day of March, 1896, to this defendant by *the plaintiff in the ordinary [543] course of its business as such a trust or combination acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

"Secondly. That the plaintiff is, and at all times since the 1st day of January, 1893, 184 U. S.

was, a combination in the form of a trust, in restraint of trade and commerce among the several states, and doing business as such throughout the United States and between the states of Ohio and Illinois, contrary to the provisions of an act of Congress of date of July 2d, 1890, and entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' and that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

"Thirdly. That the plaintiff is, and at all times since the 1st of January, 1893, was, a trust doing business as such in the state of Illinois and elsewhere, contrary to the provisions of an act of the legislature of the state of Illinois entitled 'An Act to Define Trusts and Conspiracies against Trade, Declaring Contracts in Violation of This Provision Void, and Making Certain Acts and Violations Thereof Misdemeanors, and Prescribing Punishment Thereof and Matters Connected Therewith, Approved June 20th, 1893, in Force July 1st, 1893;' that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof."

The set-offs claimed by Connolly were: Treble the amount of the actual damages sustained and allowed by the act of Congress of July 2d, 1890, chap. 647, known as the Sherman anti-trust act, \$56,970.44; actual damages sustained by reason of the violation by the plaintiff of the provisions of the Illinois statute of July 1st, 1893, \$17,323.48; and for money had and received by plaintiff of defendant contrary to law, \$17,323.48.

The set-offs claimed by Dee were of like character, but of larger amounts.

*Both cases were, by agreement, submitted [544] to the same jury, and were treated as one consolidated case. At the trial the defendants respectively asked leave to amend their notices of special defenses, but leave was denied.

The circuit court disallowed both the first and second of the above special defenses, and in respect of the third its decision was that the Illinois trust statute of 1893 was in violation of the Constitution of the United States. It consequently directed the jury to find a verdict for the plaintiff in each case: in the *Connolly Case*, for the amount of the two notes sued on; in the *Dee Case*, for the amount of the plaintiff's open accounts against him. Verdicts having been returned as directed, and a motion for new trial in one case, and motions for new trial and in arrest of judgment in the other, having been overruled, judgments were entered on the verdicts.

1. The defendant in error insists that these cases should have gone to the circuit court of appeals, and has moved on that ground that the writ of error be dismissed. The defense in each case was based in part on the Illinois statute of 1893. The plaintiff insisted at the trial that that statute was in violation of the Constitution of the United States, and its position was sustained by the circuit court. There have been suits in which the circuit court upon the claim of the defendant has applied the Constitution of the United States to the case before it, and put the plaintiff out of court. Here, the plaintiff claimed that the state enactment upon which defendants relied was unconstitutional, and its position upon that point was sustained. In *Loeb v. Columbia Twp.* 179 U. S. 472, 477, 45 L. ed. 280, 285, 21 Sup. Ct. Rep. 174, 177, this court said: "The circuit court of appeals act does not declare that the final judgment of a circuit court in a case in which there was a claim of the repugnancy of a state statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony [545] with its object, that this court *review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant. It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the circuit court in every case in which a claim is made that a state law is in contravention of the Constitution of the United States." Upon the authority of that case, the motion to dismiss is denied.

2. The defendant Connolly purchased Akron sewer pipe from the plaintiff, and for the agreed price thereof gave the two promissory notes upon which he was sued. The defendant Dee also purchased Akron sewer pipe at an agreed price as shown by the account upon which he was sued. Each defendant disputed his liability to the plaintiff upon the ground that prior to the making of the contracts with the defendants respectively for pipe, the plaintiff corporation entered into a combination with certain firms, corporations, and companies engaged in Ohio in the manufacture of Akron pipe; which combination, it is alleged, was in illegal restraint of trade, and therefore forbidden by the principles of the common law as recognized and enforced both in Ohio and Illinois.

This defense cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combina-

tion did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe.

In *Strait v. National Harrow Co.* 51 Fed. 819, a suit in which the plaintiffs sought a permanent injunction restraining the defendant from instituting or prosecuting any action against the plaintiffs for the infringement of letters patent owned by the defendant covering certain improvements in spring-tooth harrows, *or from instituting [546] or prosecuting any such suits against any person using the spring-tooth harrows manufactured by the plaintiffs, the court said: "In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may be an odious and wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. 'The exercise of the legal right cannot be affected by the motive which controls it.' *Kiff v. Youmans*, 86 N. Y. 329, 40 Am. Rep. 543."

In *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352, 355, 56 N. W. 864, 865, which was an action to recover the price of goods sold and delivered, one of the defenses was the plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce. The supreme court of Wisconsin said: "The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the

vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of [547] trade and commerce *and in restraint thereof and to accomplish the ends therein set forth. . . . Conceding, for the purposes of this case, that the trust or combination in question may be illegal, and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called 'trust,' or 'combination,' the defendant might voluntarily purchase the goods in question of it at any agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by, the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences."

That case was cited with approval by the circuit court of appeals for the seventh circuit in *Dennehy v. McNulta*, 41 L. R. A. 609, 611, 612, 30 C. C. A. 422, 424, 427, 59 U. S. App. 264, 270, 273, 86 Fed. 825, 827, 829. In that case the court said: "The mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal—a status apparently held in *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 448, 41 N. E. 188, cannot serve, *ipso facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any *manner its independent contract obligations." Again: "In the case of an injurious combination of the nature asserted here, the remedy is by well-recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination is illegal, or that its prices were unreasonable." [548]

184 U. S.

nation is illegal, or that its prices were unreasonable."

It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it, as in *Embrey v. Jenison*, 131 U. S. 336, 348, 33 L. ed. 172, 177, 9 Sup. Ct. Rep. 776. That was an action upon a promissory note given in execution of a contract for the purchase of "future delivery" cotton, neither the purchase nor delivery of actual cotton being contemplated by the parties, but the settlement in respect to which was to be on the basis of the "difference" between the contract price and the market price of cotton futures, according to the fluctuations in the markets. The contract was held to be a wagering contract, and therefore illegal and void. As there could be no recovery upon the original agreement without disclosing the fact that it was illegal and one that could not, for that reason, be enforced or made the basis of a judgment, it was held that attention could not be withdrawn from the illegality of the contract by the device of taking notes for the amount claimed under that contract. So, in *Miller v. Ammon*, 145 U. S. 421, 427, 36 L. ed. 759, 762, 12 Sup. Ct. Rep. 884, 887. That was an action to recover the value of 1,125 gallons of wines sold in Chicago by one who had not obtained a license to sell liquors at all,—an ordinance of that city expressly declaring that no person, firm, or corporation should sell or offer for sale "any spirituous or vinous liquors in quantities of 1 gallon or more at a time, within the city, without having first obtained a license therefor," under a penalty of not less than \$50 or more than \$200 for each offense. It was held that the action could not be maintained, because "an act done in disobedience to the law creates no right of action which a court of justice will enforce." In that case the sale from which it was attempted to imply the promise of the buyer to pay for what *he received was itself expressly [549] forbidden by law under a penalty. The action there was upon the sale, and there was a direct connection between it and the purchase of the wines. So, again, in *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. ed. 1117, 1123, 19 Sup. Ct. Rep. 839, 845, after an extended review of the cases, American and English, the court said: "The authorities from the earliest time to the present unanimously held that no court will lend its assistance in any way toward carrying out the terms of an illegal contract."

In the present case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct

connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proved without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe.

We are of opinion that the first special defense, based alone upon the principles of the common law, was properly overruled.

3. The special defense based upon the act of Congress of July 2d, 1890, chap. 647, 26 Stat. at L. 209, was also properly rejected.

[550] *That act declares illegal "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations,"—every person making any such contract or engaging in any such conspiracy being subject to a fine not exceeding \$5,000, or to imprisonment not exceeding one year, or to both punishments in the discretion of the court. § 1. So, every person monopolizing or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, is liable by that act to the like penalties in the discretion of the court. § 2. The several circuit courts of the United States are invested with jurisdiction to prevent and restrain violations of its provisions. § 4. Any property owned under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof), and being in the course of transportation from one state to another, or to a foreign country, is subject to be forfeited, seized, and condemned. § 6. By another section it is declared: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides, or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." § 7.

Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of

the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold,—such property not being at the *time in the course of transportation [551] from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.

In the case of *The Charles E. Wisewall*, 74 Fed. 802, which was a libel *in rem* by certain tug owners against a steam dredge to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the services thus rendered upon the ground that the tug owners were members of an association which was illegal and void under the Sherman act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said: He [the claimant] should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services, and having accepted the benefit thereof, he should pay. . . . An agreement by the tug *Mayflower* to tow the dredge *Wisewall*, for a reasonable sum, from Albany to Troy, is not void because the *Mayflower* is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market value because the vendor and other tailors of that city had combined to keep up prices."

Nor can the defendants refuse to pay for what they bought, upon the ground that the 7th section of the Sherman act *gives the [552] right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or de-

clared to be unlawful" by the act, to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute." *Robison v. Hibbs*, 48 Ill. 408, 409, 410; *Hawks v. Lands*, 8 Ill. 227, 232; *Hubbard v. Rogers*, 64 Ill. 434, 437; *Evans v. Hughey*, 76 Ill. 115, 120; *Clause v. Bullock Printing Press Co.* 118 Ill. 612, 617, 9 N. E. 201; *Dushane v. Benedict*, 120 U. S. 630, 648, 30 L. ed. 810, 814, 7 Sup. Ct. Rep. 696. If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision.

4. We come now to the consideration of the defense based upon the trust statute of Illinois of 1893.

As that statute is alleged to be repugnant to the Constitution of the United States, and that its full scope may be seen, it is here given in full:

"§ 1. That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of two or more of them for either, any, or all of the following purposes: First, to create or carry out restrictions in trade. Second, to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third, to prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. [553] Fourth, to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce, or manufacture intended for sale, use, or consumption in this state; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer. Fifth, to make or enter into, or examine or carry out, any contract, obligation or agreement of any kind or description

by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

"§ 2. That any corporation holding a charter under the laws of this state which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"§ 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney general or prosecuting attorney, upon his own motion, to institute suit or *quo warranto* proceedings, at any county in this state in which such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

"*§ 4. Every foreign corporation violating [554] any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings, in any county in which such foreign corporation does business, in the name of the state on his relation.

"§ 5. Any violation of either or all of the provisions of § 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employee, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof, shall be punished by fine not less than \$2,000 or more than \$5,000.

"§ 6. In any indictment or information for any offense named in this act, it is sufficient to state the purposes and effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how or where it was created.

"§ 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted

for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

"§ 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"§ 9. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.

"§ 10. Any purchaser of any article or commodity, from any person, firm, corporation, or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the [555] price *or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment." Ill. Laws 1893, p. 188; Hurd's Rev. Stat. (Ill.) 1899, p. 618, title *Criminal Code*. [Starr & C. Anno. Stat. (Ill.) p. 1256, chap. 38, ¶¶ 109-118.]

Some reference was made to the act of the legislature of Illinois approved June 10th, 1897, amending an act approved June 11th, 1891, in force July 1st, 1891, relating to the punishment of persons, partnerships, or corporations forming pools, trusts, and combines, and prescribing the mode of procedure and rules of evidence in such cases. The act of 1897 amended § 1 of the act of 1891 so as to read: "If any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, such corporation, partnership, or individual or other association of persons shall be deemed and adjudicated guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act: provided, however, that in the mining, manufacture, or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms, or corporations doing business in this state to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages." As this act of 1897 was passed after the date of the transactions here involved, it has nothing to do with the present case. Besides, the special defense

was based on the act of 1893. The act of 1897 is referred to only as showing the exemption of another class from the operation of the general law relating to pools, trusts, combinations, and confederations organized *to regulate prices of articles, commodities, [556] and merchandise. Ill. Laws 1897, p. 153; Hurd's Rev. Stat. (Ill.) pp. 615, 639.

That the arrangement or combination made between the Union Sewer Pipe Company and other companies, corporations, and firms created such a trust as the Illinois statute forbids is manifest from the evidence in the record. It is equally clear that if the plaintiff was an Illinois corporation, its charter could be forfeited and an end put to its corporate existence by proceedings instituted by the attorney general of the state. §§ 1, 2, and 3. It is also clear that, if the statute is not altogether invalid, the defendants could plead nonliability for the pipe purchased by them upon the ground that the plaintiff was, under the statute of Illinois, an illegal combination, and the contracts which it made with the defendants were void. §§ 8, 10. The statute expressly authorizes such a defense. In that particular, the defense based upon the statute of Illinois differs from the other special defenses.

The vital question, however, is whether the statute of Illinois of 1893 is not inconsistent with the Constitution of the United States, by reason of the fact that by the 9th section it declares that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of producer or raiser." The circuit court held this section to be repugnant to the 14th Amendment of the Constitution of the United States, and to be so connected and interwoven with other sections that its invalidity affected the entire act.

Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live-stock raisers may, in respect of their products or live stock in hand, combine their capital, skill, or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock: or limiting, increasing, or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure *or card or list price; [557] or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine, or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live-stock raisers in Illinois without subjecting them to the fine imposed by the statute. But ex-

actly the same things, if done by two or more persons, firms, corporations, or associations of persons who shall have combined their capital, skill, or acts, in respect of their property, merchandise, or commodities held for sale or exchange, is made by the statute a public offense, and every principal, manager, director, agent, servant, or employee knowingly carrying out the purposes, stipulations, and orders of such combination is punishable by a fine of not less than \$2,000 nor more than \$5,000. Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause of the 14th Amendment which declares that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws?"

By § 26 of a statute of Illinois it is provided: "Foreign corporations, and the officers and agents thereof, doing business in this state shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." 1 Starr & C. Anno. Stat. (111.) 619. The contracts upon which these suits are based were made in Illinois. The purpose of the above statute was "to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law." *Stevens v. Pratt*, 101 Ill. 206; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 173 Ill. 439, 51 N. E. 55. These matters are called to our attention as showing—as they undoubtedly do—that the Union Sewer Pipe Company, while doing [558] business in Illinois, was subject to *the statute of Illinois concerning trusts or combinations, and which, in terms, applies to both domestic and foreign corporations. But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for the purpose of defeating the plaintiff's claims in these actions.

The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the

source from which the power to pass such enactment may have been derived. "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 883, 18 Sup. Ct. Rep. 488.

What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question *we have said that the guaranty of [559] the equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri v. Lewis*, 101 U. S. 22, 31, *sub nom. Bowman v. Lewis*, 25 L. ed. 989, 992. We have also said: "The 14th Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, 359. This language was cited with approval in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1070, in which it was also said that

"the equal protection of the laws is a pledge of the protection of equal laws." In *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350, 352, we said that the 14th Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, "shall be treated alike, under like circumstances and conditions both in the privileges conferred, and in the liabilities imposed." "Due process of law and the equal protection of the laws," this court has said, "are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the *powers of government." *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570, 572. Many other cases in this court are to the like effect.

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live-stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe.

The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the at-

tempted classification,—and is not a mere arbitrary *selection." *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 159, 160, 165, 41 L. ed. 666, 668, 670, 671, 17 Sup. Ct. Rep. 255, 257-259, 261. These principles were recognized and applied in *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cotting v. Godard*, ante, 92, 22 Sup. Ct. Rep. 30, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock-yards company in the state, but which exempted certain stock yards from its operation, was repugnant to the 14th Amendment in that it denied to that company the equal protection of the laws.

Attention has been called to the cases of *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, and *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; and it is supposed that the grounds upon which the decision of the present case is placed are inconsistent with the principles announced in those cases. We do not think so.

In *Magoun v. Illinois Trust & Sav. Bank* we held that the progressive inheritance tax law of Illinois of June 15th, 1895, was not in conflict with the Constitution of the United States by reason of the fact that the amount of the tax was determinable by valuation so that every person and corporation should pay in proportion to the value of his, her, or its property inherited. The classification made by the statute was held not to be arbitrary by reason of the fact that inheritances were classified according to amount, and each class taxed at a different rate; for it was based upon principles of equality between the members of each distinct class. Such classification was held not to be inconsistent with the 14th Amendment.

In *American Sugar Ref. Co. v. Louisiana*, we held that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses, did not deny the equal protection of the laws to such persons and corporations as were thus taxed. It was as if the statute had imposed a tax upon the *business* of refining sugar and molasses, and had declared, as reasonably it might have done, that those who only refined their own sugar and molasses should not be regarded as belonging to that class. We said in that case: "The power of taxation under this provision was fully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 392, 10 Sup. Ct. Rep. 533, in which it was said not to have been intended to prevent a state from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax

real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness. 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their Constitution.' Again: "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the state, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great, and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the state. A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a [563] court of the *United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not 184 U. S.

a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a state. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land. We only need to say, in this connection, that the constitutional validity of the statute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing laws.

Other cases have been cited, but they are equally inapplicable in the present discussion, and only serve to show the extent to which the police powers of the states may be exerted without infringing the Federal Constitution.

Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill, or acts, in respect *of the sale or purchase of [564] goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill, or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the 9th section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that state.

We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices,

and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.

We therefore hold that the act of 1893 is repugnant to the Constitution of the United States, unless its 9th section can be eliminated, leaving the rest of the act in operation.

[565] *The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The 1st section of the act here in question embraces by its terms *all* persons, firms, corporations, or associations of persons who combine their capital, skill, or acts for any of the purposes specified, while the 9th section declares that the statute shall not apply to agriculturalists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products or stock in hand. Looking, then, at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the 9th section. Whether it is also within the prohibition against the deprivation of property without due process of law is a question which it is unnecessary to consider at this time.

Percceiving no error in the record, *the judgment in each case must be affirmed.* It is so ordered.

Mr. Justice **Gray** did not participate in the decision of this case.

Mr. Justice **McKenna** dissenting:

The trust statute of Illinois of 1893 is directed against combinations *in trade made to affect prices of commodities. The court holds that the statute is repugnant to the

Constitution of the United States because of the 9th section, which excludes from the operation of the statute "agricultural products or live stock while in the hands of the producer or raiser." In other words, and to present the discriminations of the statute in its application to persons, it punishes as a criminal conspiracy the acts enumerated in § 1, except when they are done by producers and raisers of agricultural products and live stock in respect thereto. The statute also takes away a right of action for the price of the commodities sold. One of the defenses of the plaintiffs in error was based on that provision.

The view of the court is that the legislation is purely discriminative, and is not justified by any legal principle of classification. To sustain the view the rule expressed in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, is quoted. It was there said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection." Undoubtedly. Without the observance of that principle, there can be no classification at all in any proper sense. There will be arbitrary grouping—not association of persons or things on account of common properties or characters or relations. But differences are recognized in classification as well as resemblances, and this court has found it necessary to so state. In *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, we said: "Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

It seems like a contradiction to say that a law having inequality of operation may yet give equality of protection. Viewed rightly, however, the contradiction disappears; indeed, need not even be expressed. There are very few exertions of *government [567] which can be made applicable to all persons as such. Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a legislature must be allowed a wide latitude of discretion and judgment. This has been decided many times against contentions based on a variety of facts. I will content myself by citing the later cases and commenting upon them very briefly. The cases are *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; 184 U. S.

Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

In these cases and the cases cited in them classifications were sustained which depended upon differences in the amounts of legacies; on differences between corporations; on differences between land dependent on its use for agriculture and other purposes in regard to the power of a city to annex it; on differences between fire insurance and other insurance; on the right of a legislature to declare, as a matter of law, that the work of a barber was not a work of necessity, while as to all other kinds of labor the fact was to be determined by a jury; on the difference between hiring persons to labor in the state and hiring persons to labor out of the state; on differences between sugar refiners based entirely and only on the fact of the production or purchase of the sugar refined.

In *American Sugar Ref. Co. v. Louisiana* a license tax was imposed on those engaged in carrying on the business of refining sugar and molasses. It was provided, however, that the law should not apply to "planters and farmers grinding and refining their own sugar."

Wherein did the Louisiana statute, which was held constitutional, differ from the Illinois statute, which is held to be unconstitutional? In the former case the distinction (in the opinion in the case it is called "discrimination") was between manufacturers of sugar and growers of it. In the case at bar the distinction is between traders in products and growers of them. Is not a parallel obvious? Can the cases be [568] distinguished because *in one a tax was imposed and in the other conduct is regulated or penalized? Indeed, is not the distinction verbal, each being means to an end? Besides, what justification for the distinction is there under the Constitution? None, I submit, can be found in the words of that instrument. Any state legislation which denies the equal protection of the laws is prohibited. The prohibition is independent of form or means. It would be strange, indeed, if the power of a state is limited and confined by the Constitution of the United States, when the state attempts by law to regulate conduct, and is unbounded in its discretion when it imposes taxes; that in one case it may see a difference between manufacturers and planters, and in the other case may not see a difference between traders in commodities acquired for the purposes of sale and such property when held by farmers by whose labor they were produced.

The reasoning of the cases is as strong and demonstrative as their instances. We have declared that we could not investigate or condemn the impolicy of a state law, and that this court is not a refuge from the mere injustice and oppression of state legislation. Many of the exercises of govern-

ment, it has been pointed out, were addressed to persons, not absolutely or abstractly, but according to their relations, and that classification based on those relations need not be constituted by an exact or scientific exclusion or inclusion of persons or things. Therefore it has been repeatedly declared that classification is justified, if it is not palpably arbitrary.

The cases afford, not only affirmative examples, but also by a negative deduction illustrate what is legal classification. Mr. Justice Bradley said in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533: "Clear and hostile demonstrations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,"—that is, the prohibition upon the states to deny to any citizen the equal protection of the laws. The thought of Mr. Justice Bradley was developed and illustrated by Mr. Justice Brown, speaking for this court in *American Sugar Ref. Co. v. Louisiana*, and tests of the unconstitutionality of the discriminations of a state law *were expressed, which were as ready as they were significant. Speaking of the Louisiana act, which discriminated between refiners of sugar, Mr. Justice Brown said: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely *arbitrary, oppressive, or capricious* [the italics are mine], and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

Of course, the enumeration of some tests does not exclude others, but why the enumeration of the special kind? Did not the case require it? What ingenuity can find a difference in the act and process of sugar refining when done by a purchaser of raw sugar and a raiser (planter) of it; what difference in the product after it shall be refined, or in any element, thing, or circumstance, which can affect its use or sale. The whole and only distinction in the classes which the statute made was between the grower of sugar and the buyer of it—the exact and only distinction of the Illinois law now held to be void, and yet the Louisiana law was sustained as constitutional.

I have already adverted to the distinction which may be claimed to exist between taxing laws and regulating laws, but a few words more may be justified. The opinion of the court makes a great deal of the penal provisions of the trust law, and its discriminations are displayed and intensified more by the recitation and effect of those provisions than by the provision upon which the defense of plaintiffs in error was

based, that is, the provision (§ 10) which precludes recovery of the price of "any article or commodity sold" by an offender against the statute.

[570] The penal provisions of the statute are not before us for judgment. If they were, and the unconstitutionality of the statute could be attributed to them, they might be construed as separable and be discarded. But, not insisting on that, and considering the comments on those provisions to be more than incidental illustration of the character of the statute, it is very clear to me that they do not in any way affect the power of the state. In other words, the power of the state cannot be impugned or affected by the sanctions which the state may impose to secure obedience to its commands or prohibitions. It may be through a tax or it may be through penalties, and the question will always be, Is the thing which is directed or forbidden within the power of the state? And when a statute is assailed as denying the equal protection of the laws, its equal operation is only involved.

The principle of classification, therefore, is not different in tax laws than in other laws. That principle, as I have said, necessarily implies discrimination between the persons composing the class and other persons. The equality prescribed by the Constitution is fulfilled if equality be observed between the members of the class. It is violated if such equality be not observed, and the latter was the case in *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cotting v. Godard*, ante, 92, 22 Sup. Ct. Rep. 30. That case, therefore, does not sustain the ruling now made.

Any further remarks may be only repetition, but the application of the cases to the statute now before us should be pointed out.

The equality of operation which the Constitution requires in state legislation cannot be construed, as we have seen, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions, and relations of men. Classification, therefore, is necessary, but what are its limits? They are not easily defined, but the purview of the legislation should be regarded. A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation. But a wide latitude of selection must be left to the legislature. It is only a palpable abuse of the power of selection which can be judicially reviewed, and the right of review is so delicate that even in its best exercises it may lead to challenge. At times, indeed, it must be exercised, but should always be exercised in view of the function and necessarily large powers of a legislature.

[571] *What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the state to suppress combinations to control the

prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons, or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that state? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stockraisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons, but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That differences exist cannot be denied. To describe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action based upon those differences is legislative and cannot be reviewed by the judiciary.

I am therefore constrained to dissent from the judgment of the court.

*UNITED STATES, *Appt.*,

v.

JUAN PEDRO CAMOU.

(See S. C. Reporter's ed. 572-577.)

[572]

Conclusiveness of prior decision on subsequent appeal—Mexican land grants—definite location.

1. An appeal from a decree entered in proceedings taken in pursuance of the mandate of the Supreme Court of the United States on a prior appeal brings up for review no other question than whether such decree was reached in due pursuance of the previous opinion and mandate of the appellate court.
2. A definite location and possession of a Mexican land grant of 4 sitios is shown with reasonable certainty by evidence that the grantee took and continued in possession of a segregated tract of that area, laid off by

NOTE.—On the conclusiveness of prior decisions on subsequent appeals—see note to *Hastings v. Foxworthy* (Neb.) 34 L. R. A. 321.

184 U. S.

the original survey in the proceedings to obtain the grant, and that the subsequent surveys, though, like the original, not made with the care and precision that characterize surveys made in the long-settled portions of the country, were made to verify and renew the original survey, and not with a purpose to locate a floating grant of uncertain boundaries and extent.

[No. 35.]

Submitted March 22, 1901. Decided March 17, 1902.

A PPEAL from the Court of Private Land Claims to review a decree confirming a title under a Mexican land grant. *Affirmed.*

See same case on former appeal, 171 U. S. 277, 43 L. ed. 163, 18 Sup. Ct. Rep. 855.

Statement by Mr. Justice **Shiras**:

In December, 1891, Juan Pedro Camou filed a petition in the court of private land claims, praying to have confirmed to him a certain tract of land situated in the county of Cochise, territory of Arizona, known and designated as the San Rafael del Valle grant. Subsequent proceedings resulted in a trial and a decree in favor of the government, adjudging petitioner's claim and title invalid, and dismissing the petition. The case was then brought by appeal to this court, where the decree of the court of private land claims was reversed and the case remanded for further proceedings. 171 U. S. 277, 43 L. ed. 163, 18 Sup. Ct. Rep. 855.

Subsequently further proceedings were had in the court of private land claims in pursuance of the mandate of this court, resulting, on June 2, 1899, in a decree confirming the petitioner's title to 17,474.93 acres. From this decree of confirmation an appeal was allowed to this court.

Solicitor General Richards and **Messrs. Matthew G. Reynolds** and **William H. Pope** submitted the cause for appellant.

Messrs. William Herring and **Rochester Ford** submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

[572] *Mr. Justice **Shiras** delivered the opinion of the court:

When this cause was before us, in 171 U. S. 277, 43 L. ed. 163, 18 Sup. Ct. Rep. 855, the validity of the claim was, upon full consideration, upheld. It was, however, held that the recovery should be restricted to the

[573] land *claimed in the petition and paid for, and as it was shown that the survey was in excess of the land granted and paid for, the cause was remanded to the court of private land claims for further proceedings which resulted, as shown by this record, in a final decree of confirmation establishing the boundaries of the grant, and finding it to contain 4 sitios, or 17,474.93 acres.

The contention made on behalf of the government in this appeal is that this grant of 4 sitios was a mere float within exterior

boundaries containing a larger tract; that there were no means afforded of identifying where, within those exterior boundaries, such 4 sitios were located; that accordingly, as matter of law, prescribed in the 6th section of the Gadsden treaty, the tract cannot be said to have been located, and hence the grant must be held to be invalid.

It may well be doubted whether, even if this contention were well founded, it can be urged at this stage of the controversy.

When the case was originally tried in the court of private land claims, and subsequently was heard on appeal in this court, the principal contention on the part of the government was that the state of Sonora had no power to make a grant of public lands, and hence that the grant in question, although made in the name and by the proper officers of that state, was invalid. The subject was fully considered by this court, and it was held that the several states of the Republic of Mexico, of which Sonora was one, had, at the time when the transaction in question took place, authority to make sales of vacant public lands within their limits.

The government further contended that this and similar grants by the separate states had been annulled by certain decrees of Santa Anna, when acting as dictator of Mexico, and that, as the government of the United States had recognized Santa Anna, in purchasing the territory covered by the Gadsden treaty, the courts of the United States must recognize, when dealing with personal rights existing in the ceded territory, his declarations or decrees in respect to titles, as authoritative. But this view of the legal effect of the decrees of Santa Anna *upon the private rights of residents [574] within the ceded territory was not accepted by this court, and, for reasons given in the opinion of Mr. Justice Brewer, it was held that, as the grant made by the state of Sonora was valid when made, it was not destroyed by the arbitrary decree of a temporary dictator.

As, however, it appeared that the survey of the land claimed in the petition was in excess of the 4 sitios granted and paid for, the court applied the rule laid down in *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840, that where there is a valid grant for a certain number of acres within the outboundaries of a larger tract, the court of private land claims may inquire, and, if it finds sufficient reasons for determining the true boundaries of the tract that was granted, it can so prescribe them, and sustain the claim to that extent.

Upon this second appeal we have only to consider whether the court of private land claims reached its final decree in due pursuance of the previous opinion and mandate of this court. The decision there made is the law of the case, and is not open for reconsideration in the subsequent appeal. This subject was recently considered in *Illinois ex rel. Hunt v. Illinois C. R. Co.* 184 U. S. 77, ante, 440, 22 Sup. Ct. Rep. 300, and it was there shown that it is the settled law of

this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members.

Accordingly, in the present case, everything involved in the question of the validity of the grant might be deemed to have been determined on the first appeal, as well its alleged invalidity for want of definite location, as for the want of power in the state [575] of Sonora to make the grant. However, even if this view were waived, and it were conceded that our former mandate left it open to the government to urge the invalidity of the grant by reason of alleged want of definite location, our examination of the record has satisfied us that the final decree of the court of private land claims defining the boundaries of the grant was justified by the evidence.

It is clearly shown that on March 12, 1827, Rafael Elias presented his petition to the treasurer general of the state of Sonora, asking for a grant of public lands adjacent to the ranch of San Pedro, within the jurisdiction of Santa Cruz; that on July 1, 1827, the treasurer general issued an order directed to the alcalde of the police of Santa Cruz, empowering him to proceed to survey, appraise, and offer at public sale for thirty consecutive days the lands indicated in the petition; that on August 20, 1827, in obedience to said order, the alcalde executed what is called an act of obedience, wherein he stated that he would go to the ranch of San Pedro in order to proceed with the survey of the lands petitioned for; that he appointed four citizens to act as counters, tallymen and chainmen, who were duly qualified; that the survey was so proceeded in that there resulted a segregated tract of land containing 4 sitios, of which Rafael Elias took possession; that, at the conclusion of the survey, the testimonio states the alcalde proceeded to the appraisement of the land through experts, who adjudged the value of the 4 sitios to be \$240, at the rate of \$60 each, and that upon this appraisement the alcalde put them up at auction, asking for bidders, for thirty consecutive days, from August 30 to September 30, 1827. On September 30, 1827, after summoning the interested party, the alcalde remitted the proceedings to the treasurer general, who transmitted them to the fiscal attorney, who on February 7, 1828, reported his opinion

that "the proceedings be continued to adjudication, according to the forms and requisites in use." The testimonio then states that the treasurer general, being satisfied with the report of the fiscal attorney, by order of April 16 proceeded, asking for bidders, and none appearing, the 4 sitios were auctioned off in favor of Rafael Elias. The testimonio further discloses that *the [576] purchase money was duly paid into the treasury, and a certificate of the treasurer general, of April 21, 1828, concluded the proceedings; that, on December 25, 1832, followed the grant or patent by the treasurer general of the state of Sonora, stating that the proceedings had been concluded with all the requisites and formalities provided by law, and remained in the custody of the treasurer general as a perpetual muniment of title; that therefore, in the exercise of the faculties conferred on him by law, and in the name of the sovereign state of Sonora, he granted in due form of law the 4 sitios of land for the raising of cattle and horses, comprised in the locality of San Rafael del Valle, situated in the jurisdiction of the presidio of Santa Cruz, in favor of the citizen Rafael Elias, to whom he conceded, gave, and adjudged the said land by way of sale, with the condition and permanency established by the law, for himself and his successors, with the injunction and condition that he must keep said sitios occupied and settled, without letting them be abandoned or deserted at any time, with the understanding that if they be abandoned for the period of three consecutive years, and there should be any person to petition for them, in such event, with previous proof of the fact, they would be declared public lands and granted anew to the highest bidder, excepting in such cases where the abandonment was caused by the notorious invasion of the public enemies; and admonishing said Elias and his successors that they must keep and confine themselves to the land and limits as marked precisely in the foregoing proceedings of survey, and comply exactly with the law which imposed obligations to mark the metes and boundaries with monuments of stone and mortar. It is admitted by the government that the expediente of this grant is on file in the archives of Hermosillo, and is in the usual form, and that on folio 11 and on the back of it, of the book of "Toma de Razon," is recorded an entry of the delivery of the title deed to Rafael Elias for 4 sitios of land, comprised in the place called Rafael del Valle, situate in the jurisdiction of the presidio of Santa Cruz. This was followed by evidence showing the continuous possession of the tract by Rafael Elias until forced to leave it by hostile incursions of the Apache Indians. *There was also proof of a regular deraign- [577] ment of title from the original grantee to Camou, the appellee in the present case.

Taking together the evidence adduced by the claimant on the first trial before the court of private land claims, and that introduced after our mandate had gone to that court, we think it is satisfactorily

shown that the land described in the final decree is that described in the original survey and of which Rafael Elias was put in possession. The principal witnesses in this part of the case were George J. Roskrue, a surveyor of more than twenty years' experience in that part of the country, and who made the survey and map of the San Rafael del Valle land grant, which was used upon the trial. Douglass Snyder and Max Marks, who assisted in making that survey, were also examined. These witnesses were subjected to a rigorous cross-examination by the attorney of the government, and their testimony has been minutely criticised in his brief.

But we are not able to perceive that the statements of these witnesses have been materially shaken. Some discrepancies indeed appear, but they are not important, and are naturally to be expected from the nature of the case. Neither the original nor the subsequent surveys were made with the care and precision that characterize surveys made in the long-settled parts of the country. But it is evident—and this is the important point—that the latter surveys were made to verify and renew the original survey, and not with a purpose to locate a floating grant of uncertain boundaries and extent. In this particular this case is plainly distinguishable from the case of *Ainsa v. United States*, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544, where the claimant's case failed because there had been no actual location of the grant prior to the Gadsden treaty, and because there was no satisfactory evidence that the act of juridical possession had ever taken place.

From our examination of the evidence we concur in the view of the court of private land claims, that a definite location and possession of the grant in question, prior to the date of the Gadsden treaty, are shown with reasonable certainty, and accordingly the decree of that court, confirming the claim to the extent of the 4 sitios granted and paid for, is affirmed.

[578]*FERDINAND EIDMAN, Collector, etc.,
v.

MIGUEL R. MARTINEZ, Administrator,
etc.

(See S. C. Reporter's ed. 578-592.)

Inheritance tax—personal property of non-resident alien—will executed abroad.

American securities passing partly under a

NOTE.—On collateral-inheritance taxes—see notes to *Re Howe* (N. Y.) 2 L. R. A. 825; *Wallace v. Myers* (C. C. S. D. N. Y.) 4 L. R. A. 171; *Com. v. Ferguson* (Pa.) 10 L. R. A. 240; *Re Romaine* (N. Y.) 12 L. R. A. 401, and *Magoun v. Illinois Trust & Sav. Bank*, 42 L. ed. U. S. 1037.

On collateral-inheritance tax on property passing by intestate laws of another state—see *State v. Dalrymple* (Md.) 3 L. R. A. 372, and note.

184 U. S.

will executed abroad by a nonresident alien, and partly under the intestate laws of Spain, are not subject to the inheritance tax imposed by the war revenue act of June 13, 1898, § 29, upon personal property passing "either by will or by the intestate laws of any state or territory," since the words "passing by will" are limited by the subsequent words "or by the intestate laws of any state or territory," as is evident from the provision of § 30 for the payment of such tax to the collector of the district of which the deceased person was a resident.

[No. 287.]

Argued November 21, 1901. Decided March 17, 1902.

UPON CERTIFICATE from the Circuit Court of Appeals for the Second Circuit on a question as to the inheritance tax imposed by the war revenue act. Answered in the negative.

Statement by Mr. Justice Brown:

This case came up upon certain questions of law arising in an action brought in the circuit court for the southern district of New York by Martinez, as ancillary administrator with the will annexed of the estate of Salvador Elizalde, against the collector of internal revenue, for the refund of an inheritance tax paid to the defendant upon certain personal property in the city of New York.

The facts out of which the questions arose are as follows:

Salvador Elizalde, a nonresident alien, a subject of the King of Spain, who had never resided within the United States, died in Paris, France, on April 27, 1899, leaving a will in the Spanish language, executed in Paris, in the year 1891, pursuant to the laws of Spain. This will was filed and protocolized in the office of the Spanish consul in Paris, and thereby under the laws of Spain and the consular convention or treaty between Spain and France, Arturo Elizalde, the sole legatee under said will, became entitled to the possession and administration of all the "personal property of [579] the decedent. Said Arturo Elizalde is the only son and sole next of kin of the decedent, and is a nonresident alien and a Spanish subject. He has resided all his life in Spain and France, and has never resided in the United States. Said will purports to give all of the personal property of the decedent to his said son, but, by the laws of Spain, only one third of the property passed by the will, and the remaining two thirds passed to said son by and under the Spanish intestate law.

The decedent left certain Federal, municipal, and corporate bonds, of the par value of \$225,400, in the custody of his agents in the city of New York, and they were within the third collection district of New York at the date of his death.

After the filing of said will in Paris, Arturo Elizalde entered upon the administration of the decedent's personal estate, and appointed the defendant in error, Miguel R. Martinez, his attorney for the purpose of

receiving ancillary letters of administration with the will annexed in the state of New York, and such letters were issued to him by the surrogate of New York county. After receiving such letters, said Martinez took possession of said bonds.

The United States Commissioner of Internal Revenue, under the alleged authority of the 29th and 30th sections of the act of Congress of June 13, 1898, entitled "An Act to Provide Ways and Means to Meet War Expenditures and for Other Purposes," assessed an internal revenue tax of \$4,293.76 upon a legacy and distributive share arising from personal property in the hands of the administrator, defendant in error, who paid said tax to the United States collector of internal revenue for the third district of New York, plaintiff in error, under protest and upon compulsion of the collector's threat of distraint and sale, and made the statutory application for its refund to the Commissioner of Internal Revenue, who rejected the application. The administrator then brought this action in the circuit court of the United States for the southern district of New York against the collector to recover the amount of the tax.

[580] The collector demurred; the demurrer was overruled, and a final judgment entered against the collector for the amount claimed, with interest and costs. The collector then brought the action into the circuit court of appeals, which certified to this court the following questions of law arising out of the foregoing facts:

"1. Is any tax or duty imposed by the 29th and 30th sections of the act of Congress of June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet War Expenditures and for Other Purposes,' upon the passing of any legacy arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile, pursuant to the laws thereof, by which he gives all his property to a nonresident alien legatee, and who leaves certain personal property within the state of New York exceeding \$10,000 in value?"

"2. Is any tax or duty imposed by the 29th and 30th sections of the act of Congress of June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet War Expenditures and for Other Purposes,' upon the passing of any distributive share arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States, in the year 1899, intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a nonresident alien, and who leaves certain personal property within the state of New York, exceeding \$10,000 in value?"

Solicitor General Richards argued the cause and filed a brief for collector:

For the purposes of taxation, personal

property may be separated from its owner, and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Lane County v. Oregon*, 7 Wall. 71, 19 L. ed. 101; *State Tax on Foreign-held Bonds*, 15 Wall. 300, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787; *Tappan v. Merchants Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 669; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 935, 17 Sup. Ct. Rep. 604; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

The same disregard of the old maxim, *Mobilia sequuntur personam* obtains in the levying of inheritance taxes by the various states of the Union.

Dos Passos, *Inheritance Tax Law*, 2d ed. § 47, p. 167; *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82; *Alvany v. Powell*, 55 N. C. (2 Jones, Eq.) 51.

The war-revenue act of 1898 was passed after the enactment by many of the states of the Union of inheritance-tax laws, all of which were made applicable to the personal property within the state of nonresident as well as resident decedents.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The theory on which such laws are based is that in the transmission or receipt of such property a privilege is enjoyed under the law of the state.

United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774.

That Congress intended by the language in § 29 to reach every personal estate within the United States, whether of a resident or a nonresident decedent, is shown conclusively by the amendments made to § 30 by the act of March 2, 1901 (31 Stat. at L. 948).

Treasury Annual Report, 1900, p. 617.

The English courts, while adhering to *Thomson v. Advocate General*, 12 Clark & F. 1, where the nonresident dies leaving a foreign will, have held, in a number of cases, that a succession created by a gift of property in England intended to take effect after death is subject to the tax.

Hanson, *Death Duties*, p. 531.

No property within a state can pass to

legatees or distributees except by virtue of and in compliance with the law of the state. This applies to all property, the property of aliens as well as the property of residents.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168.

As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain.

Cooley, Taxn. 2d ed. p. 204.

Where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

For nearly fifty years after the passage of the English legacy act of 1796, the English courts never adopted or applied the maxim, *Mobilia, etc.*, in its construction. When they did finally adopt it, they did so out of considerations of public policy.

See *Atty. Gen. v. Cockerell*, 1 Price, 165; *Atty. Gen. v. Beatson*, 7 Price, 560; *Thomson v. Advocate General*, 12 Clark & F. 1; *Albany v. Powell*, 55 N. C. (2 Jones, Eq.) 51.

The courts of this country have often explicitly refused to adopt and apply this maxim in the construction of a legacy tax, although the language of the acts permitted it.

Alvany v. Powell, 55 N. C. (2 Jones, Eq.) 51; *State v. Dalrymple*, 70 Md. 295, 3 L. R. A. 372, 17 Atl. 82; *Small's Estate*, 151 Pa. 1, 25 Atl. 23, 28; *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759; *Re Whiting*, 150 N. Y. 27, 34 L. R. A. 232, 44 N. E. 715; *Re Bronson*, 150 N. Y. 1, 34 L. R. A. 238, 44 N. E. 707; *Re Houdayer*, 150 N. Y. 37, 34 L. R. A. 235, 44 N. E. 718; *Re Fitch*, 160 N. Y. 87, 54 N. E. 701; *Weaver v. State*, 110 Iowa, 323, 81 N. W. 603.

Personal property of a nonresident decedent, dying without a will, is regarded as passing by the intestate laws of the state wherein it is situated for the purpose of levying legacy taxes.

Billings v. People, 189 Ill. 472, 59 N. E. 798; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176.

The essential thing is the presence of the property within the jurisdiction of the United States. The remedy is against the property or the person in custody of it, not against the legatee.

United States v. Allen, 9 Ben. 154, Fed. Cas. No. 14,430.

Messrs. **Wheeler H. Peckham** and **John G. Carlisle** argued the cause, and, with Messrs. **William Edmond Curtis** and **Henry M. Ward**, filed a brief for Martinez:

The law in question must be strictly construed in favor of the exemption or noninclusion of this property.

Warrington v. Furber, 8 East, 242; *Williams v. Sanger*, 10 East, 66; *Denn ex dem.* 184 U. S.

Manifold v. Diamond, 4 Barn. & C. 243; *Tomkins v. Ashby*, 6 Barn. & C. 541; *Doe ex dem. Scruton v. Snaith*, 8 Bing. 152; *Wroughton v. Turtle*, 11 Mees. & W. 561. See *Chandos v. Inland Revenue Comrs.* 6 Exch. 464; *Gurr v. Seudds*, 11 Exch. 190; *Dwarris*, Stat. 749.

It is the law of England that where a legacy-taxing statute is phrased in general terms and does not directly state that personal property of one domiciled abroad, found in England, shall be subject to the tax, such personal property of one domiciled abroad is not subject to the tax.

Thomson v. Advocate General, 12 Clark & F. 1; *Re Lovelace*, 4 De G. & J. 340; *Re Wallop*, 1 De G. J. & S. 656; *Jeves v. Shadwell*, L. R. 1 Ch. 1; *Atty. Gen. v. Campbell*, L. R. 5 H. L. 524; *Lyall v. Lyall*, L. R. 15 Eq. 1, 42 L. J. Ch. N. S. 195; *Cigala Settlement Trusts*, L. R. 7 Ch. Div. 351; *Atty. Gen. v. Jewish Colonization Asso.* [1900] 2 Q. B. 556.

Statutes similar to the one in question have always been held not to cover a legacy given in a will of a foreign domiciled testator, or a distributive share passing by the laws of a foreign country wherein the deceased was domiciled at the time of his death.

United States v. Hunnewell, 13 Fed. 617; *United States v. Morris*, 27 Fed. 341; *Re Enston*, 113 N. Y. 174, *sub nom. People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87; *Ruckgaber v. Moore*, 104 Fed. 947.

Congress, by enacting the law of 1898, in the precise words of the law of 1864, meant and intended to adopt the construction which the courts had given to the law of 1864, and which the English courts had given to a similar English law.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142; *Ryalls v. Mechanics' Mills*, 5 L. R. A. 667 and *note*, 150 Mass. 190, 22 N. E. 766.

Personal property which had belonged to one deceased is actually situated in the place where the deceased was domiciled at the time of his decease.

Re Enston, 113 N. Y. 181, *sub nom. People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87.

Where a succession tax has been intended to act in opposition to this fiction the fact should be stated in plain and unmistakable language.

Ibid.; *Cross v. United States Trust Co.* 131 N. Y. 330, 15 L. R. A. 606, 30 N. E. 125.

Many states have provided in plain terms for taxing property found within their borders, whether that of residents or nonresidents.

1 Dos Passos, Inheritance Tax Law, 2d ed. pp. 426-443, 459, 467, 477, 484, 489, 493, 498, 503, 510, 518.

This is a legacy tax as distinguished from a probate or estate or succession duty.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

This duty, therefore, is imposed upon the right or privilege of the legatee or distributee of succession to the legacy or share by virtue of a will or of the intestate laws of a state or territory, as distinguished from the right or privilege of the owner of the estate to dispose of it by will or to have it pass under the intestate laws.

Ibid.; 3 Dowell, History of Taxation (London, 1884), p. 138.

The statute should be construed strictly in favor of the taxpayer.

Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611.

The 29th and 30th sections of the war revenue law of 1898 are a substantial re-enactment of the corresponding sections of the Acts of 1862 and 1864, and they were based upon the English legacy duty act of 1796.

Knowlton v. Moore, 178 U. S. 51, 44 L. ed. 973, 20 Sup. Ct. Rep. 747.

Under the administrative and judicial construction of the legacy duty act of 1864 no tax accrued on the passing of the property of nonresident decedents.

6 Int. Rev. Rec. p. 179, 1st column; *United States v. Hunnewell*, 13 Fed. 617; *United States v. Morris*, 27 Fed. 341.

Congress, in re-enacting the act of 1864, must be deemed to have adopted the administrative and judicial construction of that act and the construction of the English legacy duty act by the English courts.

Minor v. Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; *The Abbotsford*, 98 U. S. 440, *sub nom. The Abbotsford v. Johnson*, 25 L. ed. 168.

Congress, by adopting the language of the act of 1864 instead of the language of the state inheritance-tax laws, declared its intention not to include the passing of the property of nonresidents.

The legacy and distributive share do not pass under the testate or intestate laws of New York, and are not subject to the payment of the duty imposed by the act of Congress.

Re Enston, 113 N. Y. 181, *sub nom. People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87; *Cross v. United States Trust Co.* 131 N. Y. 339, 15 L. R. A. 606, 30 N. E. 125; *Dammert v. Osborn*, 141 N. Y. 564, 35 N. E. 1088; *Parsons v. Lyman*, 20 N. Y. 103; *Re Fitch*, 160 N. Y. 92, 54 N. E. 701; *Re Prout*, 128 N. Y. 74, 13 L. R. A. 104, 27 N. E. 948; *Schluter v. Bowers Sav. Bank*, 117 N. Y. 125, 5 L. R. A. 541, 22 N. E. 572; *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759.

The rule or maxim, *Mobilia*, etc., is based on the fiction that personal property and securities have their situs at the domicile of their owner, and not where they may actually be found.

2 Kent, Com. *429, bottom paging 572, 12th ed. 1873; Story, Conf. L. § 37 and notes, §§ 376-381, p. 312, note to §§ 379, 473; *Re Ewin*, 1 Cromp. & J. 156; *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472. See also Dicey, Conf. L. 683, 684; 1 Wms. Exrs. 300, 310; Wharton, Conf. L. 576; 2 Wms. Exrs. 1387.

700

*Mr. Justice Brown delivered the opinion of the court: [580]

This case raises the question whether the inheritance-tax law of the *United States [581] applied, in 1899, to the intangible personal property of a nonresident alien who never had a domicile in the United States and died abroad,—such personal property being within the United States and having passed to his son, also an alien domiciled abroad, as sole legatee and next of kin of the deceased, partly under a will executed abroad and partly under the intestate laws of Spain.

By the 29th section of the war tax law of June 13, 1898 (30 Stat. at L. 448, 464, chap. 448), "any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property . . . passing . . . from any person possessed of such property, either by will or by the intestate laws of any state or territory, . . . shall be, and hereby are, made subject to a duty or tax," etc.

The ancient maxim of the law, *Mobilia sequuntur personam*, was the outgrowth of conditions which have largely ceased to exist, and of an age when personal property consisted principally of articles appertaining, as the name indicates, to the person of the owner, such as gold and silver, jewels, apparel, and less immediately to horses, cattle, and other animals, and to the products of the farm and the shop. As this property was, in primitive times, usually kept under the personal supervision of the owner, and was often carried about by him on his journeys (as it often still is in Oriental countries), the principle became incorporated in the law that its locality was determined by the domicile of the owner, and that his rights with respect to such property were fixed by the law of that domicile.

While the enormous increase in the amount and variety of personal property during the past century has necessitated certain limitations of the maxim, particularly in matters of taxation, it is by no means obsolete. It is still the law that personal property is sold, transmitted, bequeathed by will, and is descendible by inheritance according to the law of the domicile; and not by that of its situs. *Cross v. United States Trust Co.* 131 N. Y. 330, 15 L. R. A. 606, 30 N. E. 125; *Ennis v. Smith*, 14 How. 424, 14 L. ed. 483; *Dammert v. Osborn*, 141 N. Y. 564, 35 N. E. 1088. In matters of taxation, however, and of subjecting the personal property of nonresidents to the *claims of local creditors of the owner, seri- [582]ous encroachments have been made upon the ancient maxim, and a rule has grown up in modern times that legislatures may deal with the personal as well as with the real property of nonresidents within their jurisdiction, and that such property, while enjoying the protection and benefits of the local law, may be taxed for the expenses of the local government. These doctrines have found expression in a large number of cases in this court. *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599, 7 Wall. 139, 19 L.

184 U. S.

ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Walworth v. Harris*, 129 U. S. 355, 32 L. ed. 712, 9 Sup. Ct. Rep. 340; *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545, and cases there cited.

Recent cases in this court have affirmed very broadly the right of the legislature to tax the local property of nonresidents, and particularly of corporations who are permitted by comity to do business within the state. *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604. The same principle has been applied not only to tangible property but to credits and effects. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

The question in each case is not of the power of the legislature to tax the personal property of nonresidents, both tangible and intangible, since that is well established both in England and America (*Mager v. Grima*, 8 How. 498, 12 L. ed. 1172), but of its intent to do so by the particular act in question. The inheritance-tax law of the United States above cited applies to property "passing by will or by the intestate laws of any state or territory." As the property in this case did not pass under any will executed in any state or territory of the United States, or by the intestate laws of any such state or territory, the case is not within the literalism of the act, unless we are to use the word "state" in a sense broad enough to include a foreign state or territory. [583] As *matter of fact, the decedent was a Spanish subject, who had never resided in the United States, had executed a will at Paris in the Spanish language, pursuant to the laws of Spain, under which will one third of his property passed to his son and two thirds to the same person under the intestate laws of Spain. The property left by the will consisted of Federal, municipal, and corporation bonds, in custody of the agents of the deceased in New York. It is the locality of the property within the jurisdiction of the United States which subjects it, if at all, to the legacy or succession tax.

It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be

given to words of exception confining the operation of duty (*Warrington v. Furber*, 8 East, 242, 247; *Williams v. Sanger*, 10 East, 66, 69; *Denn ex dem. Manifold v. Diamond*, 4 Barn. & C. 243, 245; *Tomkins v. Ashby*, 6 Barn. & C. 541; *Doc ex dem. Scruton v. Smith*, 8 Bing. 146, 152; *Wroughton v. Turtle*, 11 Mees. & W. 561, 567; *Gurr v. Seudds*, 11 Exch. 190), though the rule regarding exemptions from general laws imposing taxes may be different. *Cooley*, Taxn. 146; *Re Enston*, 113 N. Y. 174, 177, *sub nom. People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87.

We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. *Hartranft v. Wiegmann*, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *Powers v. Barney*, 5 Blatchf. 202, Fed. Cas. No. 11,361.

It is pertinent in this connection to examine similar statutes passed in other countries and in the several states of this Union, and to inquire what construction is given to them. By the English tax legacy act of 1796 a tax was imposed on every legacy "given by any will or testamentary instrument to any person who shall die after the passing of this act." In *Atty. Gen. v. Cockrell* (1814) 1 Price, 165, this was held by the court of exchequer to apply to a legacy bequeathed by a *British subject residing in [584] the East Indies to persons living in England, if the executor proved the will in England, and paid the legacy there, though the testator held his property in India, and resided and made his will and died there. The case was put upon the ground that the will was proved in England, that the executors had received the property there, and that the legatees resided there and were to be paid there. But the case is further distinguishable from the one under consideration in the fact that the testator was a British subject and domiciled in a British possession, although the stress of the case was laid upon the residence of the legatees in England. *Atty. Gen. v. Beatson* (1819) 7 Price, 560, differs from the last one only in the fact that the property bequeathed was in India, and was remitted to England and paid to legatees residing in Scotland. But it was held in *Re Erwin* (1830) 1 Comp. & J. 151, that foreign stocks, the property of a testator domiciled in England, were liable to the legacy duty, although the stocks were transferable and the dividends were payable in the foreign countries. In this case the law of the domicile was held to be controlling and the domicile to be the situs of the personal property. The two cases from Price were not cited.

In *Jackson v. Forbes*, 2 Crompt. & J. 382,

a testator born in Scotland, who resided and died in India, leaving property there, but none in England, left his property to his four natural children. The property was collected by his executors, sent to England, and invested in their own names. The court held the property exempt from legacy duties, apparently upon the ground that the property was administered by the executors without necessarily invoking the aid of the court of chancery, although no reasons were given in the opinion. Up to this time it had been thought that, if the legacy were paid from assets administered in England, the duty was payable. The two cases from Price were cited, but not discussed. This case was subsequently affirmed by the House of Lords under the name of *Atty. Gen. v. Jackson*, 8 Bligh. N. R. 15. The case of *Logan v. Fairlie*, 1 Myl. & C. 59, was a similar case, and the legacy was held to be exempt upon its authority.

[585] But in *Arnold v. Arnold*, 2 Myl. & C. 256, a similar *case of a testator residing and dying in India, leaving property there which was remitted to England and administered there, the legacy tax was held not to be payable, and the question was regarded as finally settled by *Atty. Gen. v. Jackson*. The two cases from Price were overruled.

Finally, in *Thomson v. Advocate General*, 12 Clark & F. 1, a British-born subject died, domiciled in a British colony. At the time of his death he was possessed of personal property in Scotland. Probate of his will was taken out in Scotland for the purpose of administering that property, and legacies were paid to legatees residing there. It was held by the House of Lords that no legacy duty was payable. The two cases from Price were flatly overruled, the other cases cited and discussed at length, and the doctrine of domicile applied. This case must be regarded as settling the law of England upon the subject.

It will be observed in these cases that the testator was a British subject, but in the *Case of Bruce*, 2 Crompt. & J. 436, the testator was an American who lived and died abroad, having appointed an English executor and bequeathed property in England to legatees residing there. The case is exactly in point, and the court had no difficulty in reaching the conclusion that the property was not liable to legacy duty.

There are some later cases in England, but none that seem to qualify the rule laid down in *Thomson v. Advocate General*. In some of them a distinction is drawn between the legacy tax act and the succession duty act, which came into operation May 19, 1853; and in *Re Lovelace*, 4 De G. & J. 340, it was said that the latter act applied to a succession *inter vivos* under a British settlement to British property vested in British trustees, and falling under the jurisdiction of a British court, although the persons entitled were aliens domiciled abroad. This case arose under an English marriage settlement made in England on the marriage of two English subjects, and

affected English personalty only. In *Wallop's Trust*, 1 De G. J. & S. 656, a distinction was drawn between the legacy act of George III. and the succession duty act, and a broader construction given to the latter. In *Wallace v. Atty. Gen.* L. R. 1 Ch. App. 1, it was held that a succession duty was *not payable on legacies given by the will [586] of a person domiciled in a foreign country. The law was treated as settled by *Thomson v. Advocate General*, 12 Clark & F. 1, and the question discussed on principle in a vigorous opinion. The converse of this case is that of *Atty. Gen. v. Napier*, 6 Exch. 217, in which a British-born subject died in India, though he had never acquired a domicile there, and it was held that the whole of his property, though chiefly situate abroad, was liable to a legacy duty. This case is similar to that of *Ewin*, 1 Crompt. & J. 151, above cited, though decided twenty years later. See also *Atty. Gen. v. Campbell*, L. R. 5 H. L. 524; *Lyall v. Lyall*, L. R. 15 Eq. 1.

From this analysis of the English cases it clearly appears that, under a general act imposing a duty upon legacies, the law of the domicile of the testator controls, and if he be domiciled abroad, whether an alien or a British subject, his legacies are exempt, whether the property be in England at the time of his death, or be subsequently remitted there by his executors for local administration and distribution.

We proceed now to an examination of the state decisions upon the same subject, which, with one or two exceptions, tend in the same direction. The Massachusetts collateral-inheritance law of 1891 imposes a tax upon "all property within the jurisdiction of the commonwealth, . . . whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible, which shall pass by will or by the laws of the commonwealth regulating intestate succession," etc. In *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176, it was held that under this act the succession to property of nonresidents was expressly taxed as if the property belonged to inhabitants of the commonwealth, and that the language, "which shall pass by will or by the laws of the commonwealth regulating intestate succession," taken in connection with the clauses immediately preceding it, applies to foreign wills, and to property that passes under the statute of this commonwealth which regulates the succession to the property of a nonresident owner after his death." The testator in that case lived in the state of New York, but the property was within the jurisdiction of Massachusetts. *The statute was held to [587] apply to property tangible or intangible. We make no criticism of this case, which was placed expressly upon the language of the statute.

The inheritance-tax law of New York of 1885 imposed a tax upon "all property which shall pass by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while being

a resident of the state, or which property shall be within this state, or any part of such property . . . transferred by deed, grant, sale, or gift made or intended to take effect . . . after the death of the grantor," etc. [N. Y. Laws 1885, chap. 483, § 1.] In *Re Enston*, 113 N. Y. 174, *sub nom. People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87, this was held not to apply to property within the state which passed by will or intestacy from a nonresident decedent to collateral relatives or strangers, legatees domiciled in the state, and the latter clause, "or which property shall be within the state," was held to be limited to such as was transferred by deed, grant, sale, or gift *inter vivos*. The act was amended in 1887 so as to include "all property which shall pass by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state." [N. Y. Laws 1887, chap. 713, § 1.] And in *Romaine's Case*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759, it was held to apply to personal property in New York, owned by a nonresident intestate at the time of his death, which was habitually kept or invested by him there. There can be but little doubt of the propriety of this ruling. In *Whiting's Case*, 150 N. Y. 27, 34 L. R. A. 232, 44 N. E. 715, the same rule was extended to bonds of foreign as well as domestic corporations, and certificates of stock of domestic corporations (but not of foreign), owned by a nonresident decedent, but deposited by him in a safe deposit vault in New York. See also *Bronson's Case*, 150 N. Y. 1, 34 L. R. A. 238, 44 N. E. 707, and *Houdayer's Case*, 150 N. Y. 37, 34 L. R. A. 235, 44 N. E. 718. These cases seem rather to accentuate the general principle that general statutes imposing taxes upon legacies do not apply to the personal property of nonresident testators, and that a special inclusion of such is necessary to subject it to taxation.

[588] The inheritance-tax law of Maryland subjects to taxation all "property "passing from any person who may die seised or possessed thereof, *being in this state*," and it was held in *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82, that the words "being in this state" referred, not to the decedent himself, but to his property. The testator was a resident of California, and his property was also bequeathed to residents of the same state. The property which was in Maryland consisted of an undivided quarter of the personal estate of the brother of the testator, who died in Maryland. The act was held to apply, though the testator's domicile was in California. The English cases were cited and held to be distinguishable by reason of the peculiar language of the Maryland act. The language was evidently ambiguous, but the court having held that the words "being in this state" applied to the property, and not to the person, of course its liability followed. A like con-

struction was given to the same words in *Com. v. Smith*, 5 Pa. 142; *Re Short*, 16 Pa. 63. The case of *Billings v. People*, 189 Ill. 472, 59 N. E. 798, is of no value, as the testator, as well as his legatees, were domiciled in Illinois, and the question was as to the liability of the widow's dower.

The case of *Alvany v. Powell*, 55 N. C. (2 Jones Eq.) 51, is directly in point, and undoubtedly sustains the positions of the government in this case. The North Carolina inheritance act imposed a tax upon "all personal property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to or amongst the next of kin, of any intestate, when such next of kin are collateral relations of such intestate." The act was held to apply to property in North Carolina descending to a brother from an intestate domiciled in Canada. The court was satisfied that the true principle, both in regard to real and personal property, was the situs of the property. The English case of *Thomson v. Advocate General*, 12 Clark & F. 1, decided by the House of Lords, was considered at length, and thus criticised: "No one can read the opinion delivered before the Lords in the case of *Thomson v. Advocate General*, which is the case in which the principle of the domicile is finally settled, without being struck with the fact that there is throughout a marked paucity of reasoning." The North Carolina case was decided in 1854, and, so far as we *know, has not been fol-[589] lowed in any other state, and it is the only one to which our attention has been called that seems to be in point in favor of the construction contended for by the government.

There are a number of other cases in the state courts, but they either involve questions of taxation under general laws imposing taxes upon real and personal property, not being special inheritance taxes, or the language of the particular statute is such as to create little doubt as to the intention of the legislature to tax or not to tax the particular inheritance in question. *Small's Estate*, 151 Pa. 1, 25 Atl. 23, 28; *Weaver v. State*, 110 Iowa, 328, 81 N. W. 603; *State ex rel. Taylor v. St. Louis County Ct.* 47 Mo. 594; *Catlin v. Hull*, 21 Vt. 152; *People v. Home Ins. Co.* 29 Cal. 533; *People ex rel. Hoyt v. New York City & County Tax & A. Comrs.* 23 N. Y. 224; *People ex rel. Jefferson v. Gardner*, 51 Barb. 352. In some jurisdictions a distinction has been made between tangible and intangible property which does not arise in this case. *Orcutt's Appeal*, 97 Pa. 179.

The tax in question in this case is not upon the property itself, but upon the succession. *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. Laws imposing general taxes upon real and personal property are not controlling when ap-

plied to taxes upon the succession, when such succession takes place and is governed by the laws of a foreign country. The actual situs of the property in such cases cuts but a small figure, while in the case of general taxes upon such property it is now considered determinative of the whole question.

The question involved in this case, however, arose under the act of June 30, 1864 [13 Stat. at L. 285, chap. 173], before Mr. Justice Gray of this court, while holding the circuit court for Massachusetts, in *United States v. Hunnewell*, 13 Fed. 617. Section 124 of that act imposed a duty on legacies or distributive shares arising from personal property passing from any person possessed of such property, either by will, or by the intestate laws of any state or territory. The action was brought to recover the tax upon American securities bequeathed by a French citizen domiciled in France to a son who was also domiciled there. The will was executed in conformity with the French law [590] and was *duly proved there, though a local executor was appointed by the probate court in Boston to transfer to the legatee the securities in question. It was held that § 124 did not make the duty payable when the person possessed of such property died testate if it would not be payable if such person died intestate; and as if the deceased had died intestate her son would not have taken a distributive share by the intestate laws of any state or territory, his rights were the same if he took by will. In other words, that the words "either by will or by the intestate laws of any state or territory" must be construed together, and would apply only to wills executed within any state or territory of the United States. The case is precisely in point.

We regard this case as a correct exposition of the law. It is not necessary to rely exclusively upon the English cases, or upon those in the state courts, which hold that a general law imposing an inheritance tax upon property passing by will or descent does not apply to intangible personal property within the jurisdiction of the taxing power, but owned by persons domiciled abroad, under the laws of which domicile the property passes, since the statute in question here applies only to property passing "either by will or by the intestate laws of any state or territory." Now, as the finding in this case is that the property passed partly under a Spanish will and partly under the intestate laws of Spain, the only question is whether the words "passing by will" are limited by the subsequent words "or the intestate laws of any state or territory." We are clearly of opinion that they are, and that the words "passing by will" are limited to wills executed in "any state or territory" under whose laws the property would pass, if the owner had died intestate. The whole scheme of the act evidently contemplates the application of the tax only to the property of a person domiciled in a state or territory of the United States whose property is transmitted under our laws. This is evident not only from the language

704

of § 29, above quoted, but from the provision of § 30, "that every executor, etc., . . . shall pay to the collector or deputy collector of the district⁴ of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive *share," etc. It would be difficult to find language more expressive of an intent to confine the tax to persons domiciled in this country. It need only be added that while the words "state or territory" are used in treaties, and perhaps also in some acts of Congress regulating our international relations, as including foreign states, they are used in the Constitution and in ordinary acts of Congress as applying only to states or territories of the United States.

If, as in several of the states, the words "passing by will or by the intestate laws of this state," or similar words, are connected with words declaring that the tax was intended to be imposed upon the estates of persons domiciled abroad, the latter provision is held to apply, and the words "passing by will or the intestate laws of this state" are held to include the estates of persons domiciled abroad. Such is the case in Illinois: *Billings v. Illinois*, 189 Ill. 472, 59 N. E. 798; Massachusetts: *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; Maine: *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632, 30 Atl. 76; Ohio: *Laws of 1894*, p. 166; Connecticut: *Laws of 1889*, p. 106; Tennessee: *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178, 30 S. W. 750. But it is hardly necessary to say that the construction given to these statutes would have no application to cases where words expressly providing for the estates of non-residents are omitted.

To say that we recognize by comity the law of a foreign domicile as controlling the transmission or succession of personal property because it thereby becomes *our* law (and the property therefore taxable), as is indicated in some cases, notably in *Alvany v. Powell*, 55 N. C. (2 Jones Eq.) 51, is misleading, and little more than a play upon words. When we speak of *our* laws we mean to be understood as referring to our own statutory laws, or the common law we inherited from the mother country, and when we apply the laws of a foreign domicile we do so, not because they are our laws, but because upon principles of comity we recognize those laws as applicable to the particular case. But to speak of such foreign laws as thereby becoming "the intestate laws of any state or territory" wherein they are enforced is practically to confound the whole distinction between the law of the situs and the law of the domicile. We do not *enforce the law of Spain in this case be- [592] cause it is our law, but because the practice of all civilized nations is to recognize the law of the domicile as governing the transmission and inheritance of personal property, and to prevent the confusion that would follow if estates, situated possibly in half a dozen countries, were administered

and distributed according to the laws of each country in which any portion of such estate happened to be located. We decline to hold the tax involved in this case applicable to this estate because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country. It is true that Congress may, and in certain cases has seen fit to, adopt the laws of a particular state, and apply them within a territory, as was done when Congress applied the laws of Oregon to Alaska (23 Stat. at L. 25, chap. 53), and certain statutes of Nebraska to Oklahoma (26 Stat. at L. 87, chap. 182). They thereby became the laws of those territories as much as if enacted by a territorial legislature, and were universally applicable. But that result follows expressly from the statute, and not from the recognition of the foreign law as applicable to a particular case. Section 2694 of the New York Code [Civil Proc.] recognizes this distinction, in its requirement that "except where special provision is otherwise made by law, the validity and effect of the testamentary disposition of any other [than real] property situated within the state, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the state or country of which decedent was a resident at the time of his death."

Conceding it to be within the power of Congress to impose an inheritance tax upon property in this country, no matter where owned or transmitted, it has not done so in this case, and the questions propounded by the Court of Appeals must be answered in the negative.

Mr. Justice **White** and Mr. Justice **McKenna** concurred in the result.

[593]

*FRANK R. MOORE

v.

MAX RUCKGABER, Executor, etc.

(See S. C. Reporter's ed. 593-598.)

Inheritance tax—personal property of non-resident alien—will executed in United States.

Personal property in the United States, passing under the will of a nonresident alien executed in New York during a temporary sojourn there, is not subject to the inheritance tax imposed by the war revenue act of June 13, 1898.

[No. 295.]

Argued November 21, 1901. Decided March 17, 1902.

NOTE.—On collateral inheritance taxes—see notes to *Re Howe* (N. Y.) 2 L. R. A. 825; *Wallace v. Myers* (C. C. S. D. N. Y.) 4 L. R. A. 171; *Com. v. Ferguson* (Pa.) 10 L. R. A. 240; *Re Romaine* (N. Y.) 12 L. R. A. 401, and *Magoun v. Illinois Trust & Sav. Bank*, 42 L. ed. U. S. 1037.

184 U. S.

UPON CERTIFICATE from the Circuit Court of Appeals for the Second Circuit on a question as to the inheritance tax imposed by the war revenue act. Answered in the negative.

See same case in circuit court, 104 Fed. 947.

Statement by Mr. Justice **Brown**:

This was also an action brought in the circuit court for the southern district of New York by Ruckgaber, as executor of the last will and testament of Louisa Augusta Ripley-Pinède, against the collector of internal revenue, to recover an inheritance tax paid to the defendant upon certain personal property in the city of New York.

The material facts, as set forth in the certificate, are briefly as follows:

The testatrix, Louisa Augusta Ripley-Pinède, died at Zürich, Switzerland, on September 25, 1898, being at that time a nonresident of the United States, and having, for at least eight years immediately preceding her death, been domiciled in, and a permanent resident of, the Republic of France. She left a will dated November 6, 1890, which was made in New York and in conformity to the laws of that state, where the testatrix was then sojourning, whereby she bequeathed all her personal property in the United States to her daughter, Carmelia von Groll, who was then, and is now, also a nonresident of the United States, domiciled in Germany. Said will was probated *in the [594] surrogate's court of Kings county, New York, on February 17, 1899, and letters testamentary were thereupon issued to the defendant in error, a resident of said county and state, who alone qualified as executor.

At the time of her death the testatrix owned a claim in account current against one Carl Goepel and one Max Ruckgaber, Jr., constituting the firm of Schulz & Ruckgaber, both of whom resided in the county of Kings and state of New York. She was also the owner of a share of stock in the Tribune Association, a New York corporation. The testatrix was also the owner of bonds and coupons of divers American corporations hereinafter particularly described. Said chose in action, stock, bonds, and certificate constituted all the personal property of every kind in the United States of America referred to in the said will. The value of the said property of the testatrix at the date of her death, September 25, 1898, as fixed and determined by appraisers duly appointed, was \$105,670.70. On or about the 15th day of June, 1899, upon the written demand of the collector of internal revenue for the first district of New York, and under protest, the executor did make and render in duplicate to the said collector a return of legacies arising from personal property of every kind whatsoever, being in charge or trust of said executor, passing from Louisa Augusta Ripley-Pinède to her said daughter by her will, as aforesaid.

The following questions of law which

arose out of the foregoing facts were certified to this court:

"1. Can the said personal property of the nonresident testatrix, Louisa Augusta Ripley-Pinède, actually located within the United States at the time of her death, September 25, 1898, be deemed to have a situs in the United States for the purpose of levying a tax or duty upon the transmission or receipt thereof under §§ 29, 30, and 31 of the act of Congress entitled 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,' approved June 13, 1898?"

"2. Was the transmission or receipt of the said personal property of the nonresident testatrix, Louisa Augusta Ripley-Pinède, which was actually located in the United States at the time of her death, September 25, 1898, subject to taxation under [595] §§ 29, 30, *and 31 of the act of Congress entitled 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,' approved June 13, 1898?"

Solicitor General Richards argued the cause and filed a brief for Moore:

For his contentions see his brief as reported in *Eidman v. Martinez*, 184 U. S. 578, ante, 697, 22 Sup. Ct. Rep. 515.

Mr. Alfred E. Hinrichs argued the cause, and, with *Mr. Frederic W. Hinrichs* filed a brief for Ruckgaber:

In order that this estate should escape the tax it is not necessary that an intention should be found in the statute to exempt the legacy; but on the contrary, in order that it may be subjected to the tax, there must be found in the statute, either in express words or by necessary implication, an intention to include the legacy.

United States v. Wigglesworth, 2 Story, 373, Fed. Cas. No. 16,690; *Re Enston*, 113 N. Y. 177, sub nom. *People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87. See *Thomson v. Advocate General*, 12 Clark & F. 1.

An amendment must be regarded as a legislative declaration that the law did not, as originally passed, embrace the provisions which the later act supplies.

Re Harbeck, 161 N. Y. 218, 55 N. E. 850.

The reported cases support the executor's contention.

United States v. Hunnewell, 13 Fed. 617; *United States v. Morris*, 27 Fed. 41.

Where a law will bear a construction which is just and reasonable, it must be so construed rather than in a manner to make it result in injustice and unreasonableness.

Knowlton v. Moore, 178 U. S. 77, 44 L. ed. 984, 20 Sup. Ct. Rep. 747.

Not the property, nor the probate, nor the administration, but the passing of the property, is the subject of the tax.

Ibid.

The fact that the laws of the state of New York are to some extent applied to for the purpose of securing control of the estate would afford a basis for a probate tax or the like, but not for a legacy or succession tax.

Thomson v. Advocate General, 12 Clark & F. 1.

706

Foreign law is matter of fact. It must be alleged and proved, in cases where it is to control.

Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

**Mr. Justice Brown* delivered the opinion [595] of the court:

This case differs from the one just decided only in the fact that the will of the nonresident testatrix was executed in New York, November 6, 1890, during a temporary sojourn there, although, as in the preceding case, the testatrix was domiciled abroad, and bequeathed her personal property in New York to a daughter who was married and also lived abroad.

There can be no doubt whatever that, if Madame Pinède had died intestate, the personal property would not have passed by the law "of any state or territory" (using the words of the act), but by the laws of France. The question, then, is whether the condition is changed if the property pass under a will executed in this country. In *United States v. Hunnewell*, 13 Fed. 617, cited in the preceding case, the will was executed in France, but the decision of *Mr. Justice Gray*, holding that the tax was not payable, was not put upon the ground that the will was executed in a foreign country, but upon the broader ground that the legacy duty was payable only upon the estate of persons domiciled within the United States. In delivering the opinion he observed: "Section 124 [of the similar act of 1864] imposes a duty on legacies or distributive shares arising from personal property 'passing from any person possessed of such property, either by will or by the intestate laws of any state or territory:' it does not make the duty payable when 'the person possessed of such property' dies testate, if it would not be payable if such person died intestate; and if Madame de la Valette had died intestate, her son would not have taken a distributive share 'by the intestate laws of *any state or territory.' [596] but, if at all, by the law of France, the domicile of his mother at the time of her death. And § 125, by requiring the executor or administrator to pay the amount of this duty 'to the collector or deputy collector of the district of which the deceased person was a resident,' leads to the same conclusion."

The real question, then, is, as said by *Mr. Justice Gray*, whether the act makes the duty payable when the person possessed of such property dies testate, if it would not be payable if such person died intestate, although the actual question involved in this case differs from the one there involved, in the fact that in the *Hunnewell Case* the will was executed abroad, while in the present case it was executed in this country.

Bearing in mind the fact that the tax in this case is not upon the property itself, but upon the transmission or devolution of such property, the question again recurs, as it did in the preceding case, whether the succession took effect in France or in New York. We are aided in the solution of this

problem by the language of § 2694 of the New York Code of Civil Procedure, also cited in the preceding case, which is as follows: "Except where special provision is otherwise made by law, the validity and effect of the testamentary disposition of any other [than real] property situated within the state, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the state or country of which the decedent was a resident at the time of his death." Now as, if Madame Pinède had died without leaving a will, her property would have passed under the intestate laws of France and been exempt from this tax, it follows under the *Hunnevell Case* that it is equally exempt though it passed by will.

The will of Madame Pinède is confined to her personal property in this country, and the record does not show whether she was possessed of other property in France or in any foreign country. If she had, that property would either pass by will executed there or under the intestate laws of her domicile. For reasons stated in the prior opinion, we do not think Congress contemplated by this act that the estates of deceased persons should be split up for the [597] purposes of distribution or taxation, *but that, so far as regards personal property, the law of the domicile should prevail.

A question somewhat to the converse of this arose in *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759, which was a proceeding to compel payment of an inheritance tax by the administrator of the estate of Romaine, who had died intestate in Virginia, leaving a brother and sister resident in New York, as his next of kin. The act of 1887 subjected to an inheritance tax "all property which shall pass by will or by the intestate laws of this state, from any person who may died seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state." [N. Y. Laws 1887, chap. 713, § 1.] The question was whether the property of Romaine, who died in Virginia intestate, was subject to the tax. After deciding that the tax applied to two classes, namely, resident and nonresident decedents, the court observed: "But does it apply to all persons belonging to these two classes? It is not denied that it applies to all *resident* decedents, and to all nonresident *testators*, but it is contended that it does not apply to nonresident *intestates*, because property 'which shall pass . . . by the intestate laws of this state' is expressly mentioned to the implied exclusion of property passing by the intestate laws of other states. This is the position of the appellant, whose learned counsel claims that the act in its present form was designed to meet cases of succession by will, but not of succession by intestacy, unless the intestate was a resident of this state. It is difficult, however, to see why the legislature should discriminate simply for the purposes of tax-

ation between the property of a nonresident decedent who made a will, and of one who did not. It is not probable that there was an intention to tax the estates of nonresident testators and to exempt those of nonresident intestates, because there is no foundation for such a distinction . . . Property of the same kind, situated in the same place, receiving the same protection from the law, and administered upon in the same way, would naturally be required to contribute toward the expense of government upon the same basis, regardless of whether its last owner died testate or intestate."

*By parity of reasoning, we think it follows that no discrimination was intended to be made between nonresidents who died testate, even though the will were made in this country, and those who died intestate; and as we have held in the preceding case that the law does not apply to nonresidents who died intestate, or testate under a will executed abroad, we think it follows that it does not apply to deceased persons domiciled abroad who left property by will executed in this country.

The questions certified must therefore be answered in the negative.

Mr. Justice White and Mr. Justice McKenna concurred in the result.

CLARENCE M. BUSCH, *Appt.*,
v.

JOSHUA W. JONES and W. O. Hickok
Manufacturing Company.

(See S. C. Reporter's ed. 598-608.)

Equitable jurisdiction—patents — anticipation—process invention.

1. Equitable jurisdiction must be determined by the conditions existing at the time the bill is filed, and not by conditions which come into existence after the commencement of the suit.
2. Jurisdiction of a court of equity over a suit for the infringement of a patent is not defeated on the theory that because the contract between the patentee and his co-complainant conveyed only the patent rights to the machine, and not the process claimed in such patent, the court could not have ordered an injunction against the defendant, who was a mere user of the machine, since, the question as to what the contract provided being an issue in the case, preliminary relief by injunction could have been granted pending the decision of such question.
3. The Jones patent, No. 204,741, for a press for removing type indentations from printed sheets, in which the sheets can be so tied

NOTE.—On *anticipation of patents*—see notes to *Leggett v. Standard Oil Co.* 37 L. ed. U. S. 737, and *Wollensak v. Sargent*, 38 L. ed. U. S. 138.

On *process inventions*—see note to *Corning v. Burden*, 14 L. ed. U. S. 683.

As to *including process and product in same patent; separate patents therefor*—see note to *Evans v. Eaton*, 4 L. ed. U. S. 433.

while under pressure that the subsequent pressure necessary to remove the indentations is continued in the tied-up bundle when removed from the press, was not anticipated by hay, cotton, tobacco, wool, and other presses used for applying pressure to substances placed between compressing heads or followers to compact them into bundles, which afford facilities for tying the bundles while under pressure.

4. The claim of the Jones patent, No. 204,741, for a process for removing type indentations from printed sheets by tying them while under pressure into compact bundles, and allowing them to remain tied when removed from the press to fix and complete the dry pressing, is invalid because it describes nothing but the operation and effect of the press for applying the pressure, which is covered by the other claims of such patent.

[No. 96.]

Argued January 14, 1902. Decided March 17, 1902.

APPPEAL from the Court of Appeals of the District of Columbia to review a judgment which affirmed a decree of the Supreme Court of the District of Columbia in favor of complainants in a suit for the infringement of a patent. *Reversed.*

See same case below, 16 App. D. C. 23.

Statement by Mr. Justice **McKenna**:

This suit was brought by appellees against appellant for the infringement of letters patent No. 204,741, and letters patent No. 452,898, issued to Joshua W. Jones, one of the appellees. An accounting was prayed, and also an injunction, pending the suit. The bill contained the usual allegations of invention and utility, and of infringement by the defendant (appellant).

[599] The answer traversed those allegations, and alleged prior use, disclosure of the invention in prior publications, and also anticipation by prior devices and processes. The answer contained a list of the devices. No evidence was given as to, and no judgment passed on, patent No. 452,898. This appeal therefore is only concerned with patent No. 204,741. The patent was issued to Joshua W. Jones, one of the appellees, for a press and process (the relation of the two is disputed) for "dry pressing" and removing type indentations from printed sheets. The validity of the patent was sustained, and its infringement by the defendant (appellant) was found by the supreme court of the district of Columbia, and decree passed adjudging appellees the sum of \$3,491.70, with interest and costs. The decree was affirmed by the court of appeals. 16 App. D. C. 23. The case was then brought here. The facts are stated in the opinion.

Mr. George J. Murray argued the cause and filed a brief for appellant:

At the first hearing upon which the interlocutory decree was entered, it clearly appeared that the court had no jurisdiction because the only patent before the court had expired, no motion for preliminary injunction had been made before its expiration,

and the single machine used by defendant had been destroyed by fire, and at the time the decree was entered the defendant had purchased and was using one of the complainant's presses. It was clearly the duty of the court to dismiss the bill before the interlocutory decree was entered.

Way v. Way, 64 Ill. 406; *Crandell v. Plano Mfg. Co.* 24 Fed. 738; *Spring v. Domestic Sewing Mach. Co.* 13 Fed. 446; *Curry v. McCauley*, 11 Fed. 365; *Cecil Nat. Bank v. Thurber*, 8 C. C. A. 365, 8 U. S. App. 496, 59 Fed. 913; *Whitehead v. Entwistle*, 27 Fed. 778; *Consolidated Middlings Purifier Co. v. Wolf*, 28 Fed. 814; *Ross v. Ft. Wayne*, 58 Fed. 404.

Although the question is not raised by the pleadings or suggested by counsel, and is not apparent upon the face of the bill, or the bill is framed to avoid the point, if, looking at the proofs, it appears that the case is one for which there is a plain and adequate remedy at law, it is the duty of the court to decline jurisdiction and dismiss the bill.

Dumont v. Fry, 12 Fed. 21; *Lewis v. Cocks*, 23 Wall. 466, 23 L. ed. 70; *Campbell v. Ward*, 12 Fed. 150; *McConnell v. Provident Sav. Life Assur. Soc.* 16 C. C. A. 172, 37 U. S. App. 213, 69 Fed. 113; *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975; *Burdell v. Comstock*, 15 Fed. 395; *Davis v. Smith*, 19 Fed. 823; *Mershon v. J. F. Pease Furnace Co.* 24 Fed. 741; *Racine Cedar Co. v. Joliet Wire-Check Rower Co.* 27 Fed. 368.

The structure disclosed in this patent involves no invention, in view of the prior state of the art.

King v. Galloway, 109 U. S. 99, 27 L. ed. 870, 3 Sup. Ct. Rep. 85; *Ide v. Ball Engine Co.* 149 U. S. 550, 37 L. ed. 843, 13 Sup. Ct. Rep. 941; *Appleton Mfg. Co. v. Star Mfg. Co.* 9 C. C. A. 42, 18 U. S. App. 492, 60 Fed. 411; *Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; *Fuller-Warren Co. v. Michigan Stove Co.* 30 C. C. A. 193, 58 U. S. App. 465, 86 Fed. 463; *Plumb v. New York, N. H. & H. R. Co.* 97 Fed. 645; *Craig v. Michigan Lubricator Co.* 72 Fed. 173; *Blakesley Novelty Co. v. Connecticut Web Co.* 78 Fed. 480; *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.* 174 U. S. 492, 43 L. ed. 1058, 19 Sup. Ct. Rep. 641; *Mowry v. Whitney*, 14 Wall. 651, 20 L. ed. 866; *Black v. Thorne*, 111 U. S. 122, 28 L. ed. 372, 4 Sup. Ct. Rep. 326; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 38 L. ed. 103, 14 Sup. Ct. Rep. 295.

The described process is merely a function of the machine, and therefore not a proper process claim.

Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745; *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707.

The burden of proof was on the complainants to show the actual profits made by defendant from the use of the invention covered by the patent in suit.

Garretson v. Clark, 111 U. S. 120, 28 L. ed. 371, 4 Sup. Ct. Rep. 291.

Only nominal damages should have been awarded.

Ibid.; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 38 L. ed. 103, 14 Sup. Ct. Rep. 295.

Mr. M. W. Jacobs argued the cause and filed a brief for appellees:

If between the date of filing the bill and the expiration of the patent there is not sufficient time for the plaintiff to obtain equitable relief, the court has no jurisdiction.

Davis v. Smith, 19 Fed. 823; *American Cable R. Co. v. Citizens' R. Co.* 44 Fed. 484; *Mershon v. J. F. Pease Furnace Co.* 24 Fed. 741; *Bragg Mfg. Co. v. Hartford*, 56 Fed. 292; *Burdell v. Comstock*, 15 Fed. 395.

But where, according to the usual course of equity practice in the particular court, there is sufficient time to obtain equitable relief by injunction, either preliminary or final, the court is justified in entertaining jurisdiction of the bill, and, having once properly acquired jurisdiction, will retain it for the purpose of granting complete relief by an accounting or otherwise, even after the expiration of the patent; and this is so, even though no motion for an injunction is actually made during the life of the patent.

Clark v. Wooster, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; *Beedle v. Bennett*, 122 U. S. 71, 30 L. ed. 1074, 7 Sup. Ct. Rep. 1090; *Adams v. Howard*, 19 Fed. 317; *New York Grape Sugar Co. v. Peoria Grape Sugar Co.* 21 Fed. 878; *Toledo Mower & Reaper Co. v. Johnston Harvester Co.* 24 Fed. 739; *Adams v. Bridgewater Iron Co.* 26 Fed. 324; *Brooks v. Miller*, 28 Fed. 615; *Kittle v. DeGraaf*, 30 Fed. 689; *Kittle v. Rogers*, 33 Fed. 49; *Singer Mfg. Co. v. Wilson Sewing Mach. Co.* 38 Fed. 586; *Ross v. Ft. Wayne*, 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 466.

The court has power to grant injunction after the expiration of the patent.

American Diamond Rock Boring Co. v. Sheldon, 18 Blatchf. 50, 1 Fed. 870; *American Diamond Rock Boring Co. v. Rutland Marble Co.* 18 Blatchf. 146, 2 Fed. 357; *Reay v. Raynor*, 19 Fed. 308; *Reay v. Berlin & J. Envelope Co.* 19 Fed. 311; *Toledo Mower & Reaper Co. v. Johnston Harvester Co.* 24 Fed. 739; *New York Belting & Pkg. Co. v. Magowan*, 27 Fed. 111.

That the defendant was not a manufacturer, but "a mere user of one machine" is no objection to the jurisdiction of the court.

Jonathan Mills Mfg. Co. v. Whitehurst, 56 Fed. 589.

A suit at law to recover damages for past infringement would be neither an adequate nor a complete remedy, and nothing short of an injunction and an accounting of profits as well as damages would be.

Birdsell v. Shaliol, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894.

A patentee has, as against an infringer, the election either to sue at law for the roy-
184 U. S. U. S., Book 46.

alty or to proceed in equity for an injunction and an accounting, not only of damages, but also of profits.

Tilghman v. Proctor, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894. See also *Bragg v. Stockton*, 27 Fed. 509; *Brooks v. Miller*, 28 Fed. 615; *Birdsell v. Shaliol*, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; *Penn v. Bibby*, L. R. 3 Eq. 308.

A process may be patentable which involves the use of mechanism, and in such cases, the inventor may be entitled to patents upon both his mechanism and his process.

Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745; *O'Reilly v. Morse*, 15 How. 62, 14 L. ed. 601; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. ed. 279; *Cochrane v. Decner*, 94 U. S. 780, 24 L. ed. 139; *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 30 L. ed. 1193, 7 Sup. Ct. Rep. 1304; *Eames v. Andrews*, 122 U. S. 40, 30 L. ed. 1064, 7 Sup. Ct. Rep. 1073; *Lawther v. Hamilton*, 124 U. S. 1, 31 L. ed. 325, 8 Sup. Ct. Rep. 342; *American Fibre-Chamois Co. v. Buckskin-Fibre Co.* 18 C. C. A. 662, 37 U. S. App. 742, 72 Fed. 508; *Chicago Sugar-Ref. Co. v. Charles Pope Glucose Co.* 28 C. C. A. 594, 56 U. S. App. 158, 84 Fed. 977; *Melvin v. Thomas Potter, Sons & Co.* 91 Fed. 151; *Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 36 C. C. A. 24, 93 Fed. 958; *Chisholm v. Johnson*, 106 Fed. 191; *Hake v. Brown*, 37 Fed. 783; *Clement Mfg. Co. v. Upson & H. Co.* 50 Fed. 538; *Watson v. Stevens*, 2 C. C. A. 500, 5 U. S. App. 101, 51 Fed. 757.

***Mr. Justice McKenna** delivered the[599] opinion of the court:

1. A question of jurisdiction is raised. It is contended by appellant that the case was not one of equitable cognizance, the appellees' remedy being, it is claimed, at law. The specification of error upon which the contention is based is expressed as follows:

"Because at the time of the hearing it appeared from the record that the only patent before the court had expired before the hearing, no motion for preliminary injunction having been made prior to the expiration of the patent, and defendant being a mere user of one machine, which machine was destroyed by fire before the case was brought to hearing."

This seeks to determine the jurisdiction of the court by conditions which came into existence after the commencement of the suit, not upon those which existed at the time the bill was filed. It is, however, urged in argument that the contract between Jones and the W. O. Hickok Manufacturing Company *conveyed the patent rights to the[600] press only, and not the process described in the 5th claim of the patent, and that "the court, sitting as a court of equity, had no jurisdiction to order an injunction at the time the bill of complaint was filed." But what the contract provided was an issue to be made in the case, and pending its decision the preliminary relief by injunction could have been granted. Appellees' con-
45

tention as to the jurisdiction is, therefore, not justified, and a discussion of the reasons for this conclusion is not necessary. They are expressed in *Clark v. Wooster*, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217, and *Beedle v. Bennett*, 122 U. S. 71, 30 L. ed. 1074, 7 Sup. Ct. Rep. 1090.

2. The patent is designated an "Improvement in Bookbinders' Dry Press and Sheet Tie." That is, a new press and process for removing type indentations from printed papers or sheets, the latter when folded being designated technically as "signatures."

The type indentations are made in printing, the type displacing somewhat the fiber of the paper, and the removal of the indentations is technically known in the art as "dry pressing," and the device by which it is done is called a "dry press." Such a press the patent is intended to cover, and also a particular process for dry pressing. As a process the validity of the patent is questioned; as a new machine its invention is controverted. An inquiry into the prior art becomes, therefore, important, and a witness, describing it and its imperfections, testified as follows:

"Previous to the invention of Mr. Jones as described in said patent, it was the custom to press printed sheets by inserting them between heavy paper boards, sometimes called 'fuller boards,' but generally now called 'glazed boards,' and putting said boards with the printed papers between them into a powerful press, by which pressure was produced on said boards by various means, sometimes by means of screw pressure, sometimes by hydraulic pressure. After the pressure was produced on the paper it was continued by allowing the press to remain with its pressure on to its fullest extent for ten or twelve hours or more, say from one night to the next morning, when the pressure was removed, the papers and boards taken from the press and separated by removing the boards from the pile of [601] *combined boards and paper, and putting the boards on one side on one pile and making another pile of the printed papers. This was necessarily comparatively a slow process, inasmuch as with one press only as much printed paper as the press would hold when put between the boards could be pressed in about ten or twelve hours, so that where much work had to be done a number of such presses were necessary. It was also costly as to labor, because the sheets had to be placed between the boards and removed therefrom afterwards, which took much time, especially where, as in the case of fine work, only one sheet was placed between two boards; and when this was done comparatively few sheets could be pressed at once, because the boards took up much more room than the paper did, they being quite thick."

It was to meet this condition that the Jones patent was conceived, and its object is stated to be, first, to "furnish a bulk compressor device, to be used to prepare the matter properly before it is inserted in the dry press proper, thus saving time or re-

peated travel by the latter, before the operation of tying; second, to furnish a dry press proper in which the compressing parts or heads—that is, the base and plunger—are constructed dividedly, or with ways through them, to afford access through them, to readily insert and manipulate the twine, and to tie the bundles of paper while held compressed, thus securing the bundle together by a powerful tie, which, when they are removed from the press, retains its force *ad libitum*; third, a press frame, having sides peculiarly set and arranged, and provided with longitudinal slots therein corresponding with the ways in the press heads, above referred to, and for the same purpose, as well as to rightly lodge and center the paper with relation to the middle of the press heads; fourth, certain ledges in the said press-frame and guides on the plunger thereof, to properly center different-sized sheets in press to secure the tie at the middle of the bundles both ways; fifth, a new process for treating printed and folded sheets of paper in dry pressing, consisting of subjecting a collection of such sheets to pressure without the use of fuller boards, and while under such pressure tying them into compact bundles, with end boards thereon; *then removing them immediately [602] from the press, and allowing them to remain tied sufficiently long to fix and complete the dry pressing."

The press is described in the patent with particularity, and illustrated by drawings. It may be said, generally, that it is a press in which bundles of signatures (sheets) are placed, at the end of which bundles rigid boards are attached to distribute the pressure which is exerted by the press. The press moves in a "trough formed" bed so mounted as to incline laterally "so that the folded paper may securely lodge and carry therein while being operated on." Rectangular blocks are rigidly secured at both ends of the bed. The lower block is the base of what is called in the specifications "a divided head," constructed with "openings or ways." Opposing this there is a "plunger or follower," to which there is also attached a "divided head" having "openings and ways" between the parts of the head. The "openings and ways" are to enable the operator to pass his hand between the parts of the press and tie the bundles. The operation of the press is as follows: A bundle of signatures (sheets) with rigid boards at its ends is placed in the press, pressure is exerted by means of a screw (other means may be used) which passes through the upper block and operates on the plunger or follower and the "divided head" attached to it, and as the bundle rests on the lower block and its "divided head," it is evident that the pressure on the sheets will be in proportion to the power applied. While under pressure in the press the bundles are tied, access to them being had through the openings in the "divided head." The bundle is then removed from the press and allowed "to remain tied sufficiently long to fix and complete the dry pressing."

The advantage of the new method is that it is not so dilatory as the old and is more economical. In the old method the sheets, coming damp from the printing press, had to be dried before dry pressing, and had also to be subjected to pressure in the press a number of hours to effect the smoothing (dry pressing) of the sheets. The quantity of the work, therefore, was limited by the number of presses. In other words, as expressed by one of the witnesses, "where much work had to be done a number of [603] such presses were necessary." And it was further testified that "it (the old method) was also costly as to labor, because the sheets had to be placed between the boards [fuller boards] and removed therefrom afterwards, which took much time, especially where, as in the case of fine work, only one sheet was placed between two boards, and when this was done comparatively few sheets could be pressed at once, because the boards took up much more room than the paper did, they being quite thick." In the new method there is no such limitations as to time, nor does it require the same expenditure of money. In the new method the initial pressure is applied in the press—the subsequent pressure necessary to remove the type indentations is continued in the tied-up bundle. The operation, therefore, is comparatively rapid. "Putting the paper into the press," a witness testified, "tying it up in a bundle, and removing it therefrom," takes a few minutes. And the longer the sheets remain in the bundles the better the effect. Some time is necessary. Another advantage is claimed. It was testified that in the Jones method the sheets when folded have the convex impression of one half of the sheet brought in contact with the convex side of the other half of the sheet or of the sheet next to it, "and these convex impressions coming in contact with each other tend, when under pressure, to efface each other."

There is, however, no revelation in the specifications of the patent of the operation of opposing "convex impressions," nor a word to indicate that Jones was conscious of the advantage of that assistance to the pressure upon the sheets. The discovery seems to have been made by one of the witnesses, and also seems to have been disclaimed by Jones in the following question and answer:

X-Q. 56. Throughout the testimony a good deal has been said about the advantages derived from your supposed invention from the fact of the type indentations being concaved or convexed, whatever that may mean. Is there anything said in the patent about that?

A. No; neither do I claim that they are produced by my process.

There is a dispute as to the character of [604] the patent. Appellees *contend that it is "a process of 'dry pressing' or removing type indentations from printed sheets" (claim 5 of the patent). Second. "A press of pecu- 184 U. S.

liar construction and adapted to the convenient carrying of this process into effect. The novel features of which press are covered by claims one to four inclusive." The appellees contend that the patent is for a machine (claims 1 to 4) and also for a process (claim 5). And it is asserted the latter claim is but an operation or function of the machine. It is further contended that the machine and process were anticipated.

In discussing these contentions, it is not necessary to minutely observe the distinctions made and disputed by counsel. Even if the patent is primarily for a novel process, there is a claim for a novel press, and, by the consideration of the latter, we think, the validity of the former will be determined.

Was, then, the press anticipated, including broadly in the term the inquiry whether the press exhibited invention, in view of the prior state of the art? Anticipation is a question of fact, and the burden of establishing it is on the appellant. The patent bears a presumption of novelty and invention, and the lower courts, passing on the evidence, found against appellant's contention. Such united judgment this court accepts unless there is a clear showing to the contrary. *Brainard v. Buck*, 184 U. S. 99, ante, p. 499, 22 Sup. Ct. Rep. 458. That showing appellant claims the record establishes, and even urges that presses of various kinds had become so familiar, before the Jones patent, that judicial knowledge can be invoked for them. Hay presses, cotton presses, tobacco, wool, and other presses are instanced, all of which, it is said, were used for applying pressure to masses of matter to compact them into bundles, and in all of which the pressure was retained by strings, ropes, or bands of some kind. But wherein those presses differed one from the other and received special characterization and utility would be a matter of proof, not of assumption, and wherein the Jones patent differs from either of them and has derived its special applicability is certainly not so clear that it is demonstrated against the judgment of the supreme court and the court of appeals of the District. Nor are we nearer that demonstration by the specific patents *put in evidence by appellant. There [605] is generic sameness we concede, but there are differences. and the Patent Office and both lower courts found novelty and invention in those differences.

The appellant introduced in evidence a patent issued to D. Kellogg, October 12, 1852, for a wool press; one to W. R. Dingham, October 20, 1863, for improvement in paper presses; one to S. Cooley, October, 16, 1866, for a wool press; to Thomas Stibbs, September 19, 1871, for pressing yarn; to W. P. Craig, for a baling press; to Thomas G. Hardesty, for tobacco press; to G. B. Archer, for baling manure and other substances; to C. Brown, for baling short-cut hay, and another for baling short-cut straw; and a patent for a signature press to R. A. Hart. There was also testimony of the existence of a press used in the book-

bindery of one John Palmer, in Philadelphia. The press was used in a later stage of bookbinding than "dry pressing," for the purpose of tying printed sheets into bundles for storing. It was an upright press with opposing platens or heads in which there were grooves to receive the cords by which the bundle was tied while under pressure.

There is a certain resemblance between all of the devices. They are all instruments for exerting pressure upon substances placed between compressing heads or followers to compact such substances into bundles and afford facilities for tying the bundles while they are under pressure. The Dingham patent, the one most relied on by appellant, may be selected for illustration.

The Dingham device is an "Improvement in Paper Presses," and the inventor claimed to have "invented a new and useful machine for combining and facilitating the operation of pressing and tying paper into reams or bundles," which he called "the combination paper press and tie engine."

There were defects in the art of pressing and tying paper very similar to the defects in the art of dry pressing "signatures," and Dingham described the former as follows:

[606] "The process of pressing and tying paper now generally employed requires a large and somewhat expensive press, which is located in some corner of the finishing room, and as the paper comes from the machine it is carried to the finishing table, there counted and folded, and when sufficient is obtained to fill the press (usually about 100 reams) it is conveyed to the press and placed therein, and, by means of a large serew and follower, pressed for about twelve hours, or during the night. It is then removed and conveyed to the tie table and there tied into reams. After this (it being, when it comes from the machine, usually double crown, or double the length of the ordinary ream of wrapping paper) it is cut into two reams or single crown. The usual mode of tying paper is by passing a strong cord or twine around the ream, with a noose or loop at the end, through which the other end is passed, and then drawn upon with the hand until the loose ream or bundle is sufficiently compressed. This operation is laborious and tedious, occupying much time, requires strong twine, and unavoidably draws the ream away or the paper out of place."

This language is quite similar to that used by Jones and his witnesses to describe the defects which existed in the bookbinder's art, and the presses of the inventors also have similarity. In both sheets of paper are pressed by being placed between "compressing heads," which "are constructed dividedly," to use the words of the Jones patent, "separate and sufficiently disconnected (to use the language of the Dingham patent) to allow the string or cord for tying the paper to pass between." Each machine, therefore, comprises a compress and tie table. In each there is the same rapidity of operation, the same economy of time and means, and in each the pressure first applied by the machine is re-

tained by cords and continued in the bundle. And it is manifest that this retained and continued pressure, which has for its purpose in the Jones patent to remove type indentations from the sheets, and in the Dingham patent to retain the sheets in the bundle, adds nothing to the operation of the press of the former and detracts nothing from the operation of the press of the latter. But notwithstanding these resemblances we may ascribe invention to the Jones patent if it be confined to the press proper. In other words, the press may be regarded as a form, adapted to the bookbinder's art, and although preceded by the Dingham patent in a general way, may be considered as an invention of that form.

*The 5th claim of the Jones patent—the [607] claim for the process—must be viewed from a different standpoint. The first four claims of the patent, as we have said, describe the elements, "In a printer's and bookbinder's dry press and sheet tie." The 5th claim is as follows:

"5. The process herein described for treating folded printed sheets of paper in dry pressing, the same consisting of subjecting a collection of such sheets to pressure without the use of fuller boards, and while under such pressure tying them into compact bundles with end boards, then removing them immediately from the press, and allowing them to remain tied sufficiently long to fix and complete dry pressing."

The dependence, therefore, is not, as counsel for appellee contends, the press upon the process. It is the other way, the process upon the press; for it is impossible to consider the 5th claim as describing anything but the operation and effect of the press. Indeed, the process is the whole value, the sole purpose of the press. What, indeed, is the process—what is the force at work? And the inquiry is entirely independent of questions as to what constitutes a patentable process discussed by this court in *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745, and in *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707. What, then, is the force at work and how is it applied? It is force (pressure) applied to sheets of paper placed between "compressing heads." In other words, a special application of pressure began in the press and continued in the bundle by means of strings and cords. This, however, is the operation and effect of the machine, and it is none the less so because the pressure is held indefinitely. Its existence in the bundle is not independent of the press. The pressure is as much an effect in the bundle as when first applied. The pressure is applied by the press and so, substantially, are the bands or cords which continue the pressure, and we cannot assent to the view that the continuation of the pressure in the bundles with the consequence of removing type indentations in the printed sheets is anything but the natural and direct effect of the machine.

Infringement was put in issue by the pleadings and passed on by the lower courts.

[608] They found as a fact that all the claims *of the patent had been infringed by appellant. The finding is not absolutely disputed. The assignment of error is "that the patented machine used by defendant, in view of the state of the art preceding Jones's invention, did not infringe any claims of the patent in suit." That is, appellant contends that the evidence exhibits a complete anticipation, or so limits and narrows the Jones invention as to make the differences between the Jones press and that which was used by appellant more than formal. We have decided that the Jones press had not been anticipated, and both of the lower courts have found that the differences between it and appellant's press were not substantial. The evidence sustains the finding. The witnesses on behalf of appellees testified to the differences between the presses. They pointed out the essential resemblances of the presses and the merely formal character of the differences. There was no opposing testimony.

The accounting in the lower court, however, was had upon the basis of the validity of the process (claim 5), and therefore the judgment of the Court of Appeals must be reversed and the cause remanded, with directions to that court to reverse the judgment and decree of the Supreme Court and remand the cause to the latter court for further proceedings, in accordance with this opinion.

So ordered.

JAMES D. PATTON, Trading as J. D. Patton & Co., *Plff in Err.*,
v.

MAGGIE A. BRADY, Executrix of J. D. Brady, Collector of Internal Revenue for the Second District of Virginia.

(See S. C. Reporter's ed. 608-624.)

Original jurisdiction of circuit court—case arising under Constitution—survival of actions—war revenue act—increase in excise.

1. A case arises under the Constitution of the United States, of which the circuit court has original jurisdiction without diversity of citizenship, where the plaintiff's right of recovery depends upon the unconstitutionality of an act of Congress.
2. A cause of action to recover from a collector of internal revenue a sum alleged to have been paid him under protest to protect property from unlawful seizure for illegal

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7, and Bailey v. Mosher, 11 C. C. A. 308.

On abatement of action by death of defendant—see note to Weeks v. Russell (Tenn.) 3 L. R. A. 212; Green v. Watkins, 5 L. ed. U. S. 256.

On recovery back of duties paid under protest—see note to Greely v. Thompson, 13 L. ed. U. S. 398.

184 U. S.

taxes survives the death of the defendant, both under the common law and Va. Code 1887, § 2655, providing that "trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of or damage to any estate of or by his decedent."

3. The tax levied on tobacco by the war revenue act of June 13, 1898, "in lieu of the tax now imposed by law," is an excise, and not a direct tax upon property, which must be apportioned according to population.
4. It was within the power of Congress to impose by the war revenue act of June 13, 1898, an additional excise upon manufactured tobacco on which the excise theretofore imposed by law had been paid, even though such tobacco had passed from the hands of the manufacturer, where it had not reached the consumer, and was, at the time of the passage of the act, held and intended for sale.

[No. 16.]

Submitted February 1, 1900. Ordered for Oral Argument May 28, 1900. Argued December 6, 1901. Decided. March 17, 1902.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia to review a judgment dismissing a suit to recover from a collector of internal revenue excises paid under protest. *Affirmed.*

Statement by Mr. Justice Brewer:

*On July 14, 1899, plaintiff in error, as [609] plaintiff below, commenced this action in the circuit court for the eastern district of Virginia against J. D. Brady, collector of internal revenue for the second district of Virginia. In his declaration he alleged that in May, 1898, he had purchased in the open market and in the regular course of business 102,076 pounds of manufactured tobacco; that all the requisites of the internal revenue laws of the United States then existing had been fully complied with, stamps placed upon the boxes containing the tobacco, and regularly and duly canceled subsequent to April 14, 1898, and the tobacco removed from the factory; and that when he made his purchase the entire tax due the United States under and by virtue of such laws had been paid. The declaration then proceeded:

"After the act of Congress approved June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet War and Other Expenditures, and for Other Purposes,' had been enacted, the defendant, James D. Brady, who is the collector of internal revenue for the second district of the state of Virginia, in which he and plaintiff reside, and in the month of June, 1898, demanded of plaintiff that he pay the sum of \$3,062.28 as an additional tax to be paid upon said tobacco, which he claimed was imposed upon the same by the 2d paragraph of the 3d section of said act. Plaintiff refused to pay the same; whereupon the defendant threatened plaintiff that unless he did *pay it he would [610]

treat plaintiff as a delinquent, and would seize his property under the provisions of an act of Congress applicable to such case, and would sell the same. Under the coercion of this demand and threat plaintiff paid the sum of \$3,062.28 to the defendant, but he did so under protest, and with notice to the defendant that he would sue him to recover it back.

"Plaintiff avers that said § 3 of said act of June 13, 1898, imposing said additional tax upon his tobacco, is repugnant to the Constitution of the United States, and said acts of Congress authorizing the defendant to seize plaintiff's property and sell it if he did not pay the same are also repugnant to said Constitution, and that his suit therefore arises under the Constitution of the United States.

"On the 17th day of June, 1899, the plaintiff set out all of the foregoing facts in an application to the Commissioner of Internal Revenue of the United States, according to the laws in that regard and the regulations of the Secretary of the United States, established in pursuance thereof, and he appealed to said Commissioner of Internal Revenue to have said money so unlawfully extorted from him returned to him; but said Commissioner of Internal Revenue on the — day of July, 1899, rejected said appeal and refused to direct said money to be returned to plaintiff. The said Commissioner did not reject said appeal because of any informality in the manner in which it was made, but because he was of opinion that said act of Congress imposing said tax was consistent with the Constitution of the United States, and that said tax was lawfully collected; by all of which acts and doings the plaintiff is damaged \$6,000, and therefore he sues."

Summons having been served, the case came on for hearing on the motion of the United States attorney for the district to dismiss the action on the ground that the act of Congress set forth in the declaration was not repugnant to the Constitution of the United States, which motion was sustained, and on September 22, 1899, the action was dismissed. To review such ruling plaintiff sued out this writ of error.

Mr. John W. Daniel submitted the cause for plaintiff in error. **Mr. Fred Harper** was with him on the brief:

The tax on personal property, or on the income thereof, is a direct tax.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; *Nicol v. Ames*, 173 U. S. 516, 43 L. ed. 791, 19 Sup. Ct. Rep. 522.

The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct tax.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 580, 39 L. ed. 819, 15 Sup. Ct. Rep. 673.

A tax on a sale of personal property made at any place is really and practically upon the property.

Nicol v. Ames, 173 U. S. 521, 43 L. ed. 794, 19 Sup. Ct. Rep. 522.

"Uniform" as applied to taxation means "not variant in degree or rate."

Century Dict.

The tax must be uniform on the particular article; and it is uniform within the meaning of the constitutional provision if it is made to bear the same percentage all over the United States.

Justice Miller's Lectures on the Constitution, pp. 240, 241.

Arbitrary selection can never be justified by calling it classification.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255.

To impose upon the owner of goods a criminal punishment or penalty for not paying an additional tax would subject him to the operation of an *ex post facto* law.

Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; *United States v. Burr*, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002; *United States v. Iselin*, 87 Fed. 194.

The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.

Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; *United States v. Burr*, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002; *United States v. Iselin*, 87 Fed. 194.

The law regards facts, not names.

United States v. Iselin, 87 Fed. 194.

Mr. William L. Royall also submitted the cause for plaintiff in error:

Circuit courts have jurisdiction of suits without regard to the citizenship of the parties, if the suit requires a construction of the Constitution of the United States in order to its correct decision.

Cohen v. Virginia, 6 Wheat. 378, 5 L. ed. 284; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 201, 24 L. ed. 656; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 140, 26 L. ed. 98; *Smith v. Greenhow*, 109 U. S. 669, 27 L. ed. 1080, 3 Sup. Ct. Rep. 421; *White v. Greenhow*, 114 U. S. 307, 29 L. ed. 199, 5 Sup. Ct. Rep. 923, 962; *Royall v. Virginia*, 116 U. S. 572, 29 L. ed. 735, 6 Sup. Ct. Rep. 510.

Mr. William L. Royall argued the cause and filed a brief for plaintiff in error on oral argument:

The question whether the action survives is to be determined by Virginia law.

Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466.

Every wrong that relates to property survives against the personal representative.

Lee v. Hill, 87 Va. 497, 12 S. E. 1052; *Ferrill v. Brewis*, 25 Gratt. 770.

The word "goods" includes money, so that Brady took and carried away "goods."

Bouvier, Law Dict.; Anderson, Law Dict.; Abbott, Law Dict.; *The Elizabeth & Jane*, 2 Mason, 407, Fed. Cas. No. 4,355.

Patton could certainly have brought *indebitatus assumpsit* against Brady for money had and received.

Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; *Bend v. Hoyt*, 13 Pet. 263, 10 L. ed. 154; *Philadelphia v. The Collector*, 5

Wall. 731, *sub nom. Philadelphia v. Diehl*, 18 L. ed. 617; *State ex rel. McCarty v. Nelson*, 4 L. R. A. 300, note, 41 Minn. 25, 42 N. W. 548.

Congress may excise an article as it pleases so that the excise does not amount to spoliation or confiscation. But having excised it, it has excised it, and the power is exhausted. It cannot excise a second time.

The view generally entertained of an excise at the time our Constitution was adopted was that it was a tax that could be made most onerous and oppressive, and was not to be tolerated unless imposed with reason and according to justice.

1 Madison Papers, p. 306.

Whenever an act of Congress amounts to "spoliation" it will be declared void upon general principles, and as against common right.

Fletcher v. Peck, 6 Cranch, 135, 3 L. ed. 177; *Citizens' Sav. & L. Asso. v. Topcka*, 20 Wall. 662, 22 L. ed. 461; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Hurtado v. California*, 110 U. S. 536, 28 L. ed. 239, 4 Sup. Ct. Rep. 111, 292; *Legal Tender Cases*, 12 Wall. 581, 20 L. ed. 322; *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

The tax is imposed upon those only who bought tax-paid tobacco between April 14th, 1898, and June 13th, 1898. This is an unreasonable, unjust, and outrageous discrimination.

Oliver v. Washington Mills, 11 Allen, 268; *Portland Bank v. Apthorp*, 12 Mass. 252.

Mr. Fred. Harper also argued the cause for plaintiff in error.

Assistant Attorney General Boyd submitted the cause for defendant in error:

The uniformity required under the provision of the Constitution that duties, imposts, and excises shall be uniform throughout the United States, has been held to be geographical or territorial only, and a tax is uniform when it operates with the same force and effect in every place where the subject of it is found.

Loughborough v. Blake, 5 Wheat. 318, 5 L. ed. 98; *Head Money Cases*, 112 U. S. 580, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

Under the power to tax property may be classified for taxation at different rates, and it is enough that there is no discrimination in favor of one against another of the same class.

Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

In pursuance of the principle of classification Congress has the right under the Constitution to provide subjects of taxation by separating an article into classes and basing the distinction among such classes upon any description which can be generally applied and which will identify a particular class wherever it is found.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 586, 39 L. ed. 821, 15 Sup. Ct. Rep. 673; *Head Money Cases*, 112 U. S. 580, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. 184 U. S.

Rep. 247; Justice Miller's Lectures on the Constitution (N. Y. 1891) pp. 240, 241; *Cobb v. Durham County*, 122 N. C. 307, 30 S. E. 338.

Assistant Attorney General Beck argued the cause, and, with Solicitor General Richards, filed a brief for defendant in error:

No statute of a state which authorized suits on state penal statutes to be prosecuted after the death of the offender can have any effect on a suit for the recovery of penalties under a statute of the United States.

Schreiber v. Sharpless, 110 U. S. 76, *sub nom. Ex parte Schreiber*, 28 L. ed. 65, 3 Sup. Ct. Rep. 423. See also *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, *sub nom. Gerling v. Baltimore & O. R. Co.* 38 L. ed. 311, 14 Sup. Ct. Rep. 533.

An action to recover damages for official extortion by a tax collector is not an action "for the taking or carrying away of goods, or for waste or destruction of, or damage to any estate of, or by, his decedent."

Anderson v. Hygeia Hotel Co. 92 Va. 687, 24 S. E. 269; *Mumpower v. Bristol*, 94 Va. 739, 27 S. E. 581; *Birmingham v. Chesapeake & O. R. Co.* 98 Va. 548, 37 S. E. 17.

Assistant Attorney General Beck also filed a separate brief for defendant in error on reargument:

The tax in question is not one imposed upon the plaintiff's personal property, invested or otherwise, or the income thereof, but is a duty imposed upon certain merchandise, the privilege to sell which is subjected to an additional tax. That this is an excise seems clear.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; *Knowlton v. Moore*, 178 U. S. 82, 44 L. ed. 986, 20 Sup. Ct. Rep. 747.

The tax now under consideration is uniform, for wherever throughout the United States tobacco is found in the possession of a person who intends to sell it, and having tax-paid stamps canceled of a certain date, the tax in question will fall upon it. No preference is given to any locality or to any person.

Knowlton v. Moore, 178 U. S. 82, 44 L. ed. 986, 20 Sup. Ct. Rep. 747; *Head Money Cases*, 112 U. S. 585, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

The Constitution in no respect forbids double taxation, and therefore there is no limit to the number of times property can be taxed. This rests wholly within the discretion of the taxing power.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95.

*Mr. Justice Brewer delivered the opinion of the court:

The first contention of the defendant is that the circuit court did not have jurisdiction. The parties, it is true, were both citizens of Virginia, but the question presented in the declaration was the constitutionality of an act of Congress. The plaintiff's right

of recovery was rested upon the unconstitutionality of the act, and that was the vital question. The circuit courts of the United States "have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States." 25 Stat. at L. 433, chap. 866.

That a case arises under the Constitution of the United States when the right of either party depends on the validity of an act of Congress is clear. It was said by Chief Justice Marshall that "a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either" (*Cohen v. Virginia*, 6 Wheat, 264, 379, 5 L. ed. 257, 285); and again, when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Osborn v. Bank of United States*, 9 Wheat. 738, 822, 6 L. ed. 204, 224. See also *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 201, 24 L. ed. 656, 658; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *White v. Greenhow*, 114 U. S. 307, 29 L. ed. 199, 5 Sup. Ct. Rep. 923, 962; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 139, 26 L. ed. 96, 98. In the latter case the following statement of the controversy was given in the opinion: "From this analysis of the pleadings, and of the petition for removal, it will be observed that the contention of the state rests in part upon the ground that the construction and maintenance of the bridge in question is in violation of the condition on which Mississippi was admitted into the Union, and inconsistent with the engagement, on the *part of the United States, as expressed in the act of March 1, 1817. On the other hand, the railroad company, in support of its right to construct and maintain the present bridge across Pearl river, invokes the protection of the act of Congress passed March 2, 1868." And upon these facts it was held that the case was rightfully removed to the Federal court. Within these decisions obviously the circuit court had jurisdiction.

A second contention of the defendant is this: After the case had been brought to this court the defendant, J. D. Brady, died. Whereupon the plaintiff took steps to revive the action, and on November 4, 1901, Maggie A. Brady, the executrix of the deceased, was substituted as party defendant. Now it is insisted that the action was one based upon a tort, and, as such, abated by reason of the death of defendant.

Congress has not, speaking generally, attempted to prescribe the causes which survive the death of either party. Section 955, Rev. Stat., provides that—

"When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies

before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."

This does not define the causes which survive. In the absence of some special legislation the question in each case must be settled by the common law or the law of the state in which the cause of action arose. *United States v. Daniel*, 6 How. 11, 12 L. ed. 323; *Henshaw v. Miller*, 17 How. 212, 15 L. ed. 222; *Schreiber v. Sharpless*, 110 U. S. 76, sub nom. *Ex parte Schreiber*, 28 L. ed. 65, 3 Sup. Ct. Rep. 423; *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, sub nom. *Gerling v. Baltimore & O. R. Co.* 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 229, 43 L. ed. 677, 678, 19 Sup. Ct. Rep. 387. It matters not whether we consider the common law or the statute law of Virginia as controlling. By either the cause of action stated in the complaint survived the death of defendant.

Section 2655 of the Code of Virginia (Code of 1887) reads as follows:

"An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or *car- [613] rying away any goods, or for the waste or destruction of or damage to any estate of or by his decedent."

The term "goods" is broad enough to include money, and as used in this statute must be held to be so inclusive, for it would be strange that a cause of action for taking and carrying away a thousand pieces of silver should survive the death of the defendant, while a like action for taking and carrying away a thousand dollars in money should not. In *The Elizabeth & Jane*, 2 Mason, 407, 408, Fed. Cas. No. 4,355, Mr. Justice Story said: "It cannot be doubted that money, and, of course, foreign coin, falls within the description of 'goods' at common law." But more than that, the estate of plaintiff was reduced to the amount of \$3,000 and over by the action of decedent, and such reduction was a direct damage and comes within the rule laid down by the supreme court of appeals in *Mumpoiver v. Bristol*, 94 Va. 737, 739, 27 S. E. 581, 582, in which the court held that: "The damages allowed to be recovered by or against a personal representative by § 2655 of the Code are direct damages to property, and not those which are merely consequent upon a wrongful act to the person only," and in which the presiding judge of the court, delivering the opinion and showing that the act sued for was not within the scope of the statute, said:

"The wrongful act which the defendant is alleged to have committed, and for the injury resulting from which the plaintiff sues, consisted in maliciously and without probable cause suing out an injunction against the plaintiff, whereby the operation of his mill was suspended. It is quite obvious that this injunction did not operate to take or carry away the goods of the plaintiff. nor

cause the waste or destruction of, or inflict any damage upon, the estate of the plaintiff. It is true that the language of the statute is comprehensive, and embraces damage of any kind or degree to the estate, real or personal, of the person aggrieved; but the damage must be direct, and not the consequential injury or loss to the estate which flows from a wrongful act directly affecting the person only. No part of the defendant's property was taken or carried away; no part of it was wasted or destroyed. The plaintiff's use of his property, and not the property itself, was affected by the act of which he complains."

[614] *See also *Ferrill v. Brewis*, 25 Gratt. 765, 770, and *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052.

If we turn to the common law, there the rule was that if a party increased his own estate by wrongfully taking another's property an action against him would survive his death, and might be revived against his personal representative. In the case of *United States v. Daniel*, 6 How. 11, 12 L. ed. 323, which was an action against one who had in his lifetime been marshal of a district, to recover damages which the plaintiffs had sustained by reason of false returns made on certain executions by one of defendant's deputies, it was held that the action did not survive, because the decedent had received no benefit and had not increased his estate by means of the wrongful act. The court, referring to the common law, said:

"If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offense, property is acquired, which benefits the testator, there an action for the value of the property shall survive against the executor. . . . If the deputy marshal, in the misfeasance complained of, received money or property, the marshal being responsible for such acts, the cause of action survived against his executors. But this is not the case made in the present action."

Now the gravamen of the plaintiff's complaint is that he was compelled to pay to the defendant the sum of \$3,062.28 to protect his property from unlawful seizure for illegal taxes. In such cases, having paid under protest, he can recover in an action of assumpsit the amount thus wrongfully taken from him.

"Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. Where the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received." *Philadelphia v. The Collector*, 5 Wall. 720, 731, *sub nom. Philadelphia v. Diehl*, 18 L. ed. 614, 616. See also *Dooley* 184 U. S.

v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762.

*It is true there are one or two sentences[615] in the declaration appropriate to an action sounding in tort, such as the one last quoted, in which the pleader alleges that "by all of which acts and doings the plaintiff is damaged \$6,000, and therefore he sues." But nevertheless the substance of the charge is that the defendant wrongfully took from plaintiff the sum of \$3,062.28. By virtue thereof there was an implied promise on the part of the defendant to repay the same, and that implied promise lies at the foundation of the action.

In *Schreiber v. Sharpless*, 110 U. S. 76, 80, *sub nom. Ex parte Schreiber*, 28 L. ed. 65, 66, 3 Sup. Ct. Rep. 423, 424, it was said:

"The right to proceed against the representatives of a deceased person depends, not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. . . . Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it."

And in *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, the court observed (p. 500, S. E. p. 1052):

"The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a *tort* unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule *actio personalis*, etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in *tort*, and there it survives."

And also quoted the following from *Booth v. Northrop*, 27 Conn. 325:

"In determining whether a cause of action survives to the personal representative, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced."

For these reasons, and under these authorities, we are of opinion that this cause of action survived the death of the defendant, and was rightfully revived in the name of his executrix.

We pass, therefore, to consider the merits of the case, and here the first question is, What is the nature of the tax? Obviously it was intended by Congress as an excise.

In the chapter in the Revised Statutes on internal revenue, § 3368, *it was provided[616] that "upon tobacco and snuff manufactured and sold, or removed for consumption or use, there shall be levied and collected the following taxes:" Then followed statements of the amounts of the prescribed taxes. Section 30 of the tariff act of 1890 (26 Stat. at L. 619, chap. 1244) reads:

"That on and after the first day of January, eighteen hundred and ninety-one, the internal taxes on smoking and manu-

factured tobacco shall be six cents per pound, and on snuff six cents per pound."

On June 13, 1898, Congress passed an act to provide ways and means to meet the expenditures of the Spanish-American War. 30 Stat. at L. 448, chap. 448. Section 3, so far as is applicable, is as follows:

"Sec. 3. That there shall, in lieu of the tax now imposed by law, be levied and collected a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured, and sold, or removed for consumption or sale. . . .

"And there shall also be assessed and collected, with the exceptions hereinafter in this section provided for, upon all the articles enumerated in this section which were manufactured, imported, and removed from factory or customhouse before the passage of this act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, and which articles were at the time of the passage of this act held and intended for sale by any person, a tax equal to one half the difference between the tax already paid on such articles at the time of removal from the factory or customhouse and the tax levied in this act upon such articles.

"Every person having on the day succeeding the date of the passage of this act any of the above-described articles on hand for sale in excess of one thousand pounds of manufactured tobacco and twenty thousand cigars or cigarettes, and which have been removed from the factory where produced or the customhouse through which imported bearing the rate of tax payable thereon at the time of such removal, shall make a full and true return, under oath, in duplicate, of the quantity thereof, in pounds as to the tobacco and snuff and in thousands as to [617]the *cigars and cigarettes so held on that day, in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. . . ."

Ever since the early part of the Civil War there has been a body of legislation, gathered in the statutes under the title *Internal Revenue*, by which, upon goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption. Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the nation, but are among its comforts and luxuries. The first of these acts, passed on July 1, 1862 (12 Stat. at L. 432, chap. 119), in terms provided for "the collection of internal duties, stamp duties, licenses, or taxes imposed by this act," and included manufactured tobacco of all descriptions. Subsequent statutes changed the amount of the charge, the act of 1890 reducing it to 6 cents a pound. Then came the act in question, which, for the purpose of providing means for the expenditures of the Spanish

718

War, increased the charge to 12 cents a pound, specifying distinctly that it was to be "in lieu of the tax now imposed by law." Nothing can be clearer than that in these various statutes, the last included among the number, Congress was intending to keep alive a body of excise charges on tobacco, spirits, etc. It may be that all the taxes enumerated in these various statutes were not excises, but the great body of them, including the tax on tobacco, were plainly excises within any accepted definition of the term.

Turning to Blackstone, vol. 1, p. 318, we find an excise defined: "An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." This definition is accepted by Story in his *Constitution of the United States*, § 953. Cooley in his work on *Taxation*, page 3, defines it as "an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities." Bouvier and Black, respectively, *in [618] their dictionaries give the same definition. If we turn to the general dictionaries, Webster's *International* calls it "an inland duty or impost operating as an indirect tax on the consumer, levied upon certain specified articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue certain trades and deal in certain commodities." The definition in the *Century Dictionary* is substantially the same, though in addition this is quoted from Andrews on *Revenue Law*, § 133: "Excises is a word generally used in contradistinction to imposts in its restricted sense, and is applied to internal or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it, and sometimes upon the manufacture of it."

Some of these definitions were quoted with approval by this court in the *Income Tax Cases*, and while the phraseology is not the same in all, yet so far as the particular tax before us is concerned, each of them would include it. The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article.

It is practically conceded by one counsel for plaintiff in error that this is an excise tax. After discussing the question at some length he says:

"To determine, then, what excise means, we have for our guidance, first, an enumeration of the articles that it fell on in Great Britain in 1787. We have, second, the nature of the tax as judicially determined; and we have, third, the definition of it, or the common understanding of men about it, as given by the *Encyclopedia Britannica* and the *Century Dictionary*. Taking these three sources of information and combining them, it would seem that the leading idea of excise is that it is a tax, laid without

184 U. S.

rule or principle, upon consumable articles, upon the process of their manufacture and upon licenses to sell them. . . . Since tobacco was supposed to be one of the subjects to which excise was applied in England when the Constitution was framed, I shall assume that the court will hold that the tax in this case is an excise."

[619] It is true other counsel in their brief have advanced a very *elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax Cases*, but, as we have seen, it is not a tax upon property as such, but upon certain kinds of property, having reference to their origin and their intended use. It may be, as Dr. Johnson said, "a hateful tax levied upon commodities;" an opinion evidently shared by Blackstone, who says, after mentioning a number of articles that had been added to the list of those excised, "a list which no friend to his country would wish to see further increased." But these are simply considerations of policy, and to be determined by the legislative branch, and not of power, to be determined by the judiciary. We conclude, therefore, that the tax which is levied by this tax is an excise, properly so called, and we proceed to consider the further propositions presented by counsel.

It is insisted: "That Congress may excise an article as it pleases, so that the excise does not amount to spoliation or confiscation. But that having excised it, it has excised it, and the power is exhausted. It cannot excise a second time." But why should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the government has ceased. They are, as said in *Cooley on Taxation*, p. 1: "The enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government and for all public needs," and so long as there exists public needs just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the state is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order "to provide for the common defense" and "promote the general welfare." Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be that having made provi-

[620] sion for times *of peace and quiet, the government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies?

That which was possible in fact existed. A war had been declared. National expenditures would naturally increase and did increase by reason thereof. Provision by way
184 U. S.

of loan or taxation for such increased expenditures was necessary. There is in this legislation, if ever such a question could arise, no matter of color or pretense. There was an existing demand, and to meet that demand this statute was enacted. The question, therefore, is whether congressional provision must reach through an entire year and at the beginning finally determine the extent of the burden of taxes which can be cast upon the citizen during that year, with the result that if exigencies arise during the year calling for extraordinary and unexpected expenses the burden thereof must be provided for by way of loan, temporary or permanent; or whether there inheres in Congress the power to increase taxation during the year if exigencies demand increased expenditures. On this question we can have no doubt. Taxation may run *pari passu* with expenditure. The constituted authorities may rightfully make one equal the other. The fact that action has been taken with regard to conditions of peace does not prevent subsequent action with reference to unexpected demands of war. Courts may not in this respect revise the action of Congress. That body determines the question of war, and it may therefore rightfully prescribe the means necessary for carrying on that war. Loan or tax is possible. It may adopt either, or divide between the two. If it determines in whole or in part on tax, that means an increase in the existing rate or perhaps in the subjects of taxation, and the judgment of Congress in respect thereto is not subject to judicial challenge. Wisely was it said by Mr. Justice Cooley in his work on Taxation, page 34:

"The legislative makes, the executive executes, and the judiciary construes, the laws." Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat. 1, 46, 6 L. ed. 253, 263. The legislature must therefore determine all questions of state necessity, discretion, or policy involved in ordering a tax and in apportioning it; must *make all the [621] necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made. "The judicial tribunals of the state have no concern with the policy of legislation. That is a matter resting altogether in the discretion of another co-ordinate branch of the government. The judicial power cannot legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the state." Chief Justice Redfield, in *Re Powers*, 25 Vt. 261, 265. . . . But so long as the legislation is not colorable merely, but is confined to the enactment of what is in its nature strictly a tax law, and so long as none of the constitutional rights of the citizen are violated in the directions prescribed for enforcing the tax, the legislation is of supreme authority. Taxes may be and often are oppressive to the persons and corporations taxed; they may appear to the judicial mind unjust and

even unnecessary, but this can constitute no reason for judicial interference."

In a general way these observations on the power of Congress to meet exigencies by increased taxation are not questioned by counsel, but it is specifically insisted that the power of imposing an excise once exercised is gone, even though the property may thereafter remain subject to ordinary taxation upon property as such. We quote the language of counsel:

"Possibly the property is not therefore to go free of taxation thereafter because it has been excised. If a man who has paid an excise upon a thousand boxes of tobacco chooses to stack it up in a warehouse and keep it there ten years, the tobacco is not, possibly, to go tax free because it has borne an excise. It receives the protection of the laws, and it should bear its part of the burdens of the laws. But it is to be taxed thereafter according to the principles of taxation, and not according to the arbitrariness of excise. Taxation upon it thereafter is to be direct taxation imposed according to population, which makes it bear a burden that is proportional to that borne by other property."

[622] Doubtless a general tax may be cast upon property once charged with an excise; and the power to tax it as property, *subject to constitutional limitations as to the mode of taxing property, might not be defeated by the fact that it has already paid an excise. But what is the difference in the nature of an excise and an ordinary property tax which forbids a repetition or increase in the one case and permits it in the other? They are each methods by which the individual is made to contribute out of his property to the support of the government, and if an ordinary property tax may be repeated or increased when the exigencies of the government may demand, no reason is perceived why an excise should not also be repeated or increased under like exigencies. Counsel speaks of the power to impose an excise as an arbitrary, unrestrained power, but the Constitution, art. 1, § 8, provides that "all duties, imposts, and excises shall be uniform throughout the United States." The exercise of the power is, therefore, limited by the rule of uniformity. The framers of the Constitution, the people who adopted it, thought that limitation sufficient, and courts may not add thereto. That uniformity has been adjudged to be a geographical uniformity. In the *Head Money Cases*, 112 U. S. 580, 594, *sub nom. Edye v. Robertson*, 28 L. ed. 798, 802, 5 Sup. Ct. Rep. 247, 252, it was said:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform. and operates precisely alike in every port of the United States where such passengers

can be landed. . . . Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. ed. 663, 673. Here there is substantial uniformity within the meaning and purpose of the Constitution."

So also in the recent case of *Knowlton v. Moore*, 178 U. S. 41, 106, 44 L. ed. 969, 995, 20 Sup. Ct. Rep. 747, 772.

"By the result, then, of an analysis of the history of the adoption of the Constitution, it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic, but simply a geographical, uniformity. And it also results *that the[623] assertion to which we at the outset referred, that the decision in the *Head Money Cases*, holding that the word 'uniform' must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."

Geographical uniformity being, therefore, that only which is prescribed by the Constitution, the courts may not add new conditions, and the statute in question fully complies with that requirement. It is not the province of the judiciary to inquire whether the excise is reasonable in amount or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final.

Neither can it be said that the change in the ownership of the tobacco in the case at bar had placed it beyond the reach of an excise. It is true that it had passed from the manufacturer, but it had not reached the consumer. By § 3 of the statute the charge is placed upon articles which "were at the time of the passage of this act held and intended for sale," and this tobacco was purchased and held for sale by the plaintiff. Within the scope of the various definitions we have quoted there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer.

Our conclusion, then, is that it is within the power of Congress to increase an excise, as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; that it is no part of the function of a court to inquire into the reasonableness of the excise either as respects the amount or the property upon which it is imposed.

The act in controversy, so far as the charge upon this plaintiff is concerned, is

constitutional; and the judgment of the Circuit Court is affirmed.

[624] *Mr. Justice Harlan and Mr. Justice Gray took no part in the decision of this case.

RELOJ CATTLE COMPANY, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 624-639.)

Mexican land grants — lawful area — over-plus — imperfect claim.

1. A claimant under a Mexican land grant, for whose predecessor in interest the Mexican authorities, on formal denouncement of the excess therein over the area which the grantee could take under the Mexican law, have laid off in Mexico this lawful area, cannot have such lawful area confirmed by the court of private land claims out of territory ceded by Mexico to the United States, which was included within the original survey of the grant.
2. A preferential right of purchase of over-plus land within a Mexican land grant, to which the owner of the lawful area was entitled under the Mexican law at the date of the treaty with Mexico, is an imperfect claim, and is therefore barred by the act of March 3, 1891, § 12, unless filed within two years from that date.

[No. 30.]

*Argued and Submitted October 21, 1901.
Decided March 17, 1902.*

A PPEAL from the Court of Private Land Claims to review a decree dismissing a petition for confirmation of a Mexican land grant. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

The Reloj Cattle Company, claiming to be the owner in fee of a tract of land in the county of Cochise, Arizona, which it described as the San Pedro grant, filed its petition for confirmation in the court of private land claims, May 29, 1897. The petition alleged that the grant contained 37,000 acres in the United States, and, by a sketch map attached, 19,000 acres in the Republic of Mexico, or a total of 56,000 acres, within its exterior boundaries. It gave a description of the grant by courses and distances from certain natural objects, and relied on a survey made by one Howe. The petition further alleged that plaintiff was the owner of the tract by virtue of certain instruments in writing, by which it had acquired from Rafael Elias, the original grantee, title to all the property he had therein; that the grant title bore date May 2, 1833, and was duly made, executed, and delivered by Don José Maria Mendoza, treasurer general of the state of Sonora, in the name of that state, under and by virtue of article 11 of [625] the general *sovereign decree No. 70, passed August 4, 1824, by the sovereign constituent 184 U. S.

congress of the United States of Mexico, which article conceded to all of the states of the Republic the rents or revenues which by said law were not reserved to the general government, one of which revenues was the vacant lands within the states of the Republic, thereby confirming to the states the lands so described.

It was further averred that by law No. 30 of May 20, 1825, and other decrees subsequent thereto, the constituent congress of the state of Sonora and Sinaloa prescribed regulations for the sale of such lands; that the initiatory proceeding to obtain the grant title to the lands in question was by petition dated 1820 or 1821, addressed to the governor intendente, the officer of the Spanish government in charge of and having exclusive jurisdiction in the matter of the sales of public lands in the precinct of Fronteras, in which precinct the lands petitioned for were situated, which petition was made and signed by José Jesus Perez, and proceedings thereon taken as required by the applicable royal ordinances of December 4, 1786; that thereafter, on July 5, 1822, at Arispe, Sonora, the tract petitioned for was sold by the proper officers to Perez for the sum of \$190; that on July 6 the intendente ordered Perez to pay into the treasury that sum, together with costs and charges; that on July 7 the sale was approved by the provincial imperial treasury at Arispe, and was referred to the superior board of the treasury for its approval or determination, and that thereafter the \$190, together with costs and charges, was paid into the national treasury of the Republic of Mexico; but that the superior board of the treasury was abolished before the sale was approved, and no further action was taken until October 25, 1832, when proceedings were instituted to transfer the rights and title of Perez to Rafael Elias, and to have the formal title to the lands issue to Elias; that in accordance therewith, on May 8, 1833, José Maria Mendoza, the treasurer general of the state of Sonora, issued to Elias the final testimonio or evidence of title to the grant, which was thereupon duly recorded in the proper records of Sonora.

The petition alleged that the claim was presented by certain *grantors of petitioner [626] to the surveyor general of Arizona, and a report made by a duly authorized agent of the United States to the effect that the expediente was among the archives in the state of Sonora, and that all the proceedings were regular, and the certificates showing payment and the record of the transfer between Perez and Elias were properly recorded, and in the proper place, among the archives of Sonora; that there was on file in the office of the surveyor general of Arizona a report of one Wharton, apparently acting under special instructions of the Commissioner of the General Land Office, in which he reported against the land grant, and that the land described therein was situated in the state of Sonora, Mexico, but the petition charged that the report was not made with full knowledge of the facts; and also that

there was a report on file by one Borton, apparently acting under instructions of the surveyor general of Arizona, of an indefinite character. And it was alleged that beyond what was so stated the San Pedro grant had not been acted on by Congress, or any other competent authority of the United States, constituted by law for the adjustment of land titles within the territory of Arizona.

The petition averred that all the proceedings in the matter of the grant were regular, complete, and legal, and vested a perfect and valid title in fee thereto in the grantee; that the grantee went into actual possession and erected proper monuments, and that the grantee and his descendants and legal representatives and assigns have continued until the present time in the actual possession, use, and occupation of the same, and were seised and possessed in fee thereof; that petitioner was entitled to all of the lands embraced within the original survey of the grant lying in the territory of Arizona, and that they were the lands delineated on the map filed with the petition; and that there was no person in possession of the grant otherwise than by permission of petitioner, except one Roberts, who was made a defendant. On May 13, 1899, plaintiff filed an amended petition in which the description followed an amended map and survey made by one Contzen, and attached to the amended petition, which survey was the one relied on at the trial, and made the contents of the grant within the United States 38,622.06 acres.

[627] *The answer of the United States denied the correctness of the surveys and maps of Howe and of Contzen, and alleged that the tract, whether located according to quantity, or courses and distances, or natural objects, was situated entirely south of the boundary line between the Republics of the United States and Mexico, and without the jurisdiction of the court.

The answer further denied that the claim set forth was at the date of the treaty a complete and perfect title, and pleaded the statute, whereby all imperfect claims not filed within two years from March 3, 1891, became forever barred.

The answer also set up that under and pursuant to proceedings of denouncement, commenced in July, 1880, by the predecessors of the Reloj Cattle Company, the government of Mexico measured off and delineated to said persons the legal area or *cabida legal* of 4 sitios mentioned in claimant's title papers; and in the same proceedings it was adjudged that the ranch of San Pedro had no known boundary, and thus no surplus or *demasias*; that the 4 sitios were measured off and delineated to said persons by the Mexican government and located entirely within the Republic of Mexico; and that the claim sued for was thus entirely satisfied and discharged by the location of the said 4 sitios within the Republic of Mexico.

The case came on for hearing in June, 1899, at which time there was offered in evidence for plaintiff a copy of the original ex-

pediente of the San Pedro grant, from which it appeared that in the year 1821 one José Jesus Perez presented the following petition to the governor intendente:

"I, Don José de Jesus Perez, a resident of this capital, before your excellency, in conformity with law, and in accordance with the royal ordinances concerning land, laws, sanctions, and rescripts that treat of the royal and abbatial lands with which His Majesty (God preserve him) protects his vassals, as perquisites of his royal patrimony, appear and state: That, whereas I enjoy some property, acquired in the military service and by my own industry, without owning a place upon which to locate and bring them together (*centruarlos*), I apply to the superior authority of your excellency (with prior permission of my father) in order that, pursuant to the provisions of the national laws and the terms [628] of the royal cedula of February 14, 1805, the depopulated place down the San Pedro river, situate in this province, toward the north, on the hostile frontier, close to the abandoned place of Las Nutrias, be considered as registered, in virtue of which I protest that I will enter into composition with His Majesty (God preserve him) and will pay the quota or cost of its purchase, the royal half annate tax, and whatever else may be necessary, for such is rigorous justice with relation to what is stated. In this understanding I pray you to issue commission for the execution of the necessary proceeding, ocular examination, reconnaissance of the ground, survey, appraisement, publication, possession, and final sale of the 4 sitios, which will be surveyed for me in a square or oblong figure, according to the length or extent of the land and its direction, and in these terms I pray your excellency to defer to my just petition, by which I shall receive grace. I protest costs and whatever is necessary, etc."

March 12, 1821, this petition was referred by the governor intendente for survey, appraisement, and other customary proceedings, and for citation to the adjoining owners, with instructions to return the proceedings when completed, for further action. On May 3, 1821, a promotor fiscal, appraisers, and recorder of courses were appointed by the constitutional alcalde of the district and judge surveyor of that registry, who accepted their positions, took the proper oaths, and were duly commissioned. On the same day publication of notice was had to all whose rights might be affected to appear at the house of San Pedro, the place of the proposed purchase; in response to which one Antunes of the place of Terrenate, claiming certain sitios in the vicinity, appeared and objected that if the survey went up the river, or south (the river ran north) from the house of San Pedro, it would interfere with his rights, to which Perez's attorney objected, on the ground that if the survey went down the river, or north, it would deprive Perez of the benefit of the water from the marsh, which was the mother of those pastures. The matter was compro-

[629] mised by an agreement to divide the water of the marsh. This part of the expediente is of importance in respect of the contention that the *entire grant was south of the boundary line between the United States and Mexico, and as to the starting point of the primitive survey.

The survey was then proceeded with from the place of San Pedro, and is set forth at length, and, having been concluded, the alcalde, May 21, 1821, directed that an appraisalment and valuation be made by the appraisers previously appointed, who appraised the first 3 sitios at \$60 each, and the remaining one at \$10. Thereupon the alcalde, reciting that the "4 sitios of land for live stock" had been appraised and valued, required the proceedings to be forwarded to the promotor fiscal for him to deduce, according to their condition, what he considered proper to the benefit of the public treasury. May 22 the fiscal directed the alcalde to make inquiry as to whether Perez had the qualifications required by law, and whether he had sufficient property to protect these sitios, and finally whether great advantage would result to the public treasury by their protection and settlement. Testimony was taken, and, the result of the inquiry being satisfactory to the fiscal, he directed, May 26, the publication for thirty days consecutively of the appraisalment of said lands, and provided for bids thereon, and that the final sale and disposition of the land should be at Arispe, before the provincial board of the royal treasury, presided over by the governor intendente of the province. Publication was thereupon had, the first being as follows:

"On said day, month, and year, I, the judge surveyor, caused Lazaro Quijada, at the sound of the drum and in clear, loud, and distinct voice, to announce: It is made public and notorious that Don José Jesus Perez has registered the place of San Pedro, and, his petition being admitted, there were measured and located and sold 4 sitios of land for large stock, which were appraised and valued in the sum of \$190 in virtue of which everyone who believes he has a well-founded right or desires to make a bid for the land mentioned may apply, as his bid will be admitted and his actions reserved till the day of the disposition and sale, which will be in Arispe on the day designated by the governor intendente of the [630] province, *to which end his actions and rights are reserved. And no bidder having appeared I entered it as a minute, which I signed, with those in my attendance, according to law, as I certify, and on this paper, without prejudice to the royal revenue."

The proclamations took place for thirty consecutive days, and no one appearing to outbid Perez, the alcalde and judge surveyor, June 26, 1821, transmitted to Antonio Cordero, the governor intendente, "the proceedings of survey, ocular inspection, appraisements, and publications executed on the depopulated tract of San Pedro in favor of Don José Jesus Perez, for your excellency to make such order as may be just." The 184 U. S.

proceedings were referred to the promotor fiscal, and June 25, 1822, he reported favorably thereon, and recommended that the celebration of the three customary offers be proceeded with in the capital of the intendency, the city of Arispe, in solicitation of bidders for the final sale of said land. On July 3, 1822, this was ordered, and such offers were made July 3, 4, and 5, 1822, at Arispe. The land described in the first offer was "4 sitios of royal land for raising cattle comprised in the place called San Pedro, situate in the particular territory of the presidio of Fronteras, surveyed for Don José Jesus Perez, of this city, and appraised in the sum of \$190 at the rate of \$60 for the first three and \$10 for the other one."

The final offer of sale was as follows:

"In the city of Arispe, on the 5th day of the month of July, 1822, having assembled as a board of sale in this said capital, the intendente, as president, and the members who compose it, for the purpose of making the third and last offer of the lands to which these proceedings refer, they caused many individuals to assemble, at the sound of the drum and the voice of the public crier, in the office of this intendency and Loreto Salcido to proceed to make in their presence a publication, as he in effect did, similar in all respects to the one set out in the preceding offer, with only the difference of announcing to the public that the final sale is now to be made to the highest and best bidder. In which act appeared Don José Maria Serrano, as attorney of Don José Jesus Perez, again offering the value of the land, and the hour for midday prayer of this day having *already been struck, the [631] public crier finally said: 'Once, twice, three times; sold, sold, sold; may they do good, good, good, to Don José Jesus Perez.' In these terms this act was concluded, the 4 sitios of royal land referred to in these proceedings being solemnly sold in favor of this party in interest for the sum of \$190, and in due witness thereof this minute was entered with the president and members of this board of sales, signed with the attorney, Don José Maria Serrano."

Thereupon the attorney of Perez prayed that "when the approval of the superior board of the treasury is obtained, there may be issued in favor of my party the corresponding title of grant and confirmation of the 4 sitios which said land contains, being prompt to appoint in Mexico a person under pay and expenses to be charged with managing the present matter at that court." July 6, 1822, the intendente *ad interim*, Bustamente, admitted Perez to composition with the imperial treasury for said royal land, and ordered that his attorney be notified to pay into the treasury the sum of \$208, 1 grain; 190 "as the principal value at which there were sold to said party in interest, the 4 sitios which said tract comprises;" and the remainder taxes and expenses. The provincial board of the imperial treasury approved the sale in favor of Perez the next day, describing the land as being "the 4 sitios of royal land for rais-

ing large stock which the place called San Pedro comprises." July 8, the sum of \$208, 1 grain, was paid into the treasury at Arispe. No action appears to have been taken in the matter by the superior board of the treasury, and it remained as it was until October 25, 1832, when Ignacio Perez, on behalf of his brother José Jesus Perez, presented to the treasurer general of the state of Sonora a petition alleging that on July 5, 1832, there was sold in favor of his brother "the land called San Pedro, situated in the jurisdiction of Fronteras, including 4 sitios of land," and that he had lawfully exchanged the right he had thereto with citizen Rafael Elias, and requesting that inasmuch as the corresponding title to the land had not yet been issued, he might be pleased to order [632] that title *issue to said citizen Rafael Elias "as the actual owner and proprietor of the land of San Pedro." On that day the treasurer general transmitted to the governor of Sonora the proceedings "comprehensive of the registry, survey, appraisalment, publications, and sale of 4 sitios of land, at the place called down the San Pedro river, in favor of citizen José de Jesus Perez;" that Perez had paid into the treasury "the sum of \$208, 1 grain, for the principal value of the land and its corresponding taxes;" and that Perez desired the title to be issued to Rafael Elias, complying at the same time with article 27 of law No. 30 of May 20, 1825: and the treasurer reported that he considered the proceedings sufficient. October 31, 1832, Ignacio Bustamante, governor of Sonora, returned the proceedings with this communication: "Having examined the proceedings on the lands which your excellency transmits with your note of the 25th ultimo, comprehensive of 4 sitios surveyed at the place called down the San Pedro river, in favor of Don José Jesus Perez, I return it to your excellency for your excellency to issue to Don Rafael Elias a corresponding title for the grant, in view of the exchange Don Ignacio Perez of this place has made with him." Mendoza, thereupon, May 8, 1833, issued the grant, reciting: "Whereupon, in the exercise of the powers which the laws confer upon me, by these presents and in the name of the sovereign state of Sonora, I confer the grant in the form of 4 sitios of land for breeding large cattle and horses, which comprise the place named San Pedro, situate in the jurisdiction of the presidio of Santa Cruz, in favor of the citizen Rafael Elias, to whom I grant, give, and adjudicate these lands by way of sale, with all the privileges, guaranties, and stability which the laws provide, etc." And commanded that the officials "do not permit that the said interested party nor his successors be in any manner disturbed in their peaceful enjoyment, nor molested in the free use, exercise, proprietorship, dominion, and possession of the said 4 sitios of land which comprise the place named San Pedro."

In the proceeding for the denouement of the overplus of the ranch of San Pedro subsequently had in Mexico, it is recited

that the district judge "has before him the testimonio of *the title of the grant of 4 [633] sitios of land for raising large stock issued by the citizen treasurer general of the state in the city of Arispe under date of 8th of May of the year 1833, José Manuel Mendoza, in favor of citizen Rafael Elias, and after payment of \$208, 1 grain, which said Elias paid into the funds of said treasury as the value of the 4 sitios, expenses and fees of the title. The land is generally known by the name of ranch of San Pedro, in the jurisdiction of the town of Santa Cruz and near the presidio of Fronteras in the district of Magdalena." Plaintiff also introduced in evidence a copy of the titulo to the San Rafael del Valle grant. Oral evidence was introduced on both sides in respect of the original and subsequent surveys.

The government introduced a petition of the Eliases presented to the surveyor general, together with a map attached to such petition. The government also introduced the expediente of the proceedings of denouement of the *demasias* of the ranch of San Pedro commenced July 8, 1830, on behalf of the Elias family. On that day Manuel Elias made a formal denouement "of the overplus that may be in the ranch of San Pedro in the jurisdiction of the town of Santa Cruz in the district of Magdalena," of which ranch he alleged that he was a co-owner. After considerable delays and after securing by appeal a declaration of his right to proceed to such denouement, Elias on June 1, 1832, secured the appointment of one Pedro Molera, who was directed to "proceed to the resurvey of the ranch of San Pedro, after examination of its titles and citation of adjoining owners, marking on the ground as well as on the respective maps the lawful area (*cabida legal*) of said ranch and the overplus (*demasias*) it may contain within its monuments, subjecting his operations to the general laws of July 22 and August 2, 1863." Molera accepted the appointment, and, July 19, 1832, appeared at the ranch of San Pedro. His report recited that before proceeding with the survey he found it necessary to make a reconnaissance of the land because the titles were decidedly obscure; and notwithstanding the person who made the ancient survey gave the distances, the courses were incomprehensible, and no description was *given of [634] the places the title cited. He then set forth what he did in respect of the general lines on which the grant should be located, and proceeded to lay off the *cabida total*, or entire area, within the exterior boundaries, so far as he could ascertain them. Having laid off the total area of 28,265.11 hectares running up to the international line on the north, Molera on July 28, 1832, proceeded to segregate the legal area (*cabida legal*), which was 4 square leagues. He described the methods he adopted, and from the map and field notes it appeared that the legal area was 7,061.61 hectares, which, deducted from the total area, left an overplus or *demasias* of 21,203.47 hectares. Orders were

then given for the advertisement of the proceedings, and testimony was taken as to the qualifications of Elias to secure the property. In April, 1884, the district judge at Guaymas recited that it appeared that the ranch of San Pedro belonged to various owners, who under the law had equal rights to the *demasias*, and ordered that Manuel Elias be notified to state whether or not he consented that said *demasias* should be adjudged to him in company with the other owners, and thereupon it was consented that the *demasias* should be adjudged to all the owners. November 18, 1884, the value of the *demasias* was fixed, but no price was fixed for the *cabida legal*, since that part of the survey belonged to the original parties. The order of the district judge recites that having examined the proceedings of survey and the map, both made by the surveyor, Pedro Molera, from which it appears that there is a total area of 28,265.11 hectares, of which 7,061.64 hectares are covered by title and 21,203.47 hectares are *demasias*, and, having examined the other proceedings, decreed the adjudication of said overplus to José Maria Manuel, and the heirs of José Juan Elias in third parts, subject to the approval of the department of public works. The proceedings were transmitted to that department at Mexico, and, an error having been found in the calculations, were returned with orders to the surveyor to repeat the survey and correct the error. Molera again went into the field, and on March 19, 1887, made a recalculation of the *cabida total*, with the result that the overplus was found to be 21,231 hectares and a fraction [635] instead of 21,203 and a fraction. *The correct valuation was thereupon made and the proceedings again sent to Mexico. May 3, 1887, the department of public works recited that they had examined the survey of the so-called *demasias*, and observed that on such survey "no monuments were found that would determine the limits or boundaries of said ranch," and that the courses indicated in the primitive survey were so confusing that in "attempting to follow them one goes and returns repeatedly over the same line without it being possible to circumscribe with this data any perimeter whatever." It was accordingly found and ordered that the ranch of San Pedro had no known boundary or boundaries that could be determined, and consequently had no *demasias*, so that the land denounced was not *demasias*, but vacant public land; and that Molera made an arbitrary survey. The adjudication was therefore not approved, and the office of the chief of the treasury in the state of Sonora was directed to register the land and the public treasurer to enter into possession of it, except that part which had been sold to McManus & Sons, and for which the proper title had already been issued. This order was subsequently revoked as a matter of equity, and the purchase of the property allowed so far as not conflicting with the McManus grant. On July 4, 1887,

on the petition of Elias, one Bonillas was appointed surveyor for the purpose of separating the McManus land from the land sought by Elias, and to make a report that would enable the final purchase of the balance by Elias's family to be effected. This survey gave the total area of the San Pedro ranch, after cutting off the McManus land, as 22,058 hectares, 11 ares, 8 centiares, from which subtracting the legal area (*cabida legal*) of 7,022 hectares, 44 ares, there remains an overplus of 15,035 hectares, 67 ares, 8 centiares. Hectare = 2.471 acres. February 24, 1888, the President of the Republic approved the adjudication of this overplus in favor of Elias and associates, and ordered the proper title to issue to them upon payment of the required amount. The proper amount was paid, and on October 15, 1888, Alejandro Elias, for the Elias heirs, receipted for the title of said *demasias*, issued by President Diaz, February 24, 1888.

The government also introduced in evidence the expediente *of an adverse suit [636] brought by Plutarco Elias respecting himself and his mother and brothers on the denouncement of the overplus of the Agua Priete grant made by Camou Brothers, in which, in deciding the matter, the district judge recited that the fact that the Elias family had already denounced a large area of *demasias* in the Republic of Mexico, and mentioned many other tracts denounced by them besides the overplus of the San Pedro ranch, and called attention to the fact that the Eliases in consequence of such denouncements had secured a larger grant than they were allowed to obtain under the law of July 22, 1863. He quoted from the regulations of the department of public works in which the method of acquiring *demasias* and other vacant lands is set forth, and showed from the order of the department of public works that overplus within a grant rests on exactly the same basis as other public lands, except that under the provisions of the law of July 22, 1863, a preference in its purchase is given the owner of the legal area. The district judge held that the Elias family had no right to be admitted as denouncers, since they had already obtained an area greater than that designated by law.

The Reloj Cattle Company was incorporated September 24, 1885, and various quit-claims of the interests of the Elias heirs in 18,000 acres in the grant, described as being north of the boundary line, commencing with April 2, 1883, and down to October 13, 1885, were introduced by it as muniments of title. The cause was submitted June 2, 1899, and November 27, 1899, the court entered a decree rejecting the grant and dismissing the petition. The court held that the grant was one of 4 sitios only, and that the owners had secured full satisfaction from the Mexican government and within its territory of all that they were entitled to. Thereupon this appeal was prosecuted.

Mr. H. H. Cobb argued the cause, and **Mr. Rochester Ford** filed a brief for appellant:

Such rights in the United States as were fixed at the time of the treaty could not be changed by any subsequent action of the Mexican authorities.

United States v. Yorba, 1 Wall. 412, 17 L. ed. 635.

Solicitor General Richards and **Messrs. Matthew G. Reynolds** and **William H. Pope** submitted the cause for appellee:

The rights of the grantee are limited to the quantity petitioned for, appraised, advertised, sold, and paid for, and for which the formal title was issued twelve years thereafter by the succeeding government.

Ainsa v. United States, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544; *United States v. Maish*, 171 U. S. 242, 43 L. ed. 150, 18 Sup. Ct. Rep. 948; *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840; *Perrin v. United States*, 171 U. S. 292, 43 L. ed. 169, 18 Sup. Ct. Rep. 861.

The securing to the owners of the grant of full satisfaction of its lawful area (*cabida legal*) by the Mexican government is conclusive of the case here presented.

Ainsa v. United States, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544; *Ely v. United States*, 171 U. S. 240, 43 L. ed. 150, 18 Sup. Ct. Rep. 840.

[637] **Mr. Chief Justice Fuller** delivered the opinion of the court:

Perez petitioned for the grant "pursuant to the provisions of the national laws and the terms of the royal cedula of February 14, 1805."

That cedula provided that (for the reason "that the settlement of a sitio of a league in extent was very difficult for a person of large means, and that lands of large area were held without this legal obligation having been fulfilled to the prejudice of others") "there should not be adjudicated nor granted more than three or four tracts (to the wealthy), and two to the poor;" "with the understanding that the lowest estimate was not to be less than \$10 for lands without water, \$30 for lands irrigable by means of wells, and \$60 for those capable of regular irrigation." Reynolds, p. 72. Recognizing the limitation, Perez prayed for the sale to him of "the 4 sitios."

The entire proceedings were directed to the acquisition of 4 sitios. Four sitios were valued; 4 sitios were put up at the auctions; 4 sitios were purchased; 4 sitios were paid for; and 4 sitios were granted. The intention to convey only so much and no more is plain, and is controlling. The title of the grantee was limited to that quantity. *Ainsa v. United States*, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544; *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840; *United States v. Maish*, 171 U. S. 242, 43 L. ed. 150, 18 Sup. Ct. Rep. 948; *Perrin v. United States*, 171 U. S. 292, 43 L. ed. 169, 18 Sup. Ct. Rep. 861.

The *cabida legal*, or lawful area, was,

therefore, 4 sitios, or something over 17,350 acres, and this lawful area, "the 4 sitios," was described by Perez as "the depopulated place down the San Pedro river, situate in this province, toward the north, on the hostile frontier, close to the abandoned place of Las Nutrias."

The primitive survey was had at the place of San Pedro, and Las Nutrias was 2 or 3 miles to the southwest. It is plain that the old house of San Pedro was in existence at that time. When Antunes appeared from the place of Terrenate, which was a short distance west of the house of San Pedro, he was willing that the survey should proceed "from the house of San Pedro down the river" (the river ran north or somewhat east *of north), while Perez [638] claimed it should be located up the river to get the benefit of the water of the marsh. This dispute was compromised by agreeing to divide the water of the marsh, which lay some distance above the house of San Pedro. The starting point of the survey was plainly up the river from the house, and then the line ran below it, for the survey states: "I caused a monument to be placed at a rectangular corner, from which, taking the course southwest to northwest, there were measured and counted 50 cords, the last of which terminated down the river from the house, on the edge of the ford, on the bank." That the house of San Pedro was an important call in the location of the grant on the ground is unquestionable. That house was the ancestral home of the Elias family, and on that place some of its members still reside. It was and is in Mexico, several miles south of the boundary line. Accordingly, when Manuel Elias made a formal denunciation, July 8, 1880, of the *demasias* there might be in the ranch of San Pedro, and it became necessary to mark the *cabida legal* on the ground, the Mexican authorities laid off the 4 sitios so as to embrace the San Pedro settlement. The omission of San Pedro from the lawful area of the San Pedro grant would have, indeed, been something remarkable. The owners of the grant thus obtained from Mexico full satisfaction of its *cabida legal*; and no legal or equitable claim therefor existed against the United States when this petition was filed.

In *Ainsa v. United States*, 161 U. S. 234, 40 L. ed. 682, 16 Sup. Ct. Rep. 553, it was said: "We have referred to the proceedings of 1882, 1886, in Mexico, as furnishing persuasive evidence of the proper construction of this grant under Mexican law, and it may be further observed that the adjudication of the overplus required the location of the $7\frac{1}{2}$ sitios, which location Mexico, as the granting government, assumed it had the right to make, and made out of the land within its jurisdiction. In this way the grant was satisfied by the receipt of all the grantees had bought and were entitled to under the Mexican law, the result as to the overplus inuring to Camou's cotenants by the terms of his petition."

In *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840, the court, 184 U. S.

referring to *Ainsa's Case*, observed: "In [639] that case it appeared *that while the out boundaries of the survey extended into the territory ceded by Mexico to the United States, the grantee had taken and was in possession of land still remaining within the limits of Mexico to the full extent which he had purchased and paid for, and therefore no legal or equitable claim existed against the United States in reference to land within the ceded territory." It is quite impossible to entertain the proposition that the court of private land claims should have adjudged to appellants another *cabida legal* on this side of the boundary line. According to the doctrine of *Ely's Case* no different location could have been recognized if the entire area had been in this country.

Something is said in respect of the right to confirmation of the tract sued for treated as *demasias*. But, apart from other insuperable objections to that suggestion, such a claim would be imperfect for want of fulfilment of conditions, and barred by § 12 of the act of March 3, 1891 [26 Stat. at L. 854, chap. 539].

Decree affirmed.

SANTIAGO AINSA, Administrator of the Estate of Frank Ely, Deceased, and Edward Camou, *Appts.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 639-649.)

Mexican land grants—grant by quantity—excess over lawful area—unperformed conditions—imperfect claim.

1. A Mexican grant of land whose measurement was made with great care and the quantity repeatedly recited in the proceedings to secure the grant is a grant by quantity, notwithstanding a general description by natural objects was given in the original petition; and when the quantity covered by the grant has been laid off in Mexico by the Mexican authorities, on denouncement of the overplus within such grant, no legal or equitable title therefor exists against the United States.
2. Title to overplus within a Mexican land grant, for which the government has a right to compel payment from the owner of the lawful area, or to resell such surplus to a third party, could not be confirmed by the court of private land claims on payment of such amount as might be found due, in view of the provision of the act creating that court, that no authority to acquire land on condition should be admitted or confirmed unless such condition had been performed,—especially where such claim was not filed within the time given by that act for filing imperfect claims.

[No. 40.]

Argued January 29, 1902. Decided March 17, 1902.

184 U. S.

A PPEAL from the Court of Private Land Claims to review a decree denying confirmation of a Mexican land grant. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

This was a petition filed February 28, 1893, by Ainsa, as administrator, against the United States and one Whitney, for confirmation of the Agua Prieta grant, so called, which he represented he owned by virtue of "a grant title," dated December 28, 1836, *made by the Mexican Republic under article 11 of decree No. 70, of August 4, 1824, and a law of the states of Sonora and Sinaloa, No. 30, of May 20, 1825, and other decrees embodied in sections 3, 4, 5, 6, and 7 of chapter 9 of the organic law of the treasury, No. 26, of July 2, 1834; and that regular and lawful proceedings were had under those laws, by which the Mexican government, December 28, 1836, sold and conveyed the land to Juan, Rafael, and Ignacio Elias Gonzales in consideration of \$142.50 and other valuable considerations. The proceedings were set out at length in the petition. [640]

The United States answered, denying the ownership and possession of the petitioner, and alleging that the grant by the state of Sonora was void; that the grant was located within the Republic of Mexico; that it was confirmed in 1882 to Camou brothers by the Mexican government, and lay south of the boundary line; that the *demasias* of the grant was also confirmed to Camou brothers; and that a large area remained between the north boundary of the grant and of the *demasias* and the boundary line, which had since been purchased from Mexico by Camou brothers February 14, 1899, on which day the cause came on for trial, petitioner filed an amended and supplemental petition, averring "that prior to the treaty known as the Gadsden treaty no resurvey of said grant had ever been applied for or ordered by anyone, and that neither the grantees nor their successors in interest had, prior to said treaty, any knowledge or notice that within the said monuments there was an excess of land over the area stated in said title papers, and petitioner avers that the grantees under said grant were, under the laws of Mexico and the state of Sonora existing at the date of said treaty, and for a long time prior thereto had been, holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as their own, even after such overplus is shown, without other obligation than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and petitioner further avers that if this honorable court should decide that said sale, as recited in said title papers, did not, as petitioner avers it did, convey to the grantees *therein all of the said tract of land [641] to the monuments described in said title papers without further payment therefor, he is ready and willing and now offers to pay to the United States of America any

amount that may be found to be due from him for such overplus, and also the costs for ascertaining the same, as soon as the amount of the same and the sum due therefor is ascertained."

Petitioner tendered the sum of \$600 in gold in payment of the overplus and \$200 in gold for costs, offered to pay whatever might be adjudged due, and prayed "that upon said payment this honorable court decree that petitioner is entitled to and is the owner of all of said tract of land, as originally surveyed, including said overplus or surplus, and that by said decree he be secured in the possession and ownership of the whole of said tract," etc.

The area delineated on petitioner's maps, as included in the grant claimed, was 163,797.48 acres. The court of private land claims rejected the claim, and dismissed the petition.

The documents covered three tracts of land called, respectively, Agua Prieta, Naidenibacachi, and Santa Barbara. And it appeared that on July 21, 1831, Juan, Rafael, and Ignacio Elias Gonzales petitioned the treasurer general of Sonora, stating that they had cattle and sheep whose numbers they could not feed on the sitios belonging to them, for which reason the stock wandered to the four points of the compass, more particularly toward the waters of the Santa Barbara, Naidenibacachi, Agua Prieta, and Coaguyona, by which they suffered incalculable damage.

They therefore made denouncement of the lands that might be "found to be public lands within the points and waters aforesaid, which are bounded on the north by the Chiricahua mountains, on the south by the lands of the Sinaloas, on the east by the mountains of Coaguyona, and on the west by the lands of the Saus;" and petitioned that under the law of May 20, 1825, the denouncement might be admitted, and orders issued for the survey, appraisalment, publications, sale, and other necessary proceedings. The petition was referred, testimony taken, and report made as to the necessities of the case, and in October, 1831, at Hermosillo, Treasurer General Mendoza ap-

[642] pointed Joaquin *Vincente Elias, resident of San Ignacio, to proceed to take the legal steps, to "the survey of the said public lands," effecting the measurement, appraisalment, and publications as is provided, in the decrees No. 30, of May 20, 1825, and No. 175 of November 20, 1830, etc. In August, 1835, Elias proceeded to execute the commission, and on September 28 appointed and qualified his assistant measurers and recorders, and commenced the survey of the Agua Prieta tract. He asked "the attorney of Messrs. Elias to point out the place they wanted as the center; he did so, fixing a lagoon or pool that is in the middle of a valley called by the same name as the place and the center of all the circumference." The survey then followed and is given at length, and closed as to the Agua Prieta tract thus: "The survey being in this manner concluded, and containing in its area,

the calculation having been made with entire correctness, $6\frac{1}{2}$ short sitios, the party, who assented to what had been done, was cautioned to inform his parties in due time to have monuments of stone and mortar constructed as is provided." Then came the survey of the Santa Barbara and Naidenibacachi tracts, and they were found to contain an area of " $11\frac{1}{2}$ sitios and $12\frac{1}{2}$ caballerias," which made, with the $6\frac{1}{2}$ sitios, a total of 18 sitios and $12\frac{1}{2}$ caballerias. Appraisers were then designated, and the $6\frac{1}{2}$ sitios composing the survey of Agua Prieta were valued, one at \$60, as it had a limited water course, and the others at \$15 each, as they were absolutely dry, and the $11\frac{1}{2}$ sitios and $12\frac{1}{2}$ caballerias were appraised, one at \$80, another at \$60, and the rest at \$15, making a total of \$432.50. Thereupon the lands were published for thirty consecutive days at the values fixed, from June 4 until July 3, 1836. The advertisement exposed for sale 18 sitios and $12\frac{1}{2}$ caballerias for raising cattle, comprised in the places of Agua Prieta, Naidenibacachi, and Santa Barbara, surveyed in favor of the citizens Elias, and appraised in the sum of \$432 and 4 reals. Three public auctions were then ordered and had on September 15, 16, 17, 1836. The advertisement was as follows:

"There are going to be sold on account of [643] the public treasury of the department 18 sitios and $12\frac{1}{2}$ caballerias of land for the raising of cattle and horses, comprised in the places called Agua Prieta, Naidenibacachi, and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras, in the district of this capital, surveyed at the request of the citizens Juan, Rafael, and Ignacio Elias Gonzales, of this town, and appraised in the sum of \$432 and 4 reals, as follows: The $6\frac{1}{2}$ sitios, which compose the survey of Agua Prieta, one in the sum of \$60, on account of having a small spring, and the other $5\frac{1}{2}$ at the rate of \$15 each, on account of their being absolutely dry; and the other $11\frac{1}{2}$ sitios, together with the $12\frac{1}{2}$ caballerias, of which the other two places consist, one in the sum of \$80, one in the sum of \$60, and the others at \$15 each, all of which sums together go to make up the total amount of \$432 and 4 reals."

The property was sold to the Messrs. Elias at \$432 and 4 reals, the record stating: "On these terms this act was concluded, the said 18 sitios and $12\frac{1}{2}$ caballerias of land which compose the said places of Agua Prieta, Naidenibacachi, and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras, having been publicly and solemnly sold to these interested parties for the said sum of \$432.50, at which said lands had been appraised." September 27, the treasurer general directed the parties to be notified to pay the sum in question into the treasury. The title was issued December 28, 1836, declaring that the purchase money for said "18 sitios and $12\frac{1}{2}$ caballerias of land for breeding cattle and horses, which are comprised in the places called Naidenibacachi, Agua Prieta, and Santa Barbara" had been paid, and granting in

the usual terms the said 18 sitios and 12½ caballerias contained in those places.

[644] On the trial, Ainsa, administrator, introduced in evidence a *number of deeds made by descendants of the original grantees to Ainsa's intestate, ranging in date from December 24, 1886, to January 24, 1893.

The United States introduced a deed of the Eliases, dated July 25, 1862, conveying to the Messrs. Camou of Hermosillo, Mexico, by way of conditional sale, all of the property forming the subject-matter of this suit, and also certain proceedings of March 17, 1869, and of November 15, 1880, showing the extinguishment of the equity of redemption.

May 31, 1899, petitioner asked for an order making Eduardo Camou party defendant, and presented a deed from Juan Pedro Camou to said Eduardo, quitclaiming the grantor's interest in the Agua Prieta grant, north of the international boundary line.

In addition to the documents much oral evidence in reference to the surveys was adduced on both sides.

The government introduced a certified copy of the expediente of the denouncement of the *demasias* of the grant made by Camou brothers before the Mexican tribunals by proceedings initiated April 22, 1880. The lands mentioned were the three places of Agua Prieta, Santa Barbara, and Naidenibacachi, and four others. The denouncement was admitted by the district judge of Guaymas, May 31, 1880, and a resurvey ordered of the seven tracts, with direction that special care be taken to make the survey of each of the lands separately, and to designate in the minutes of the survey and on the several maps the *demasias* pertaining to each. The parties in interest were summoned and were satisfied with the survey made. In 1887 Plutarco Elias, for himself and his mother and brothers, brought an adverse suit against the denouncement on the theory that the Eliases, though not entitled to the *cabida legal*, were entitled to the *demasias*, but the contention was rejected. The value of the overplus was fixed, and the judge decreed that the owner was entitled under article 5 of the law of public lands, the law of July 22, 1863, to a reduction of one half the price as fixed, and it was so liquidated. The final result was the issue, January 30, 1888, of the title to the *demasias* in favor of Camou. The government also introduced in evidence

[645] the expediente *of denouncement of a tract of public land amounting to 16,920 acres, situated between the north boundary of the Agua Prieta grant and the international boundary line. This proceeding was initiated May 4, 1881; the denouncement was admitted and a surveyor appointed, who issued summons to Elias, owner of the ranch of San Pedro, to Camou, owner of the ranches of Agua Prieta and Naidenibacachi, and to Ainsa, representing the lands surveyed to one Rochin, situated east of the Agua Prieta tract. A survey was had and the tract surveyed divided among the three

184 U. S.

petitioners, Mr. Camou, the owner of the Agua Prieta grant, acting as attorney in fact, giving his receipt for the three titles to the property, and describing it as public land. The government also put in evidence the withdrawal by Mr. Camou from the consideration of the surveyor general of Arizona of the grant now in controversy in July, 1880.

Mr. Francis J. Heney argued the cause, and Mr. Rochester Ford filed a brief for appellant:

The grant of a tract with specified boundaries covers all the land within those boundaries, irrespective of quantity, and this is true although there is a statement that the tract contains a certain amount, which amount is very much less than that included within the boundaries.

United States v. Hancock, 133 U. S. 193, 33 L. ed. 601, 10 Sup. Ct. Rep. 264; *Maxwell Land-Grant Case*, 121 U. S. 325, *sub nom. United States v. Maxwell Land-Grant Co.* 30 L. ed. 949, 7 Sup. Ct. Rep. 1015.

Under the civil law a sale is always considered *per aversionem* when it is for a total sum and assigns to the land sold existing visible boundaries, such as rivers, highways, fences, pieces of iron, stone, or wood, showing the starting point and the direction of the dividing line with the adjoining tenements. These sales are held to be *per aversionem* on the presumption that the parties to them have their attention fixed rather upon the boundaries than the enumeration of quantity.

Boyce v. Cagle, 7 La. Ann. 672.

If in the sale of an immovable property the lines have been designated, the vendor is obliged to deliver all that is comprehended within them, although there may be an excess in the measure expressed in the contract.

Hall, Mexican Law, § 2109.

When the sale is made of the whole of a certain quantity, by so much per pound, bushel, or other measure, and the vendor expresses the number of them, he is bound to deliver to the vendee the whole, though it exceed the quantity, and the vendee is bound to receive the whole, though it fall short of the quantity specified.

Schmidt, Civil Law of Spain & Mexico, art. 612, p. 134.

Where, in Sonora, questions of excess arose in grants due to inaccurate measurements or computations, the remedy was by a further payment by the grantee, and not by a curtailment of the land surveyed.

Law of Sonora, May 12, 1835, cited in *Ainsa v. United States*, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544.

No proceedings in Mexico subsequent to the treaty can affect rights in the United States fixed at the date of the treaty. The rights asserted by the inhabitants of the ceded territory depend upon the concession made by the officers of the government having at the time the requisite authority to alienate the public domain, and not upon

any subsequent declarations or actions of Mexican officials.

United States v. Yorba, 1 Wall. 412, 17 L. ed. 635.

Mr. Matthew G. Reynolds argued the cause, and, with Solicitor General Richards and Mr. William H. Pope, filed a brief for appellee:

In this grant there passed to the claimants the quantity paid for,—no more, no less.

Ainsa v. United States, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544; *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840; *Perrin v. United States*, 171 U. S. 292, 43 L. ed. 169, 18 Sup. Ct. Rep. 861; *United States v. Maish*, 171 U. S. 242, 43 L. ed. 150, 18 Sup. Ct. Rep. 948.

This grant has been satisfied by the Mexican government south of the international line, and the claim should therefore be rejected.

Ainsa v. United States, 161 U. S. 234, 40 L. ed. 682, 16 Sup. Ct. Rep. 544; *Ely v. United States*, 171 U. S. 240, 43 L. ed. 150, 18 Sup. Ct. Rep. 840.

Mr. Chief Justice Fuller delivered the opinion of the court:

The amount that passed to the grantee was 6½ short sitios, or about 28,200 acres, and the court below properly held that the case was controlled by the decisions of this court in *Ainsa v. United States*, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544, and subsequent cases. It is contended that because a general description by natural objects was given in the original petition this was not a grant by quantity; but the proceedings leave no doubt that that was nothing more than the designation of the particular territory wherein the quantity purchased was to be located. The measurement of the tract was made with great care and the quantity repeatedly recited. Eighteen sitios and 12½ caballerias of land at the three [646] places named were appraised, *sold, purchased, paid for, and granted, and no more. The survey of the Agua Prieta tract placed its contents at 6½ sitios, and of the other tracts, 11½ sitios, 12½ caballerias, which were separately appraised, and while the advertisement was of 18 sitios and 12½ caballerias comprising the lands of the three places, the valuation of the 6½ sitios composing the Agua Prieta tract, and the valuation of the 11½ sitios, 12½ caballerias, were given separately, although all were sold, paid for, and granted together. The law then in force authorized the treasurer general to grant to old breeders, "who, from the abundance of their stock, need more," the quantity shown to be needed, but the minimum price was fixed by law, and before sale the land had to be surveyed, appraised, and advertised, as was done. The Mexican government construed this grant on the denouncement of Camou as a grant by quantity, and the *cabida legal* was deducted and the *demasias* sold and patented by that government. That lawful area is south of the

international boundary line and in Mexico; and as we have just said in *Reloj Cattle Co. v. United States*, 184 U. S. 624, ante, 721, 22 Sup. Ct. Rep. 499, there was no legal or equitable claim therefor existing against the United States when this petition was filed.

Assuming that some part of the entire claim lay in the United States, which is not conceded, petitioner on May 16, 1895, by an amended and supplemental petition, prayed the court to award the overplus to him on payment of such amount as might be found due.

The laws of Mexico and of the state of Sonora in respect of *demasias* treated excess over rightful titles as subject to the *jus disponendi* of the government. The possessor did not have title to the overplus, but might acquire it under the circumstances and in the way provided. A possessor does not mean owner. Escribano's Diccionario de Legislacion y Jurisprudencia. *Poseedor*; *Poseedor de buena fe*; *Poseedor de mala fe*.

The 2d section of the Sonora law of May 12, 1835, No. 51, is given in *Ainsa v. United States*, 161 U. S. 226, 40 L. ed. 679, 16 Sup. Ct. Rep. 551, though the words *poseedores de buena fe* should have been translated "possessors in good faith" rather than owners; and we there *said: "It thus appears that [647] the resurvey of grants was provided for to ascertain the excess over the quantity intended to be granted, that unless the excess was more than half a sitio it might be disregarded, and that if it exceeded that, the owner of the original grant might be allowed to take it at the valuation. The application of Don José Elias was for a resurvey of the Casita in order that he might obtain the overplus lands therein on an appraisal, whereas if that ranch had been acquired by purchase *ad corpus*, that is to say, all the lands included by certain metes and bounds, possession delivered and monuments set up, it is not apparent how the necessity for having a resurvey could have existed; and so when, in 1882 and 1886, the Mexican government was applied to by defendant Camou, under the law of July 22, 1863, his application proceeded upon the theory that the grant under consideration was a grant of a specific quantity within exterior limits, and what he sought and was accorded was an adjudication of the overplus on paying the value thereof 'in conformity with the tariff in force at the time of the denouncement.'

"Certain articles of the law of July 22, 1863, treat of the ascertainment and disposition of excesses where the indicated boundaries are supposed to cover only a certain quantity of land which, when resurveyed, turns out to be much larger than as described in the titles; and such resurveys had been practised from an early day and were recognized by Don Elias himself in his application in respect of La Casita. Royal Decree, October 15, 1754, § 7, Reynolds' Spanish & Mexican Land Law, 54; Law of July 11, 1834, chap. 9, § 3, Id. 187; Law of July 22, 1863, Hall, Mexican Law, 174."

If the excess did not exceed $\frac{1}{2}$ a sitio; it was disregarded. If it did, and the owner did not want it, or it was very great in the opinion of the government, it would be awarded to anyone denouncing or soliciting it.

The 2d and 3d sections of the law of May 14, 1852, No. 197, were:

"2. *Demasias* are considered to be those that may be found within the true out-boundaries of the grant titles, and they shall be excessive when they amount to the third part of the land which said titles may contain.

[648] "3. When the said *demasias* are not excessive, and the possessors apply for them with proof of having sufficient means for stocking them, they shall be adjudicated to them without public auction at the rates in force at the present time. If they should not want them, they shall be adjudicated to denouncers in like manner. Should they be excessive they shall be sold to the highest bidder."

Even when not excessive, the owner of the *cabida legal* was compelled to pay the rates in force at the time of the passage of the law, and by § 11 it was provided that they could not be secured without public auction unless the original expediente was presented to the treasury within 100 days thereafter. When excessive, they had to be sold to the highest bidder. They were, in short, placed on the same footing as other public lands.

The United States is not subject to suit, except by its consent, and then only within the limits and on the terms prescribed. The act of 1891, in creating the court of private land claims, did not authorize that court to supervise performance of conditions unperformed, and by subs. 8 of § 13 it was provided that "no concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land."

By § 12, imperfect claims in respect of which no petition shall have been filed within two years "shall be deemed and taken, in all courts and elsewhere, to be abandoned, and shall be forever barred."

It is obvious that this contention cannot be sustained for the reasons indicated, and we repeat what we said in *Ely's Case*, 171 U. S. 239, 43 L. ed. 149, 18 Sup. Ct. Rep. 848: "This government promised to inviolably respect the property of Mexicans. That means the property as it then was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after. That which was subject to challenge before did not become a vested right after.

[649] No duty rests on this government to recognize the validity of a grant to any area of greater extent than was recognized by the government of Mexico. If that government

had a right, as we have seen in *Ainsa v. United States* it had, to compel payment for an overplus or resell such overplus to a third party, then this government is under no moral or legal obligations to consider such overplus as granted, but may justly and equitably treat the grant as limited to the area purchased and paid for."

Decree affirmed.

ARIVACA LAND & CATTLE COMPANY,
Appt.,
v.

UNITED STATES *et al.*

(See S. C. Reporter's ed. 649-653.)

Private land claims—definite location.

A Mexican grant of "2 sitios of land for raising cattle and horses, which comprise the place called Aribac," made in proceedings to perfect a title acquired under a prior sale, the record of which had been lost, is not so located as to admit of confirmation under the provision of the Gadsden treaty that grants are not to "be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico," where the landmarks described in the depositions taken in the proceedings to secure the grant cannot be identified with adequate certainty, and the location of the 2 sitios within the larger area claimed cannot be satisfactorily determined because the record contains no original survey or field notes, and there is no certainty as to an initial point or center.

[No. 153.]

Argued January 29, 1902. Decided March 24, 1902.

APPEAL from the Court of Private Land Claims to review a decree refusing confirmation of a Mexican grant. *Affirmed.*

The facts are stated in the opinion.

Mr. Francis J. Heney argued the cause, and Mr. Rochester Ford filed a brief for appellant:

Such natural boundaries as hills, mountains, etc., are sufficiently certain for the purposes of surveys or description of Mexican grants of land of little value whose unit of measurement was a league.

United States v. Sutherland, 19 How. 363, 15 L. ed. 666.

When there are no measurements statements of quantity yield to natural objects.

United States v. Hancock, 133 U. S. 193, 33 L. ed. 601, 10 Sup. Ct. Rep. 264.

The Sonora grants were executed contracts of sale of the whole of a tract of land the boundaries of which had previously been established by the proper officers of the Mexican government, and the value of such tract fixed by the appraisement, so that the sale was "the investiture of a complete title to a specified tract, with no future act to be performed."

Spaulding, Public Lands, § 511.

Mr. Matthew G. Reynolds argued the cause, and, with *Solicitor General Richards* and *Mr. William H. Pope*, filed a brief for appellees:

The description of the premises conveyed must be sufficiently definite and certain to admit of identification of the land; otherwise it will be held void for uncertainty.

2 Devlin, Deeds, 2d ed. § 1010; Spaulding, Public Lands, p. 272; *Boardman v. Reed*, 6 Pet. 328, 8 L. ed. 415; *United States v. Lawton*, 5 How. 10, 12 L. ed. 27; *Smith v. United States*, 10 Pet. 326, 9 L. ed. 442.

If this be construed to be a grant of 2 sitios within a larger tract it is a grant that was not located at the date of the treaty.

If, on the other hand, this be construed to be a grant to the out-boundaries, wherever they are, it is still not located, as it does not appear from the record that an authentic survey was ever made of the grant, which was essential to the proper "location" of a grant under the provisions of the Gadsden treaty.

Ainsa v. United States, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544; *Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, 44 L. ed. 78, 20 Sup. Ct. Rep. 28.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a petition filed March 1, 1893, for the confirmation of a grant situated in Arizona, containing, according to a survey made on petitioner's behalf, 26,508.06 acres. February 13, 1899, an amended and supplemental petition was filed, praying that if there were found to be an overplus, petitioner should be allowed to pay for such excess and costs, which it offered to do as soon as the same were ascertained, and it tendered [650] \$300 in *gold as payment for overplus and \$200 for costs. The court of private land claims rejected the grant because there was "such uncertainty as to the land which was intended to be granted that it is impossible now to identify it." Two justices dissented, being of opinion that the claim should be confirmed for 2 sitios.

A titulo was introduced in evidence (in the surveyor general's office, produced from private custody), and this showed that on June 2, 1833, Ygnacio and Tomas Ortiz, asserting themselves to be sons and heirs of one Augustin Ortiz, petitioned the alcalde of Tubac, stating that in 1812 their deceased father paid into the treasury of the capital of Arispe \$747 and 3 reals, as the highest bid, for which 2 sitios of land for raising cattle were sold to him at public auction in the place called Aribac, and that they were "ignorant as to who was the surveyor or where the expediente containing the measurements, appraisalment, and auctions is now," and asking that the depositions of three witnesses be taken as to the settlement and possession of the land from 1812, and the landmarks and boundary lines. The alcalde proceeded to take the depositions of three witnesses, who deposed in substance that the Aribac ranch had been settled and

occupied by Ortiz and his sons from 1812 to that time, and that the landmarks were "the one towards the north on the high pointed hill (*devisadera*) that rises on this side of the Tagito mine and borders on the Sierra de Buenavista; the one towards the south standing on this side of the Longorena mine on a low hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut in it, and borders on the Sierra de las Calaberas; and the one towards the west standing at the Punta de Agua on a pointed hill (*devisadero*) opposite the Sierra del Babuquivari." These depositions were taken *ex parte*, no representative of the government having been notified or participating.

Ygnacio and Tomas then petitioned the treasurer general of Sonora to issue them a grant, "the original expediente containing the measurements having perhaps been lost," transmitting "the documents by which they show their right of property to 2 *sitios of land for raising cattle, which in [651] the year 1812 were sold at public auction to their deceased father, Don Augustin Ortiz, from whom they inherited the same, which land is situated in the place called Aribac, and that the price at which it was sold and other imposts thereon have been paid." Besides the depositions, the titulo set forth a certificate by the treasurer of Arispe, dated June 18, 1833, to the effect that "on page 85 of the manual book corresponding to the year 1812," an entry was found, under date of October 10, signed by Bustamante, Romo and José Carrillo, that Don Augustin Ortiz by Carrillo, as his attorney, had paid into the royal treasury \$799, 5 reals, and 9 grains, for 2 sitios of land for raising cattle recently sold to him at auction. The petition of the alcalde, his order to take testimony, the three depositions, the certified entry, and the petition to the treasurer general, were then referred by the latter to the governor of Sonora for action. The governor, reciting that "the possessory right of citizens Tomas and Ygnacio Ortiz has been legally proved," ordered that the grant be made in accordance with the law. June 24, 1833, Mendoza as treasurer general of Sonora directed that the grant for 2 sitios of land for raising cattle which comprise the place called Aribac, be issued, and that the grantees pay into the treasury the value of the title in conformity with the laws, which was apparently done; and Mendoza issued the grant "of 2 sitios of land for raising cattle and horses, which comprised the place called Aribac," and declared that the expediente should remain in the archives of the office "as a perpetual record." On the titulo was indorsed: "This title is recorded on page 15 of the proper book which exists in this treasury general;" and also the certificate of the entry in the manual book of July 12, of the receipt of \$30 as the value of the land title for 2 sitios of land. The petitioner also introduced the following entry in the book of Toma de Razon in the office at Hermosillo, Sonora: "On the 12th of

[652] July there was issued to Captain Don Ygnacio Gonzales the title granted on the 2d of July, of the corresponding year, to 2 sitios of land for raising cattle and horses, which comprise the place named Aribac, situated in the jurisdiction *of Pimeria Alta, in favor of the citizens Tomas and Ygnacio Ortiz, residents of the presidio of Tubac."

The expediente of 1812 was not in the archives; the alleged entry of October 10, 1812, copied in the titulo, was not there; the expediente of 1833 was not there; no survey was there. The entry of October 10, 1812, stated that the 2 sitios comprised "the old and depopulated town or settlement called Aribac." The depositions gave as landmarks "the one towards the north on the high pointed hill that rises on this side of the Tagito mine and borders on the Sierra de Buena Vista; the one towards the south standing on this side of the Longorena mine on a low hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut in it, and borders on the Sierra de las Cabaleras; and the one towards the west boundary standing at the Punta de Agua on a pointed hill opposite the Sicra del Babuquivari."

We have carefully examined and considered the testimony in respect of these descriptive calls given on the trial, and concur in the judgment of the court below that the land cannot be so identified as to admit of confirmation. We are constrained to conclude that adequate certainty is lacking, not only so in respect of the outboundaries, but this was a grant by quantity, a grant of 2 sitios only, and where situated in the larger area claimed cannot be satisfactorily determined. The record contains no original survey or field notes; and there is no certainty as to an initial point or center.

It appears that a preliminary survey of 2 sitios was made in 1881 for the surveyor general of Arizona, but we think from the evidence of the surveyor who made it that his location of the tract was essentially arbitrary. Indeed, he admitted that his survey "did not pretend to conform to the natural objects called for," and testified: "I surveyed the 2 leagues of land. It was left a good deal to me. They wanted it for cattle raising in that valley. I used my own judgment as to where to locate it."

[653] But the court was not called on to speculate on the subject or to accept the theories of the surveyor as to the best place *for cattle raising as controlling. The doctrine of the *Ely Case*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840, was not that it was within the power of the court to locate grants, but that if a location had been made, and there were facts enough to nail it to the ground, and determine its true boundaries, that might be done. The data did not exist here for the application of that principle.

The Gadsden treaty provided that grants made previously to September 25, 1853, were not to "be respected or be considered as obligatory, which have not been located and duly recorded in the archives of Mexico."

184 U. S.

We are of opinion that this grant of 2 sitios is not shown, and cannot be presumed, to have been located within the intent and meaning of the treaty. No question, therefore, could be raised in respect of *demasias*, and, moreover, as just held in *Rejoj Cattle Co. v. United States*, 184 U. S. 624, ante, 721, 22 Sup. Ct. Rep. 499, under the laws on that subject, the owner of the *cabida legal* did not have a vested property interest in the *demasias*, but, under circumstances, had the preference in acquiring it, if he so desired; and claims to overplus, the conditions to acquiring which were unperformed, were not open to confirmation by the court.

Decree affirmed.

UNITED STATES, *Appt.*,
v.

MARGARITO BACA.

(See S. C. Reporter's ed. 653-660.)

Private land claims—claim allowed by Congress—decision on the merits.

Any decision upon the merits of a claim under a Spanish grant of land which has been included in grants confirmed by Congress and duly patented by the proper authorities is expressly forbidden the court of private land claims by the act of March 3, 1891, § 13, declaring that all proceedings and rights shall be conducted and decided subject to the provision that "no claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority," since, where the court has no jurisdiction to confirm or reject, it has no authority to inquire into or pass upon the case beyond the decision of the question of jurisdiction.

[No. 170.]

Argued January 31, 1902. Decided February 24, 1902.

A PPEAL from the Court of Private Land Claims to review a decree upon the merits of a claim under a Spanish land grant. *Reversed* and remanded, with directions to dismiss for want of jurisdiction.

Statement by Mr. Justice Gray:

This was a petition to the court of private land claims by Margarito Baca for the confirmation to him, and to all other persons interested, of the title to a tract of land in Valencia county, in New Mexico, known as the San Jose del Encinal *tract, [654] alleged to have been granted to Baltazar Baca and his two sons in 1768 by the Spanish governor and captain general of New Mexico.

The petition prayed the court to take and exercise jurisdiction of the petition; to hear and determine all questions relative to the tract, its extent, proper location, and boundaries, and whether, when properly located, it would in any manner conflict with any neighboring property to which there was su-

perior title; to take cognizance of all other matters connected therewith fit and proper to be heard and determined; and by final decree to settle and determine the questions of the proper location of the tract, the validity of the title, and the boundaries thereof; to finally determine and forever set at rest all other questions properly arising between the petitioner and his co-owners and the United States; to confirm the title of the petitioner and his co-owners to them in fee simple; and for further relief.

The United States, by an amended answer filed by leave of court, alleged, among other things, that the tract demanded lay wholly within the lands granted and confirmed by Congress to the town of Cebolleta, reported as number 30, and to the pueblo of Laguna, reported as number 46, by the acts of June 21, 1860, chap. 167 (12 Stat. at L. 71), and March 3, 1869, chap. 152 (15 Stat. at L. 454), respectively; and that, the right to this tract having been thus lawfully acted upon and decided by Congress, the court of private land claims had no jurisdiction to allow the claim of the petitioner.

The court of private land claims, upon hearing and consideration, suspended proceedings until after the decision of this court in *United States v. Conway*, 175 U. S. 60, 44 L. ed. 72, 20 Sup. Ct. Rep. 13, and then entered the following decree:

[655] "This cause having heretofore come on to be heard upon the pleadings and exhibits on file, and upon full and legal proofs introduced and taken in the cause, both written and oral, and upon the original and other documents regarding said claim from file number 104 in the office of the surveyor general of the territory of New Mexico and from other sources in said office; and the court having considered the same, and having *heard counsel for all of the parties to the cause, and being fully advised in the premises, and on due consideration thereof, doth make the following findings of fact and law, that is to say:

"1. That in the year 1768 a valid and perfect title in fee simple to all of the land of the sitio de San Jose de Encinal, situated in what is now Valencia county, New Mexico, was by the proper officers of the Spanish government, the then sovereign power of what is now the territory of New Mexico, granted in equal shares unto Baltazar Baca and his two sons, and which said tract of land, situated in said county as aforesaid, was and is described as follows, that is to say: It is bounded on the east by a tableland; thence it extends westward 5,000 Castilian varas to a sharp-pointed black hill; on the north it is bounded by the Cebolleta mountain; on the south it is bounded by some white bluffs, at whose base runs the Zuñi road,—all as the same is known and designated upon the maps, plats, and surveys in file number 104 in the office of the surveyor general of the territory of New Mexico.

"2. That such title so remained in said grantees and their successors from thence hitherto, and up to and including the time of

the cession of the land now comprised in the territory of New Mexico to the United States, and has so continued from thence to the present time.

"3. That the said grantees and their successors have from the time of the making of said grant complied with all conditions necessary to the validity of the same.

"4. That such title in such grantees and their successors to said tract of land was and is complete, valid, and perfect, and so was at the date of the cession of the land now comprised in the territory of New Mexico to the United States by the treaty of Guadalupe Hidalgo; and the same was and is such a title as the United States is bound to recognize and confirm by virtue of said treaty and otherwise.

"5. That the claimant, Margarito Baca, is a lineal descendant of the said Baltazar Baca, one of the original grantees.

"6. But the court further finds, as a matter of fact, that the land comprised within the tract aforesaid is included within the outboundaries of the town of Cebolleta grant, reported number 46, and the Pague[656] ate purchase tract, reported number 30; the said Cebolleta grant having been confirmed to the claimants thereof by an act of Congress approved March 3, 1869, and thereupon duly patented to said claimants by the proper authorities of the United States; and the said Pagate purchase tract having been confirmed to the Indians of the pueblo of Laguna by an act of Congress approved June 21, 1860, and thereupon patented to said pueblo by the proper authorities of the United States.

"7. Wherefore it is considered and adjudged by the court that a complete, valid, and perfect title in and to the tract of land above described was and is vested in the said Baltazar Baca and his two sons and their successors in interest; but that, notwithstanding such fact, this court is without jurisdiction, because of the patents for the said land so as aforesaid issued by the United States, to decree and confirm the same unto them, or to order a survey thereof for such purpose, and for such reason no other or different relief than the pronouncing upon the character of the claimant's title as aforesaid is or will be granted by this court, and it is so ordered."

The United States appealed to this court.

Mr. Matthew G. Reynolds argued the cause, and, with *Solicitor General Richards*, filed a brief for appellant:

Jurisdiction over the land for any purpose is specifically denied the court of private land claims if it should find that the right to the land has been lawfully acted upon by Congress.

United States v. Conway, 175 U. S. 60, 44 L. ed. 72, 20 Sup. Ct. Rep. 13.

The court should not have pronounced upon the character of title which it had no jurisdiction to determine.

United States v. Roselius, 15 How. 37, 14 L. ed. 590.

Mr. B. S. Rodey argued the cause and filed a brief for appellee.

[656] *Mr. Justice Gray, after stating the case as above, delivered the opinion of the court:

The duty of securing private rights in lands within the territory ceded by Mexico to the United States by the treaties of 1848 and 1853 (whether complete and absolute titles or merely equitable interests needing some further act of the government to perfect the legal title), and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government, and might either be discharged by Congress itself, or be delegated by Congress to a strictly judicial tribunal or to a board of commissioners. **Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, 79, 44 L. ed. 78, 80, 20 Sup. Ct. Rep. 28, and cases there cited.

[657] The record in this case shows that the land demanded under a grant from the Spanish authorities in 1768 had been included in grants confirmed by acts of Congress in 1860 and 1869, and in patents issued accordingly by the proper authorities of the United States; and that the court of private land claims for that reason held that it was without jurisdiction to decree and confirm the land to the petitioners, or to order a survey thereof for that purpose, and yet undertook to adjudge that a complete, valid, and perfect title in fee simple had vested by the Spanish grant in the grantees, and remained in them and their successors to the present time.

This action of the court of private land claims is sought to be justified by the following provisions of the act of Congress of March 3, 1891, chap. 539, creating that court. 26 Stat. at L. 854.

By § 1 "said court shall have and exercise jurisdiction in the hearing and decision of private land claims, according to the provisions of this act."

By § 6 any person or corporation claiming lands within the limits of the territory acquired by the United States from the Republic of New Mexico, and since within the territories of New Mexico, Arizona, or Utah, or the states of Nevada, Colorado, or Wyoming, by virtue of such a Spanish or Mexican grant as the United States are bound by the treaties of cession to recognize and confirm, "which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect," to present a petition stating his case and praying that the validity of the title or claim may be inquired into and decided. "And the said court is hereby authorized and required to take and exercise jurisdiction of all cases or claims presented by petition in conformity with the provisions of this act, and to hear and determine the same, as in this act provided, on the petition and proofs in case no answer or answers be filed after due notice, or on the petition and the answer or answers of any person or persons interested 184 U. S.

in preventing any claim from being established, and the answer of *the attorney for [658] the United States where he may have filed an answer, and such testimony and proofs as may be taken;" and to "render a final decree according to the provisions of this act."

By § 7 "the said court shall have full power and authority to hear and determine all questions arising in cases before it, relative to the title to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations," the stipulations of the treaties of 1848 and 1853, "and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States, which decree shall in all cases refer to the treaty, law, or ordinance under which such claim is confirmed or rejected."

By § 8 "any person or corporation claiming lands in any of the states or territories mentioned in this act under a title derived from the Spanish or Mexican government, that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location, and boundaries, in the same manner and with the same powers as in other cases in this act mentioned. If in any such case a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect *other or further than as a release [659] of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby."

But all the powers so conferred upon the court of private land claims are subject to and controlled by § 13, which enacts that "all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions, as well as to the other provisions of this act, namely." Then follow several provisions, the fourth of which is: "No claim shall be allowed for any land, the right to which has hitherto been

lawfully acted upon and decided by Congress, or under its authority."

The language of this provision appears to us too clear to be misunderstood or evaded. The manifest intent of Congress appears to have been that with any land, of the right to which Congress, in the exercise of its lawful discretion, had itself assumed the decision, the court of private land claims should have nothing to do. The whole jurisdiction conferred upon that court is to confirm or reject claims presented to it, coming within the act. All the powers conferred upon it are incident to the exercise of that jurisdiction. When it has no jurisdiction to confirm or reject, it has no authority to inquire into or pass upon the case, beyond the decision of the question of jurisdiction. The peremptory declaration of Congress, that "no claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress," necessarily prohibits the court from passing upon the merits of any such claim.

In *United States v. Conway*, 175 U. S. 60, 44 L. ed. 72, 20 Sup. Ct. Rep. 13, it was accordingly declared by this court that the court of private land claims had no authority to confirm such a claim; and it necessarily follows that it has no authority to express any opinion upon the merits of it, when the right to all the land claimed has already been decided by Congress. *Las Animas Land Grant Co. v. United States*, 179 U. S. 201, 45 L. ed. 153, 21 Sup. Ct. Rep. 92. Confusion rather than certainty would result from allowing the expression of an opinion to stand, which could not be made the basis of any effectual judgment.

[660] *The court of private land claims having discovered that by the express prohibition of Congress it was without jurisdiction to decree and confirm the land to the petitioner, the merits of the case cannot be decided, either by that court, or by this court on appeal; and the decree below, which undertook to pass upon the merits, must therefore be reversed, and the case remanded with directions to dismiss the petition for want of jurisdiction, without prejudice to the right of the petitioner to assert his title in any court of competent authority. *United States v. Roselius*, 15 How. 36, 38, 14 L. ed. 590.

Decree reversed accordingly.

GEORGE F. EMBLEN, *Appt.*,

v.

LINCOLN LAND COMPANY, George F. Weed, Ida B. Weed, *et al.*

(See S. C. Reporter's ed. 660-664.)

Public lands—pre-emption entry—act confirming title pending contest—due process of law.

A contestant of a pre-emption entry, who has

neither made an entry on the land nor perfected a right to do so, has no vested right or interest therein of which he is deprived without due process of law by the act of Congress of December 29, 1894, enacted during the pendency of the contest, confirming the title of the original entryman.

[No. 147.]

Submitted January 29, 1902. Decided March 24, 1902.

A PPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Nebraska dismissing a bill in equity to charge a pre-emption entry with a trust. *Affirmed.*

See same case below, 42 C. C. A. 499, 102 Fed. 559.

Statement by Mr. Chief Justice **Fuller**:

This is an appeal from a decree of the circuit court of appeals for the eighth circuit, affirming the decree of the circuit court of the United States for the district of Nebraska, dismissing a bill filed therein by George F. Emblen against the Lincoln Land Company, George F. Weed, and others. The bill averred that Weed, September 19, 1885, made a cash pre-emption entry of the south-east quarter of section 22 of township 2, north of range 48 west, at the land office of the United States in the city of Denver, Colorado; that October 4, 1888, Emblen filed a contest against this entry on the ground that Weed had not complied with the requirements of *the law in respect of resi- [661]

dence on the premises, and that the entry was fraudulent, and made for speculative purposes; that Emblen's purpose in making the contest was not only that the laws of the United States should be complied with by Weed, but that by defeating Weed's entry he (Emblen) might be enabled to enter the land under the provisions of § 2 of chapter 89 of the laws of the United States, approved May 14, 1880 (21 Stat. at L. 140, chap. 89), which section read as follows: "Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancelation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancelation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported."

The bill further averred that on a hearing the register and receiver, on May 21, 1890, recommended the dismissal of the contest; that Emblen appealed to the Commissioner

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N.

Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

of the General Land Office, and his appeal was sustained; that thereupon Weed moved for a rehearing, and the officials and inhabitants of the town of Yuma, which had been located on the premises, intervened for the protection of their rights; the rehearing was granted, but before it was had a new land district was created at Akron, Colorado, which embraced the land in question; and the rehearing was ordered to take place at Akron on September 16, 1890; that Emblen did not appear, but filed objections to the jurisdiction, averring that the receiver at Akron was an interested party. On the rehearing the local officers found in favor of Weed and dismissed the contest, and thereupon Emblen appealed to the Commissioner of the General Land Office, and the Commissioner affirmed the action of the local land office, from which ruling Emblen further appealed to Mr. Secretary Noble, then Secretary of the Interior, who, by a decision rendered January 9, 1893, affirmed the action of the local officers and of the Commissioner.

[662] The bill then averred that Emblen subsequently moved for a *review of the decision before Mr. Secretary Smith, on the ground, among other things, of newly discovered evidence, and that a rehearing of the whole contest was ordered by him to be had before the local officers, in obedience to which the register and receiver at Akron set the case for rehearing on January 2, 1894; at which time Weed and other parties interested obtained a continuance; it being charged that this continuance was obtained for the purpose of procuring the passage of an act of Congress confirming the title of the original entryman, which act was in fact passed and approved December 29, 1894 (28 Stat. at L. 599, chap. 15), and was in these words: "That the pre-emption cash entry numbered forty-nine hundred and ninety, of George F. Weed, made at the district land office at Denver, Colorado, on the nineteenth of September, eighteen hundred and eighty-five, for the southeast quarter of section twenty-two, township two north, of range forty-eight west, which tract embraces the town of Yuma, Colorado, the county seat of Yuma county, Colorado, be, and the same is hereby, confirmed; and that patent of the United States issue therefor to said Weed."

Complainant alleged that while the bill for that act was pending before both houses of Congress full information was furnished them of the exact status of the contest over the land; that when the act was passed, the question of the title thereto was pending in the Land Department, which, under the Constitution and laws of the United States, is solely charged with the duty of determining the rights of pre-emptors and contestants and the right to issue patent therefor to the parties entitled thereto; and that Congress had no right or power to adjudicate on the question of the title to the premises in dispute; and that, moreover, under the provisions of section 2 of the act of Congress of May 14, 1880, complainant had a vested right to enter the land upon the determina-

tion of the contest then pending between himself and Weed; and that if complainant had been permitted to continue the contest to final determination he would have succeeded in securing the cancelation of the Weed entry; and that the passage of the act of Congress above cited, and the issue of patent thereunder, deprived complainant of a vested right without due process of law. It was also averred *that in January, 1886, [663] the town of Yuma was located on a part of the premises, and the town and a large number of other parties were made defendants, it being charged that they had full knowledge of the facts regarding the Weed entry.

The bill prayed that the several defendants be decreed to hold the title to the property in trust for the use and benefit of complainant, and that it be decreed that the patent issued under the act of Congress to Weed conveyed no property in the premises against the rights of complainant. The principal defendants interposed a demurrer to the bill, which was sustained, and the bill dismissed with costs. 94 Fed. 710. The case was then carried to the circuit court of appeals for the eighth circuit, and the decree of the circuit court affirmed. The opinion of Judge Shiras in the circuit court was adopted as the opinion of the circuit court of appeals, 42 C. C. A. 499, 102 Fed. 559. An appeal was then prosecuted to this court.

Mr. Ed. R. Duffie submitted the cause for appellant. *Mr. T. J. Mahoney* was with him on the brief:

Where the entryman has paid for the land and received a final receipt he is then the equitable owner, and the government holds the naked legal title in trust and has no other interest in the premises, and this is the case whether the entry be a cash entry or a donation.

Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339.

Weed was the owner of the land and his title was subject to be defeated only by showing that such title was acquired fraudulently. Prior to the act of May 14th, 1880, no one but the government had any right to question Weed's title or to assail it as fraudulent.

Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362.

The government, however, had and has a right to inquire into the bona fides of all pre-emption and homestead entries even after the issue of a patent, and having that right it can transfer it to any third party who becomes thereby invested with an interest which after acceptance cannot be divested by Congress or by anyone except in a lawful manner.

United States v. Fitzgerald, 15 Pet. 403, 10 L. ed. 785; *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Witherspoon v. Dun-*

cun, 71 U. S. 210, 18 L. ed. 339.

It is not necessary in order to make a

binding contract that money should be paid for it. If money is expended on property on the faith of a contract it constitutes a valuable consideration.

King v. Thompson, 9 Pet. 204, 9 L. ed. 102; *Haines v. Haines*, 6 Md. 435.

When the government descends from the plane of sovereignty and contracts with its citizens, such government, in respect to such act, is regarded as a private person itself and bound accordingly.

Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302; *People v. Stephens*, 71 N. Y. 527.

A contract existed between Emblen and the government, and Emblen is entitled to the protection of the courts to prevent a successful violation of the contract.

Pennoyer v. McConaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

While no vested right as against the United States is acquired in pre-emption cases until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or acquisition of the land, and rights so acquired, even though inchoate, have been repeatedly protected by this court.

Ard v. Brandon, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Morrison v. Stalnaker*, 104 U. S. 213, 26 L. ed. 741; *Duluth & I. R. Co. v. Roy*, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549.

Mr. J. W. Devreese submitted the cause for appellees. *Mr. Frank E. Bishop* was with him on the brief:

Every act of Congress making a grant is to be treated both as a law and a grant; and the intent of Congress, when ascertained, is to control in the interpretation of the law.

Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020. See also the case of *St. Paul, M. & M. R. Co. v. Greenhalgh*, 26 Fed. 563.

Even if the court should believe that Congress should not have interfered in the contest to quiet the title, the fact that it has done so is within its power, and cannot be questioned by the court.

Hartman v. Warren, 22 C. C. A. 30, 40 U. S. App. 245, 76 Fed. 162; *Moss v. Dowman*, 31 C. C. A. 447, 60 U. S. App. 69, 88 Fed. 181; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668; *Yosemite Valley Case*, 15 Wall. 77, *sub nom. Hutchings v. Low*, 21 L. ed. 82; *Norton v. Evans*, 27 C. C. A. 168, 49 U. S. App. 669, 82 Fed. 806; *Wagstaff v. Collins*, 38 C. C. A. 19, 97 Fed. 8.

Appellant's action was instituted under the act of May 14, 1880, for the purpose of obtaining a preferential right to make a filing upon the land. That act did not pretend to give the appellant or any contestant any other than a preference right to file after cancelation of the previous claimant's right.

King v. McAndrews, 50 C. C. A. 29, 111 Fed. 871.

738

***Mr. Chief Justice Fuller** delivered the [663] opinion of the court:

At October term, 1895, appellant filed his petition in this court for a writ of mandamus to the Secretary of the Interior to hear and decide the contest between himself and George F. Weed as to the quarter section of land in Colorado in question. The petition alleged in substance the same matters set up in the bill in this case. The writ of mandamus was denied, and **Mr. Justice Gray**, speaking for the court, said: "Such being the state of the case, it is quite clear that (even if the act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the Land Department, and cannot be controlled or restrained by mandamus or *injunction. After [664] the patent has once been issued, the original contest is no longer within the jurisdiction of the Land Department. The patent conveys the legal title to the patentee, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor." *Re Emblen*, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487.

The bill before us is such a bill, and the question arises whether it was within the power of Congress to exercise control over the land, and direct, as it did, the issue of the patent to Weed; and that depends on whether Emblen had obtained a vested right in the land before the passage of the act of December 29, 1894, as otherwise the power of Congress over its disposition as public land was plenary. *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Buxton v. Traver*, 130 U. S. 232, 32 L. ed. 920, 9 Sup. Ct. Rep. 509; *Gonzales v. French*, 164 U. S. 345, 41 L. ed. 460, 17 Sup. Ct. Rep. 102.

The Weed entry had not been canceled when the act of 1894 took effect, so that Emblen had no right to make entry under the act of May 14, 1880. The jurisdiction of the Land Department ceased with the issue of the patent, and the power of Congress to direct the patent to issue was unaffected by the possibility that Emblen, if he had been permitted to prosecute his contest, might have succeeded. As **Mr. Justice Miller** said in *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668, the rights of a claimant are to be measured by the acts of Congress, and if they show "that he acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

As Emblen never made an entry on the land, nor perfected a right to do so, it results that he had no vested right or interest which could defeat the operation of the act of 1894.

Decree affirmed.

184 U. S.

[665] *BANK OF IRON GATE, *Plff. in Err.*,
v.

MAGGIE A. BRADY, Executrix of James
D. Brady, Deceased.

(See S. C. Reporter's ed. 665-669.)

*Abatement of action—tort or assumpsit—
estoppel by election.*

1. A plaintiff whose cause of action must be treated as an action of tort in order to involve an amount sufficient to give the court jurisdiction cannot prevent an abatement by reason of defendant's death, because facts are averred in the declaration from which a contract to pay a sum below the jurisdiction of the court might be implied.
2. A judgment of a circuit court of the United States sustaining a demurrer to a declaration in an action which must be treated as one of tort, and not in assumpsit, in order to involve a sufficient amount to give that court jurisdiction, will, on the death of defendant after the cause has reached the appellate court, be reversed and the cause remanded to the circuit court, with instructions to set aside its judgment and enter one abating the action by reason of defendant's death.

[No. 175.]

*Argued February 28 and March 3, 1902.
Decided March 24, 1902.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia to review a judgment sustaining a demurrer to a declaration in an action against a collector of internal revenue. *Reversed* and remanded, with instructions to set aside the judgment and enter a judgment abating the action.

Statement by Mr. Justice **Brewer**:

On September 11, 1900, the plaintiff in error as plaintiff commenced this action in the circuit court of the United States for the eastern district of Virginia. The declaration, after stating that both parties were citizens of Virginia, alleged that the plaintiff was a state bank, chartered under the laws of that state, and the defendant a collector of internal revenue of the United States for the second district of Virginia, and that "between the months of November, 1899, and August, 1900, the plaintiff made, issued, and paid out \$700 of its circulating notes payable to the bearer and intended to be used for circulation in ordinary business as currency. The Commissioner of the Revenue of the United States assessed upon these notes a tax of 10 per cent on their face value, equal to \$70, which said tax is imposed upon them by the 19th section of the act of Congress of February 8, 1875 [18 Stat. at L. 307, chap. 36], and by § 3412 of the Revised Statutes of the United States; and said defendant, James D. Brady, acting as said collector of internal

revenue of the United States, required of plaintiff and demanded of it that it pay said tax; but because said section of said act of February 8, 1875, and said § 3412 of the Revised Statutes of the United States, imposing said tax upon said notes, are repugnant to the Constitution of the United States, the plaintiff refused to pay said unlawful tax; therefore on the — day of September, 1900, the defendant forcibly *en- [666] tered upon the premises of the plaintiff by virtue of a distress warrant held by him, authorizing and commanding him to collect said unlawful tax, and levied on and seized a large quantity of plaintiff's personal property, and was in the act of removing and carrying away said property to sell the same when the plaintiff, protesting against the illegality of defendant's act, paid him said tax to procure a release of its said property; that defendant well knew said acts of Congress imposing said tax were repugnant to the Constitution of the United States, and he entered upon plaintiff's premises and levied on and seized its property, well knowing that he was doing unlawful acts, and he did the same maliciously and with the purpose and intention of doing a wanton injury to plaintiff and damaging its credit, so as to do it all the harm possible, and said unlawful act has damaged its credit and done it an irreparable injury; that the act of Congress authorizing the issue of said distress warrant to collect said unlawful tax is repugnant to the Constitution of the United States, and because all of said acts of Congress are repugnant to the Constitution of United States the plaintiff's case arises under the Constitution of the United States; that said unlawful acts of said defendant have damaged the plaintiff \$6,000, and therefore it sues."

A demurrer to this declaration was filed, sustained, and judgment entered for the defendant. Thereupon this writ of error was sued out. After the case had reached this court the defendant, James D. Brady, died, and an application was made to revive in the name of his personal representative.

Mr. William L. Royall argued the cause and filed a brief for plaintiff in error:

The question whether the action survives is, of course, to be determined by Virginia law.

Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466.

Every wrong that relates to property survives against the personal representative.

4 Minor Inst. pt. 1, ed. 1893, p. 614; *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052; *Ferrill v. Brewis*, 25 Gratt. 770.

In determining whether a cause of action survives to the personal representatives, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced.

Lee v. Hill, 87 Va. 501, 12 S. E. 1052.

If assumpsit would lie for the injury, it

NOTE.—On abatement of action by death of party—see notes to *Weeks v. Russell* (Tenn.) 3 L. R. A. 212, and *Green v. Watkins*, 5 L. ed. U. S. 256.

survives against the personal representatives.

Lee v. Hill, 87 Va. 497, 12 S. E. 1052.

The bank could certainly have brought *indebitatus assumpsit* against Brady for money had and received.

Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; *Bend v. Hoyt*, 13 Pet. 263, 10 L. ed. 154; *Philadelphia v. The Collector*, 5 Wall. 731, *sub nom. Philadelphia v. Diehl*, 18 L. ed. 617; *State ex rel. McCarty v. Nelson*, 4 L. R. A. 300, note, 41 Minn. 25, 42 N. W. 548.

When more than \$2,000 are claimed by the declaration the jurisdiction will be sustained, unless the court can see, by inspecting the declaration itself, that as much as \$2,000 cannot be recovered.

Vance v. W. A. Vandercook Co. 170 U. S. 472, 42 L. ed. 1112, 18 Sup. Ct. Rep. 645; *Barry v. Edmunds*, 116 U. S. 560, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Smith v. Greenhow*, 109 U. S. 671, 27 L. ed. 1081, 3 Sup. Ct. Rep. 421.

Injury to a merchant's credit is a wrong for which he is entitled to recover damages.

Peshine v. Shepperson, 17 Gratt. 472, 94 Am. Dec. 468. See also *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Hartnett v. Plumbers' Supply Asso.* 169 Mass. 229, 38 L. R. A. 194, 47 N. E. 1002.

The right to a monthly salary not earned, but only contracted for, is "estate" within the meaning of the Virginia statute that preserves the right of action for any "damage to estate."

Lee v. Hill, 87 Va. 503, 12 S. E. 1052.

Solicitor General **Richards** submitted the cause for defendant in error:

The action does not survive because, with the exception of the claim to recover back the amount of \$70 as taxes wrongfully collected, it is purely an action *ex delicto*, based on an alleged personal tort.

To bring a case within the Virginia statute, which preserves the right of action for any damage to estate, there must be shown a damage to the property, real or personal, of the person aggrieved, and the damage must be direct, and not consequential. If this were not so, then every injury by which a person is subjected to pecuniary loss would, directly or indirectly, be a damage to his personal estate.

Henshaw v. Miller, 17 How. 212, 15 L. ed. 222; *Mumpower v. Bristol*, 94 Va. 739, 27 S. E. 581.

Mr. Justice **Brewer** delivered the opinion of the court:

[667] We have recently had before us a similar action against the same party, in which also was presented the question of survivorship, **Patton v. Brady*, 184 U. S. 608, *ante*, p. 713, 22 Sup. Ct. Rep. 493, and to the opinion filed in that case we refer for a discussion of the question. There the amount of property taken by the defendant as collector was over \$3,000; here it is only \$70. So far as a recovery of the tax charged to have been illegally levied and collected is sought, it is practically an action in as-

sumpsit for money had and received. Beyond that nothing is suggested but a tort, and a tort by which the estate of the defendant was not increased and the estate of the plaintiff damaged only as an indirect consequence of the alleged wrongful act of the defendant. Such a tort does not, either at common law or by the statutes of Virginia, survive the death of the wrongdoer. See authorities referred to in the opinion cited.

It may be added that it is not easy to see how upon the acts charged against the defendant there could be, even if the tax were declared illegal, any further recovery than the amount of such tax, with interest. It is true there is an averment that the defendant knew he was doing unlawful acts, that he did them maliciously and with the purpose and intention of doing a wanton injury to the plaintiff and damaging its credit, but no wrongful act is charged against him except it be in the mere collection of this alleged illegal tax. If the tax is legal, then nothing is disclosed which would give any right of recovery to the plaintiff; nothing was done by the collector in making the collection other than was strictly his duty. So, on the other hand, if the tax be adjudged illegal, no act of wrong is shown except in the fact of compelling payment. In other words, he is charged with doing nothing that an officer ought not to have done in attempting to make a collection. An averment that a party has acted maliciously and with the intention of doing a wanton injury does not add to the measure of relief obtainable in an action of implied assumpsit. If it does in any action, it is only in one sounding wholly in tort, in which malice and wantonness may sometimes justify exemplary damages.

The case stands thus: If this is to be treated as an action of assumpsit, then the amount in controversy is not sufficient to give the circuit court jurisdiction; if as an action of tort, then it did not survive. But a party cannot unite the two; avail *himself [668] of the large amount claimed on account of a tort in order to vest jurisdiction in the circuit court, and then on the death of the alleged wrongdoer prevent an abatement of the action, which would necessarily take place if the action was only for a tort, by reason of an averment of facts from which a contract to pay a small sum, one below the jurisdiction of the court, might be implied. In other words, he cannot call it tort to acquire jurisdiction, and contract to prevent abatement. The plaintiff elected to go into court on an action sounding in tort. It could not get in in any other way. It must abide by its election and cannot be permitted to transform its action thereafter into one of contract. Abatement must therefore follow.

No judgment was entered in favor of the plaintiff. There has been no adjudication in its favor, either on the contract or the tort. What disposition ought now to be made of the case? In *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, *sub nom. Gerling v. Baltimore & O. R. Co.* 38 L. ed. 311, 14

Sup. Ct. Rep. 533, where the action sounded wholly in tort, it was said (p. 703, L. ed. 322, Sup. Ct. Rep. 545):

"The result is that by the law of Virginia the administrator has no right to maintain this action, and that by the statutes of the United States regulating the proceedings in this court he is not authorized to come in to prosecute this writ of error. The only verdict and judgment below were in favor of the defendant, who is not moving to have that judgment affirmed or set aside. The original plaintiff never recovered a verdict, judgment upon which might be entered or affirmed *nunc pro tunc* in his favor. If the judgment below against him should now, upon the application of his administrator, be reversed and the verdict set aside for error in the instructions to the jury, or, according to the old phrase, a *venire de novo* be awarded, no new trial could be had, because the action has abated by his death. *Hemming v. Batchelor*, L. R. 10 Exch. 54, 44 L. J. Exch. N. S. 54; *Bowker v. Evans*, L. R. 15 Q. B. Div. 565; *Spalding v. Congdon*, 18 Wend. 543; *Corbett v. Twenty-third Street R. Co.* 114 N. Y. 579, 21 N. E. 1033; *Harris v. Crenshaw*, 3 Rand. (Va.) 14, 24; *Cummings v. Bird*, 115 Mass. 346.

"The necessary conclusion is that, the action having abated by the plaintiff's death, the entry must be writ of error dismissed."

[669] We are inclined to think that such is not exactly the proper *disposition to be made of this case, because in the plaintiff's cause of action is stated a claim for the recovery of a tax, which, as alleged, it has been wrongfully compelled to pay. While the circuit court may not have jurisdiction of an action for that claim on account of the small amount thereof, it would not be right to leave the present judgment as a bar to an action in a court that could take jurisdiction. The proper judgment is, and it is so ordered, that the case be remanded to the circuit court, with instructions to set aside its judgment and enter one abating the action by reason of the death of the defendant.

Case No. 194, between the same parties, involves the same question, and will be disposed of in the same way.

Mr. Justice **Gray** took no part in the decision of this case.

MARY E. H. GWIN *et al.*, Appts.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 669-675.)

Direct appeal from district court—California private land claims.

No direct appeal lies to the Supreme Court of

the United States from a decree of a district court dismissing the petition in a suit to enforce a final decree of confirmation of a California private land claim, entered on November 30, 1859, since, even if the provision of the court of appeals act of March 3, 1891, § 5, restricting direct appeals to certain excepted cases, of which this is not one, does not apply, the appellate jurisdiction of the Supreme Court over decrees of approval or correction in proceedings to confirm such claims was, by the express language of the act of July 1, 1864, § 3, taken away except as to cases where an appeal had already been taken.

[No. 172.]

Argued February 26, 28, 1902. Decided March 24, 1902.

ON APPEAL from the District Court of the United States for the Northern District of California to review an order dismissing the petition in a suit to enforce a decree of confirmation of a California private land claim. *Dismissed.*

See same case below, 102 Fed. 1006.

Statement by Mr. Justice **Brown**:

*This is an appeal from an order of the [670] district court of the United States for the northern district of California sustaining a demurrer to and dismissing the petition of the appellants, interveners, who prayed that a certain decree of the above-named district court, made on November 30, 1859, be ordered to be executed.

It appears that on January 31, 1852, certain persons by the name of Peralta presented to and filed with the board of land commissioners, under the act of Congress "to ascertain and settle the private land claims in the state of California," passed March 3, 1851 (9 Stat. at L. 631, chap. 41), a petition for the confirmation of the rancho of San Antonio. Subsequently the four claimants divided the lands among themselves in severalty, and the board, proceeding to examine the claim upon the evidence, decided in favor of its validity, but restricted the area of the grant by fixing the northern boundary line at San Antonio creek, which included about one half of the claim. Both parties appealed from this decision, and the claim was certified to the district court for the northern district of California, in which court a transcript of the proceeding was filed September 23, 1854. The district court upon the trial reversed the decree of the land commissioners, and declared the claim as set forth in the petition to be valid, by decree entered January 26, 1855.

From this decree the United States appealed to this court, which affirmed the decree of the district court (1857). *United States v. Peralta*, 19 How. 343, 15 L. ed. 678.

NOTE.—Direct review by the United States Supreme Court of circuit or district court judgments or decrees under the circuit court of appeals act.

I. General effect of the statute.

II. The designated classes of cases.

a. When jurisdiction is in issue.

II.—continued.

b. Prize causes.

c. Criminal causes.

d. When construction or application of Federal Constitution is involved.

e. When constitutionality of Federal law, or validity or construction of treaty, is drawn in question.

Two controversies were decided: First, that the officers issuing the grant had power to make grants of land; and, second, that the northern boundary of the land extended beyond San Antonio creek, according to the claim of the petitioners. Upon the mandate of this court being filed in the district court, a final decree was entered therein on November 30, 1859, slightly amending its former decree in substantial compliance with such mandate. This decree is still in force.

Afterwards, and on August 10, 1860, the surveyor general returned into court a corrected plat of a survey, purporting to be in conformity with the decree of November 30, 1859. Thereupon, and on October 8, 1860,

[671] one Carpentier and others filed a petition of intervention, in which they claimed adversely so much land as lay under the waters of

the estuary of San Antonio, up to the highest tide lands, through mesne conveyances from the state of California, and afterwards filed in court their exceptions to the survey. The United States also filed exceptions thereto. The litigation thus inaugurated continued for more than ten years, and finally resulted in a decree of the district court, August 4, 1871, approving a modified survey of the tract, a certified plat of which had been filed in the clerk's office. An appeal was taken from this decree by the United States to the circuit court for the ninth judicial circuit, by which court the appeal was dismissed July 31, 1874, and a decree entered that the claimants have leave to proceed under the decree confirming the survey as a final decree. The Commissioner of the General Land Office thereupon caused

II.—continued.

f. *When state law or Constitution is claimed to violate Federal Constitution.*

III. Summary.

I. General effect of the statute.

By the express provisions of the 5th section of the act of March 3, 1891, establishing the circuit court of appeals (26 Stat. at L. chap. 517, p. 827), "appeals or writs of error may be taken from the district courts, or from the existing circuit courts, direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

"From the final sentences and decrees in prize causes.

"In cases of conviction of a capital or otherwise infamous crime.

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

This act went into immediate effect, so as to permit a writ of error from a final judgment of a circuit court on conviction of an infamous crime, by a sentence rendered on March 18, 1891. *Re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735.

Provision was, however, made by the joint resolution of March 3, 1891 (26 Stat. at L. 1115), for the preservation of the existing jurisdiction of the Supreme Court over pending appeals, and in cases in which an appeal to that court should be taken before July 1 in that year.

But no direct appeal in a case not within those specified in the 5th section of the act of March 3, 1891, can be taken from the circuit to the Supreme Court of the United States after the time limited by this joint resolution. *National Exch. Bank v. Peters*, 144 U. S. 570, 36 L. ed. 545, 12 Sup. Ct. Rep. 767; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 159 U. S. 698, 40 L. ed. 311, 16 Sup. Ct. Rep. 189; *Ogden v. United States*, 148 U. S. 390, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Mason v. Pewabic Min. Co.* 153 U. S. 361, 38 L. ed. 745, 14 Sup. Ct. Rep. 847.

And notwithstanding this resolution, the mere

allowance of an appeal from a circuit to the Supreme Court of the United States before the passage of the circuit court of appeals act, without any steps taken to perfect such appeal, was in *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4, held not to vest in the Supreme Court exclusive jurisdiction, so as to preclude the circuit court from vacating the order of allowance at the same term, and granting an appeal to the circuit court of appeals.

So, an appeal from the circuit court of the United States, following the denial on February 17, 1892, of a rehearing, could, in a case in which the jurisdiction of that court depended solely upon diverse citizenship, only be taken to the circuit court of appeals, although an appeal before the motion for rehearing was made was, because allowed before the passage of the act of March 3, 1891, within the jurisdiction of the Supreme Court. *Voorhees v. John T. Noye Mfg. Co.* 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295.

And where a new decree was rendered by a circuit court after July 1, 1891, in pursuance of a mandate of the United States Supreme Court, which decree was in no sense such a mere execution or performance of the mandate as to be reviewable by mandamus, an appeal therefrom could, unless within the special provisions of March 3, 1891, § 5, only be taken to the circuit court of appeals. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 2 C. C. A. 542, 5 U. S. App. 97, 51 Fed. 929.

So, misconstruction or disregard by the circuit court of a mandate of the Supreme Court of the United States could not give the right of appeal to the Supreme Court after July 1, 1891, in a case not within either of the classes specified in this section, although the original appeal was taken before that date, and therefore was within the jurisdiction of the Supreme Court. *Mason v. Pewabic Min. Co.* 153 U. S. 361, 38 L. ed. 745, 14 Sup. Ct. Rep. 847.

But an appeal from a circuit court of the United States to the Supreme Court, taken prior to the passage of the act of March 3, 1891, was not governed by that act, although the citation was not signed or certified until subsequent to such enactment, as neither the signing nor the service of the citation is jurisdictional, its only office being to give notice to the appellee. *Mattingly v. Northwestern Virginia R. Co.* 158 U. S. 53, 39 L. ed. 894, 15 Sup. Ct. Rep. 725.

The United States court in the Indian territory was, by act of March 3, 1891, § 13, placed on the same footing with regard to writs of error and appeals to the Supreme Court of the

to be prepared and recorded a patent of the United States for that portion of the lands included in the survey.

Thirty-seven years after the entry of the decree of November 30, 1859, and twenty-two years after the dismissal of the above appeal in the circuit court, the successors in title of one of the Peraltas presented to the Commissioner of the General Land Office, September 2, 1896, a plat of a survey of the rancho San Antonio made by the surveyor general of California, November 25, 1895, under the act of Congress of July 23, 1866 (14 Stat. at L. 218, chap. 219), with certified copies of the decree of November 30, 1859, with a request that he issue to the petitioners a patent in accordance with such plat of survey, which the Commissioner declined to do, September 22, 1896, and

the Secretary of the Interior affirmed his decision. The appellants thereupon, and on July 27, 1899, filed in the district court for the northern district of California a petition of intervention in the original case of the *United States v. Peralta*, praying that the decree of November 30, 1859, might be ordered to be executed; that the government be required to issue to the appellants its patent for so much of the lands of the rancho as had not theretofore been patented to them, or any of them. The United States demurred to the petition, which on January 29, 1900, was dismissed. [99 Fed. 618.]

*This was followed by another similar pe-[672] titution, filed March 29, 1900, based upon the survey of 1895, which was also demurred to, and resulted in a decree, rendered May 28,

United States as that occupied by the circuit and district courts. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

But by the act of March 1, 1895 (28 Stat. at L. 693, chap. 145), a court of appeals was created in the Indian territory whose judgments are reviewable in the circuit court of appeals as judgments of circuit courts. In view of this enactment, the court, in *Ainsley v. Ainsworth*, 180 U. S. 253, 45 L. ed. 517, 21 Sup. Ct. Rep. 364, held that an appeal to the Supreme Court of the United States from a United States court in the Indian territory, in a case which was not affected by the Indian appropriation act of July 1, 1898, providing for such appeals in certain specified cases, could no longer be taken under act of March 3, 1891, § 13, and that the appeal must be prosecuted to the court of appeals in the Indian territory.

In an earlier case it had been held that the Supreme Court of the United States was given no appellate jurisdiction of a capital case in the United States court for the northern district of the Indian territory by the provisions of the act of March 3, 1891, for direct appeals or writs of error from district or circuit courts in capital cases, and for appeals and writs of error from the decisions of the United States court in the Indian territory as from circuit or district courts, as, when that act was passed that court had no jurisdiction over capital crimes, and the act of March 3, 1891, could not be regarded as made applicable merely by reason of the extension, by the act of March 1, 1895, of its jurisdiction to capital cases. *Brown v. United States*, 171 U. S. 631, 43 L. ed. 312, 19 Sup. Ct. Rep. 56.

No right to review the judgment of the supreme court of the District of Columbia in a criminal case was given the Supreme Court of the United States by the act of March 3, 1891, notwithstanding the fact that by D. C. Rev. Stat. § 846, judgments of that court could be reviewed by the Supreme Court of the United States upon writ of error or appeal "in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit court of the United States." *Re Heath*, 144 U. S. 92, 36 L. ed. 358, 12 Sup. Ct. Rep. 615.

The jurisdiction of the Supreme Court of the United States to review the decrees of the circuit or district courts in cases dependent upon diverse citizenship was taken away by this act, except as preserved by the joint resolution of the same date in pending cases and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891. *Wauton v. De Wolf*, 142 U. S. 138, 35 L. ed. 965, 12 Sup. 184 U. S.

Ct. Rep. 173; *Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co.* 146 U. S. 54, 36 L. ed. 885, 13 Sup. Ct. Rep. 13.

This statement of the rule must be understood to refer only to cases in which the jurisdiction of the lower court is not in issue, as, when that question is involved, the Supreme Court has jurisdiction by virtue of the 1st clause of the 5th section of the act of March 3, 1891. The rule is thus stated by Mr. Justice Gray in *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758: "The effect of these provisions is that, in any case in which the jurisdiction of the circuit court depends entirely on the citizenship of the parties (as in the cases now before us) and in which the jurisdiction of that court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the circuit court of appeals only."

The right of appeal from the judgments of circuit courts on habeas corpus directly to the Supreme Court of the United States still exists in any of the classes of cases designated in this section. *Ex parte Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

But such appeals from decrees of circuit courts on habeas corpus since the act of March 3, 1891, cannot be so taken unless the case is one of those so designated. *Cross v. Burke*, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22.

The Supreme Court of the United States was given no jurisdiction by the act of March 3, 1891, to review a judgment in favor of the United States in an action for cutting and carrying away timber the property of the United States. *Lutcher v. United States*, 157 U. S. 427, 39 L. ed. 759, 15 Sup. Ct. Rep. 718.

And by that act, the Supreme Court of the United States was deprived of its jurisdiction to entertain an appeal from the circuit court of the United States in a proceeding to enforce obedience to an order of the interstate commerce commission. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* 149 U. S. 264, 37 L. ed. 727, 4 Inters. Com. Rep. 347, 13 Sup. Ct. Rep. 837.

A suit for a mandatory injunction by one railroad company against another to compel the granting of equal facilities to the former as to other connecting roads is not one which can be appealed from a circuit court to the Supreme Court of the United States under the act of March 3, 1891. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 159 U. S. 698, 40 L. ed. 311, 16 Sup. Ct. Rep. 189.

And the jurisdiction of the Supreme Court of the United States to review a judgment of

1900, sustaining the demurrer and dismissing the petition. Whereupon petitioners appealed to this court.

Mr. James T. Boyd argued the cause, and, with **Mr. George A. King**, filed a brief for appellants on the question of jurisdiction:

Presenting the claim under the act of 1851 was an acceptance of an offer by the United States to the claimants under the former governments, that if they would submit their claims of title to the investigation of these tribunals they should receive the like recognition as her own citizens were entitled to, under grants of land from this government, and established a vested right in the claimant to the relief provided for.

Hancock v. Walsh, 3 Woods, 351, Fed. Cas. No. 6,012; *Reichart v. Felps*, 6 Wall.

165, 18 L. ed. 851; *United States v. Adams*, 6 Wall. 107, 18 L. ed. 793.

Appeal to this court was a portion of such relief.

Wherever mandamus will lie to compel execution, appeal will also lie from an order of the lower court refusing execution.

Perkins v. Fourniquet, 14 How. 328, 14 L. ed. 441; *Chicago, D. & V. R. Co. v. Fostick*, 106 U. S. 47, 27 L. ed. 47, 1 Sup. Ct. Rep. 10; *City Nat. Bank v. Hunter*, 152 U. S. 515, 38 L. ed. 536, 14 Sup. Ct. Rep. 675; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Ex parte Union S. B. Co.* 178 U. S. 317, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904. See also *Re Blake*, 175 U. S. 114, 44 L. ed. 94, 20 Sup. Ct. Rep. 42.

The act of 1891 is inapplicable to the case at bar because that act was limited to a dis-

the circuit court in a case arising under the customs revenue laws of the United States was taken away by the act of March 3, 1891, unless the writ of error or appeal was sued out before July 1, 1891. *Hubbard v. Soby*, 146 U. S. 56, 36 L. ed. 886, 13 Sup. Ct. Rep. 13.

The right to certificates of division of opinion in criminal cases in circuit courts under U. S. Rev. Stat. §§ 651, 697, was also taken away by the act of March 3, 1891, which impliedly repeals those sections, and furnishes the exclusive rule in respect of the appellate jurisdiction of the Supreme Court on appeal, writ of error, or certificate. *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983.

And this is so whether such certificates of division of opinion between the judges of the circuit court in a criminal case are made at the request of the United States or of the accused. *United States v. Hewecker*, 164 U. S. 46, 41 L. ed. 345, 17 Sup. Ct. Rep. 18.

The provisions of the earlier acts of Congress, imposing pecuniary limits upon the appellate jurisdiction of the Supreme Court over district and circuit courts, were superseded and repealed by the provisions of the act of March 3, 1891. *The Paquete Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

The writ of error from the Supreme Court to a circuit court, provided for by the act of March 3, 1891, is a matter of right, and the citation can be signed by a justice of the Supreme Court of the United States. *Re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735.

An appeal to the Supreme Court of the United States may be allowed by an associate justice of the court of private claims by virtue of § 9 of the act creating that court, which provides for appeals in the same manner and upon the same conditions as appeals from the judgments of circuit courts, in which, by U. S. Rev. Stat. § 999, any judge of such court has the power to act. *United States v. Pena*, 175 U. S. 500, 44 L. ed. 251, 20 Sup. Ct. Rep. 165.

The act of March 3, 1891, does not contemplate several separate appeals or writs of error by the same party in the same case and at the same time to or from two appellate courts. *Columbus Constr. Co. v. Crane Co.* 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822; *Mc-*

Lish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

For this reason, an appeal to the Supreme Court of the United States from a circuit court on the ground that the jurisdiction of the circuit court is in issue was dismissed in *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343, where the appellant had taken an appeal upon the whole case to the court of appeals, in which court the whole case was determined upon the merits, although the construction of a treaty and the constitutionality of the act of Congress were involved in the circuit court.

So, in *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713, a direct appeal to the Supreme Court of the United States from the decision of a circuit court involving a constitutional right was dismissed because the cause had been appealed to, and decided by, the circuit court of appeals.

And a writ of error from the Supreme Court of the United States to a circuit court will be dismissed if taken while the case is pending in the circuit court of appeals on writ of error from that court. *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822; *Columbus Constr. Co. v. Crane Co.* 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721.

But in a prior case in which there was some doubt whether a question was involved which would justify a direct appeal to the Supreme Court of the United States from the circuit court, the right to take such appeal, if it existed, was held not to be waived by taking an appeal also to the circuit court of appeals. *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

This case was distinguished in *Columbus Constr. Co. v. Crane Co.* 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721, *supra*, on the ground that in the earlier case the appeal was first taken to the Supreme Court, and accordingly the circuit court of appeals had declined, either to decide the case on the merits, or to dismiss the appeal while the case was pending on a prior appeal to the Supreme Court, and had continued the cause to await the result of that appeal. And in *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713, *supra*, in addition to this ground of distinction, the court relied on the fact that the earlier case had been removed to the Supreme Court on certiorari to the circuit court of appeals, and the case had then been disposed of on the merits without passing on the question, which had be-

tribution of the "appellate jurisdiction of the national judicial system."

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

Messrs. James T. Boyd and George A. King and Messrs. Thayer & Rankin and Boyd & Fifield filed a brief for appellants on the merits.

Mr. Matthew G. Reynolds argued the cause, and with *Solicitor General Richards*, filed a brief for appellee.

[672] **Mr. Justice Brown* delivered the opinion of the court:

The appeal in this case is taken from the decree of May 28, 1900, sustaining the demurrer to, and dismissing the petition of, the appellants, which was filed March 29, 1900.

Our jurisdiction of this appeal depends

come immaterial, whether the direct appeal could have been maintained or not.

The reasoning of these cases would seem to furnish an additional ground for the holding, in *Aspeu Min. & Smelting Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4, that no appeal lies to the Supreme Court of the United States from a decree entered by the circuit court pursuant to a mandate from the circuit court of appeals; and that the only remedy is by review of the decree of the circuit court of appeals. And also for the decision in *Webster v. Daly*, 163 U. S. 155, 41 L. ed. 111, 16 Sup. Ct. Rep. 961, that because an appeal from a decree of a circuit court of the United States which affirms its own prior decree in obedience to a mandate from the circuit court of appeals, and declares that the decree of that court is made the decree of the circuit court, is not an appeal from the circuit court of appeals, but is an appeal from the circuit court, the Supreme Court of the United States has no jurisdiction thereof under the judiciary act of March 3, 1901, § 5, when the case does not fall within one or the other of the classes of cases therein enumerated.

But the suing out by the plaintiff of a writ of error from the circuit court of the United States to the Supreme Court for the purpose of presenting a question of jurisdiction does not bar the right of the defendant to bring the case on the merits to the circuit court of appeals, but the cause in the latter court may be continued to await the decision of the Supreme Court upon the question of jurisdiction. *Northern P. R. Co. v. Glaspell*, 1 C. C. A. 327, 4 U. S. App. 238, 49 Fed. 482.

And the mere fact that a writ of error has been sued out of the Supreme Court of the United States to review a judgment of a circuit court on the ground that it had no jurisdiction of the cause does not deprive the circuit court of appeals of its jurisdiction to review an order denying a new trial in such case, claimed under a state statute giving the defeated party in an action for recovery of possession of real property the right to a second trial. *Shreve v. Cheesman*, 16 C. C. A. 413, 32 U. S. App. 676, 689, 69 Fed. 785. See also *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39, *infra*, II. a.

II. The designated classes of cases.

Questions which can be raised under the 5th section of the judiciary act of 1891, for the purpose of a direct appeal to the Supreme Court from a circuit court, must be real and present controversies that are substantial, not

upon certain statutes, which it becomes necessary to consider. By the original act of March 3, 1851 (9 Stat. at L. 631, chap. 41), to ascertain and settle the private land claims in the state of California, a commission of three persons was constituted (§ 1) to settle such claims, whose duty it was (§ 8) to decide upon their validity and to certify the same, with their reasons, to the district attorney of the United States. By § 9 an appeal was given to the district court, which was empowered to review the decision of the commissioners, and to decide upon the validity of such claim. By § 10 the district court was required, on application of the party against whom judgment was rendered, to grant an appeal to the Supreme Court of the United States. It was held in *United States v. Fossatt*, 21 How. 445, 16 L. ed. 186, that the jurisdiction of

only from the nature of the principles invoked, but from the relation to them of the party by whom they are invoked. *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368.

a. When jurisdiction is in issue.

Only after final judgment in the cause can the Supreme Court of the United States exercise its appellate jurisdiction over a circuit or district court under the act of March 3, 1891, on the ground that the jurisdiction of such court is in issue. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

And the use of a certificate to present to the Supreme Court a question of the jurisdiction of a district court in an action arising under the bankruptcy act of July 1, 1898, is subject to the general limitations of the act of Congress of March 3, 1891, under which the trial court cannot, by certificate, send up a question as to its own jurisdiction until after final judgment. *Bardes v. First Nat. Bank*, 175 U. S. 526, 44 L. ed. 261, 20 Sup. Ct. Rep. 196.

An order of the circuit court remanding a cause to the state court is not a final judgment or decree from which an appeal can be taken to the Supreme Court of the United States to present the question of the jurisdiction of the court below. *Joy v. Adelbert College*, 146 U. S. 355, 36 L. ed. 1003, 13 Sup. Ct. Rep. 186.

The jurisdiction of the district and circuit courts of the United States which, when in issue, will warrant direct review by the Supreme Court under the act of March 3, 1891, is a jurisdiction of such courts as Federal courts. *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497.

Hence, the Supreme Court of the United States cannot, on this ground, review a decree of the circuit court dismissing a suit on the ground that a judgment of the state court was a bar, and could not be reviewed by that court. *Ibid.*

The jurisdiction of a circuit court is not so in issue within the meaning and intent of the act of March 3, 1891, as to give the Supreme Court appellate jurisdiction to review its decree, because it was contended therein that complainants had not, by their bill, made a case properly cognizable in a court of equity. *World's Columbian Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

And a decision of the circuit court dismissing a bill on the ground that the remedy was at law, and not in equity, does not involve the

the board of commissioners extended, not only to the adjudication of questions relating to the genuineness and authenticity of the grant, but also to all questions relating to its location and boundaries; and that it did not terminate until the issue of a patent conformable to the decree.

[673] The law remained in this condition until 1864, when on July 1 an act was passed (13 Stat. at L. 332, chap. 194) "to expedite the settlement *of titles to lands in the state of California," the 2d section of which provided "that where proceedings for the correction or confirmation of a survey are pending . . . it shall be lawful for such district court to proceed and complete its examination and determination of the matter, and its decree thereon shall be subject to appeal to the circuit court of the United States for the district, in like manner, and

with like effect, as hereafter provided for appeals in other cases to the circuit court." By § 3 it was enacted "that where a plat and survey have already been approved or corrected by one of the district courts, . . . and an appeal from the decree of approval or correction has already been taken to the Supreme Court of the United States, the said Supreme Court shall have jurisdiction to hear and determine the appeal. But where from such decree of approval or correction no appeal has been taken to the Supreme Court, no appeal to that court shall be allowed, but an appeal may be taken within twelve months after this act shall take effect, to the circuit court of the United States for California, and said circuit court shall proceed to fully determine the matter."

jurisdiction of that court as a court of the United States, so as to warrant a review of its decision by the Supreme Court of the United States. *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497.

So, in *United States ex rel. Mudsill Min. Co. v. Swan*, 13 C. C. A. 77, 31 U. S. App. 112, 65 Fed. 647, the court thought that, whether it was within the power or jurisdiction of the circuit court of the United States on its equity side to refuse to enforce, under a state statute, the payment of a money decree by the issue of a writ of garnishment in equity was not such a question of jurisdiction as could be carried direct to the Supreme Court under the 5th section of the court of appeals act. The court said: "There is strong ground for thinking that the first paragraph of that section was intended to apply only to the initial questions of the jurisdiction of a United States district or circuit court, whether in law or equity, over the subject-matter and parties, and not to questions whether a court of equity or of law is the proper forum for the working out of rights properly within the particular Federal jurisdiction for adjudication."

But the question whether or not jurisdiction has been acquired by a proper service of process is one which involves the jurisdiction of the court within the meaning of that section. *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214.

So, the question whether, by the proceedings taken, the circuit court obtained jurisdiction over the defendants was said in *United States ex rel. Iron County v. Severns*, 18 C. C. A. 314, 37 U. S. App. 622, 71 Fed. 768, to be one which might have been carried for review directly to the Supreme Court of the United States.

The question as to the power of a district court, after a decision of the circuit court of appeals in proceedings in admiralty for the limitation of liability denying the right to limit the liability and remanding the cause for further proceedings, to enter personal judgment against the lessees of the vessel, is one as to the jurisdiction of the district court, which may be reviewed by the Supreme Court. *The Annie Faxon*, 31 C. C. A. 325, 59 U. S. App. 421, 87 Fed. 961.

But the jurisdiction of a circuit court of the United States is not drawn in question, so that a writ of error may be taken direct to the Supreme Court, by the mere denial of the right of the plaintiff to the judgment which has been entered in its favor, nor by the allegation that such judgment is erroneous, nor by the incorrect assertion in the affidavit of defense

which was adjudged insufficient that the facts therein set forth are jurisdictional facts. *Woodbridge & T. Engineering Co. v. Ritter*, 70 Fed. 679.

It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted which must be in issue to justify a direct appeal to the Supreme Court. *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63. For this reason the court in this case held that the jurisdiction of the circuit court over a suit to set aside a decree of foreclosure and sale was not so involved as to justify a direct appeal to the Supreme Court of the United States because the bill alleged the want of jurisdiction of the circuit court to make the decree attacked.

And on a subsequent appeal from the circuit court of appeals in the same case the court reaffirmed its prior holding. *Id.* 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537.

So, a decree of a circuit court, dismissing a petition for habeas corpus which set up the want of jurisdiction of that court in a prior cause in which an injunction had been issued, for violation of which the petitioner was imprisoned, not involving the jurisdiction of the court in the habeas corpus proceedings, was, in *Ex parte Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123, held not appealable to the Supreme Court, on the theory that it was a case "in which the jurisdiction of the court is in issue" within the meaning of this section.

The question involving the jurisdiction of the circuit court must have been in issue and decided against the parties seeking to bring it before the Supreme Court of the United States for determination. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353.

Thus, a party whose suit has been dismissed by the United States circuit court for want of jurisdiction has the right to have such judgment reviewed by the Supreme Court of the United States. *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293.

But an appeal from the circuit court of the United States to the Supreme Court solely for a review of a decision sustaining the jurisdiction of the circuit court will be dismissed where that court has rendered a decree for the defendant sustaining a demurrer to the bill for want of equity with full reservation of complainant's right to sue and proceed at law, since this decree does not injure the defendant, but sustains its contention, and cannot be reversed at defendant's instance, because put upon the one rather than the other of the grounds which

It appears perfectly clear from § 3 that the appellate jurisdiction of the Supreme Court was taken away, except as to cases where an appeal had already been taken. With this exception appeals must be taken under that act to the circuit court. The law remained in that condition until the passage of the court of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517), by the 5th section of which appeals can only be taken directly from the district court to this court in cases where the jurisdiction of the district court is in issue, in prize cases, criminal cases, constitutional cases, or cases involving the validity or construction of a treaty. As to all other cases, by § 6 appeal must be taken to the circuit court of appeals. As we said in *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118, this act provides for the distribu-

tion of the *entire* appellate jurisdiction of our national judicial system between the Supreme Court and the circuit court of appeals. As this case does not fall within any of the classes excepted by § 5, it is clear that if any appeal will lie at all, it should have been taken to the circuit court *of ap-[674] peals, and that we have no jurisdiction to enforce the execution of this decree by appeal from the district court. If the decree of November 30, 1859, rendered by the district court in pursuance of the mandate of this court, were not a final decree, it became final either August 4, 1871, when the modified survey was approved, and an appeal was taken to the circuit court and the appeal dismissed by Mr. Justice Field, July 31, 1874, or upon May 28, 1900, from which the appeal was taken in this case.

It is clear that, so far as concerns appeals

it alleged. *New Orleans v. Emsheimer*, 181 U. S. 153, 45 L. ed. 794, 21 Sup. Ct. Rep. 584.

In the following cases the circuit court of appeals denied its jurisdiction to review the judgments of circuit or district courts, because the jurisdiction of such courts was thought to be so in issue as to give the Supreme Court of the United States appellate jurisdiction. *United States v. Sutton*, 2 C. C. A. 115, 47 Fed. 129; *The Alliance*, 17 C. C. A. 124, 44 U. S. App. 52, 70 Fed. 273; *Cabot v. McMaster*, 13 C. C. A. 39, 24 U. S. App. 571, 65 Fed. 533; *Davis & R. Bldg. Co. v. Barber*, 9 C. C. A. 79, 18 U. S. App. 476, 725, 60 Fed. 465; *The Annie Faxon*, 31 C. C. A. 325, 59 U. S. App. 421, 87 Fed. 961; *Dudley v. Lake County*, 43 C. C. A. 184, 103 Fed. 209; *Evans-Snyder-Buel Co. v. McCaskill*, 41 C. C. A. 577, 101 Fed. 658; *Excelsior Wooden-Pipe Co. v. Pacific Bridge Co.* 48 C. C. A. 349, 109 Fed. 497.

But because other questions were involved, the circuit court of appeals, though assuming that a jurisdictional question was involved which would have given the Supreme Court appellate jurisdiction if invoked, has often upheld its own appellate jurisdiction. Examples of such cases are: *Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 260; *Crabtree v. Madden*, 4 C. C. A. 408, 12 U. S. App. 159, 54 Fed. 426; *American Sugar-Ref. Co. v. Johnson*, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 503; *Texas & P. R. Co. v. Bloom*, 9 C. C. A. 300, 23 U. S. App. 143, 60 Fed. 979; *Baltimore & O. R. Co. v. Meyers*, 10 C. C. A. 485, 18 U. S. App. 569, 62 Fed. 367; *King v. McLean Asylum of Massachusetts General Hospital*, 12 C. C. A. 139, 21 U. S. App. 407, 64 Fed. 325; *Green v. Mills*, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 129; *Coler v. Grain-ger County*, 20 C. C. A. 267, 43 U. S. App. 252, 74 Fed. 16; *Beck & P. Lithographing Co. v. Wacker & B. Brewing & Malting Co.* 22 C. C. A. 11, 46 U. S. App. 486, 76 Fed. 10; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 470, 475, 61 U. S. App. 13, 89 Fed. 769; *The Presto*, 35 C. C. A. 394, 93 Fed. 522.

The respective appellate jurisdiction of the Supreme Court and circuit courts of appeals in cases in which the jurisdiction of the circuit court is in issue, was considered in *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39, and the court laid down the following propositions: "(1) If the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question
184 U. S.

certified and take his appeal or writ of error directly to this court; (2) if the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it; (3) if the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court; (4) if, in the case last supposed, the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone; and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined; (5) the same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits." See also cases cited, *supra*, 1.

The power of the Supreme Court in suits in which its appellate jurisdiction is invoked under the act of March 3, 1891, § 5, by reason of the existence of a question as to the jurisdiction of the circuit court over the case, is restricted to the review of that question only. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *Schunk v. Moline, M. & S. Co.* 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416.

A determination by a circuit court as to whether the lands in dispute were of a value sufficient to give the court jurisdiction, though made on the evidence without submitting the question to the jury, may be reviewed by the Supreme Court on writ of error to the circuit court in passing on the question whether such court had jurisdiction of the cause. *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293.

By the 32d rule of the Supreme Court of the United States as amended cases brought to that court by writ of error or appeal under act of March 3, 1891, § 5, when the only question at issue is that of the jurisdiction of the court be-

from final decrees, they must be taken under laws then in existence, and to the court provided by such laws. To say that a decree rendered in 1900 may be appealed to a court whose jurisdiction to review it was taken away in 1864 is beyond belief. Even if the court of appeals act do not apply to this case, the jurisdiction of this court was clearly taken away by the act of 1864, and transferred to the circuit court of the United States for California, except as to appeals which had already been taken. If there had been no reservation of pending cases, even such cases would have fallen within the law. *Baltimore & P. R. Co. v.*

Grant, 98 U. S. 398, 401, 25 L. ed. 231, 232. In that case a writ of error had been sued out on December 6, 1875, to reverse a judgment of \$2,250 by the supreme court of the District of Columbia. At that time the appeal was properly taken to this court, but on February 25, 1879, Congress passed an act limiting writs of error from this court to judgments exceeding the value of \$2,500, and it was held that the writ of error must be dismissed. Said the Chief Justice: "The act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set

low, will be advanced on motion and taken on printed briefs or arguments in accordance with the prescription of rule 6 in regard to motions to dismiss writs of error or appeals. *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4.

A certificate by the circuit court presenting the question of jurisdiction is indispensable to sustain the appellate jurisdiction of the Supreme Court of the United States when invoked under the act of March 3, 1891, § 5, on the ground that the case is one in which the question of the jurisdiction of the court below is in issue. *Colvin v. Jacksonville*, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634; *Moran v. Hagerman*, 151 U. S. 329, 38 L. ed. 181, 14 Sup. Ct. Rep. 354; *Davis & R. Bldg. & Mfg. Co. v. Barber*, 157 U. S. 673, 39 L. ed. 853, 15 Sup. Ct. Rep. 719; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Davis v. Geissler*, 162 U. S. 290, 40 L. ed. 972, 16 Sup. Ct. Rep. 796.

And the absence of such certificate cannot be helped out by resort to the petition for writ of error or to the assignment of errors. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353.

An assignment of errors filed in a circuit court of the United States under the direction of that court is not the equivalent of a certificate of jurisdiction for the purpose of presenting that question to the Supreme Court. *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185.

The question of the jurisdiction of the circuit court of the United States is, however, sufficiently certified to the Supreme Court where the petition for appeal is upon that sole ground, and the court, in the order allowing the appeal, states that the appeal is granted "solely upon the question of jurisdiction," and directs the portions of the record to be certified to the Supreme Court to present that question. *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

And this question is likewise sufficiently certified to warrant review by the Supreme Court, where the district judge certifies in the bill of exceptions that it was "held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed," and the order allowing the writ of error certifies in effect that it was allowed "upon the question of jurisdiction," which was the only question involved in the case, for want of which the court dismissed the suit. *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375.

The same is true where the record shows that the only matter tried and decided in the circuit court was a demurrer to the plea to the jurisdiction, and the petition upon which the writ of error was allowed asks only for the review of the judgment that the court had no jurisdiction of the action. *Interior Constr. &*

Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272.

And this question is sufficiently certified to sustain an appeal to the Supreme Court of the United States where the record shows the allowance of appeal taken upon the express ground of error in assuming jurisdiction, and in refusing to dismiss for want of jurisdiction, with a prayer that the question of jurisdiction be certified, and the certificate states that a copy of so much of the record is sent up as is necessary to determine the question of jurisdiction, a part of which record is the opinion in accordance with which the motion to dismiss for want of jurisdiction was denied. *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

And a direct appeal from a circuit court to the Supreme Court of the United States on the ground that the jurisdiction of the court is in issue may be sustained where the final decree dismissing the bill and the order allowing the appeal therefrom, as well as the distinct and contemporaneous certificate by the court, show that the only question on which the decree was based was that of jurisdiction. *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526.

Nor is the use of the word "certified" necessary to present the question of the jurisdiction of the circuit court on appeal to the Supreme Court of the United States, but a plain declaration that the single matter sent up by the record is a question of jurisdiction, and a clear, full, and separate statement of the precise question is sufficient. *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

The entire absence of the certificate of the question of the jurisdiction is, however, fatal to an appeal from the district or circuit court to the Supreme Court of the United States where the only question of jurisdiction was raised by a demurrer, which alleged that a final decree had been made adjudicating all the issues in the cause, and that the court had no power or jurisdiction to grant the petitioners relief. *Van Wagenen v. Sewall*, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370. The court regarded this demurrer as in substance only a general demurrer to the plea for the want of equity, and said that in any event it could not have been required to have searched the record to ascertain whether the petition was dismissed for the want of equity, or for some other reason, and added that the question of jurisdiction should plainly and distinctly be certified, or, at least, it should appear so clearly in the decree of the court below that no other question was involved that no further examination of the record would be necessary.

The mere allowance of an appeal by a district court of the United States is not the equivalent of a certificate of jurisdiction for the purpose of presenting that question to the Supreme Court,

aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal, and gave us the authority to re-examine, reverse, or affirm judgments or decrees thus brought

[675]

although the prayer for appeal states that claimant appealed upon the ground that the court was without jurisdiction to make the said decree, but specified no question of jurisdiction, and asked that a transcript of the record be sent up as if the appeal were on the whole case. *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185.

Nor does the allowance of a writ of error in general terms on a petition asking for a review of all the rulings, judgments, and orders of the court "upon the question of jurisdiction raised in said exceptions, pleas, and demurrers, and the other papers on file in this cause," without defining or indicating any specific question on jurisdiction, present such a definite question of jurisdiction as will supply the want of a formal certificate to sustain the writ of error from the Supreme Court to a district court of the United States under the act of March 3, 1891, § 5. *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397.

A sufficient certification of a question of jurisdiction by the circuit court to the Supreme Court of the United States is not made by the statement in an order allowing an appeal from a decision that the special agent of the land office is entitled to his discharge from the custody of the sheriff, that the questions whether the court has jurisdiction to discharge him, or whether it should remand him to the custody of the sheriff to be dealt with by the state court, are certified to the Supreme Court where there is no intimation that the lower court did more than pass upon the merits of the controversy, and the questions merely implied that the court assumed that it had jurisdiction, either to dispose of the case on its merits, or to remand the case to the state court, and require him to resort to his remedy by writ of error, and that the instruction of the Supreme Court was desired by the court below as to the proper exercise of its discretion. *Arkansas v. Schliehholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229.

The certificate of jurisdiction by a circuit court of the United States to the Supreme Court for decision must be granted during the term at which the judgment or decree is entered. *Colvin v. Jacksonville*, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866.

And the rule that permits an amendment of the record *nunc pro tunc* does not apply to filing a certificate of the question as to the jurisdiction of the district court of the United States after the term at which the cause was decided and the appeal allowed, where there is nothing in the record prior to the expiration of that term to indicate any attempt or intention to file a certificate during that term, and there was no omission to enter anything which had been done at that time. *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 187.

184 U. S.

up. The repeal of that law does not vacate or annul an appeal or a writ [of error] already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit because our jurisdiction is gone."

Similar cases are by no means infrequent in this court. Thus in *Yeaton v. United States*, 5 Cranch, 281, 3 L. ed. 101, it was held that if the law under which a sentence of forfeiture was inflicted expired or were absolutely repealed after an appeal and be-

b. Prize causes.

The provisions of the earlier acts of Congress limiting the jurisdiction of the Supreme Court of the United States of appeals from district courts in prize causes were superseded and repealed by the act of March 3, 1891, and jurisdiction of appeals from all final sentences and decrees in prize causes may be taken by the Supreme Court of the United States under the 5th section of that act, without regard to the amount in dispute, and without any certificate of the district judge as to the importance of the particular case. *The Paquete Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

c. Criminal causes.

A crime which is punishable by imprisonment in a state prison or penitentiary is an infamous crime within the meaning of the act of March 3, 1891, whether or not the accused is or could be sentenced or put to hard labor. *Re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735; *United States v. Sutton*, 2 C. C. A. 115, 47 Fed. 129.

The use of the mails to defraud, being punishable under U. S. Rev. Stat. § 5480, by fine or imprisonment in a state penitentiary, is an infamous crime, and a conviction thereof in a district court is therefore reviewable in the Supreme Court of the United States, and not in the circuit court of appeals. *Stokes v. United States*, 9 C. C. A. 152, 23 U. S. App. 289, 60 Fed. 597.

By the act of January 20, 1897, the jurisdiction of the Supreme Court to review convictions in district or circuit courts was restricted to convictions of capital crimes. A conviction of murder punishable with death is a conviction of a capital crime within the meaning of this amendment, although the jury are given the power, by the act of January 15, 1897, to qualify the verdict by adding the words "without capital punishment," and by reason of their exercise of that power the punishment actually imposed is imprisonment for life. *Fitzpatrick v. United States*, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944; *Good Shot v. United States*, 179 U. S. 87, 45 L. ed. 101, 21 Sup. Ct. Rep. 33.

But the Supreme Court of the United States has no jurisdiction of an appeal from a district court in a case in which a capital offense was charged in the indictment, and the accused was convicted of a lesser crime. *Davis v. United States*, 46 C. C. A. 619, 107 Fed. 753.

A criminal case may, however, be taken directly from the circuit court to the Supreme Court of the United States, although it is not a case of conviction of a capital crime, where it involves the construction or application of the Constitution of the United States. *Motes v. United States*, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993.

fore sentence by the appellate court, the sentence must be reversed. See also *The Rachel v. United States*, 6 Cranch, 329, 3 L. ed. 239; *United States v. Preston*, 3 Pet. 57, 7 L. ed. 601; *Norris v. Crocker*, 13 How. 429, 14 L. ed. 210. In *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 18 L. ed. 540, it was held that the jurisdiction of the circuit courts between citizens of the same state in internal revenue cases, conferred by the act of 1864, was taken away by the act of 1866, and that cases pending at the passage of the act fell with its repeal. *Ex parte McCordle*, 7 Wall. 506, 19 L. ed. 264. These cases fully establish the proposition that a

repealing statute which contains no saving clause operates as well upon pending cases as upon those thereafter commenced.

In the case under consideration there was a saving of suits already begun, but there was an express proviso that, where no appeal had been taken to the Supreme Court, no appeal to that court should be allowed. That law remained unchanged until the court of appeals act of 1891, to which all appeals from circuit or district court must now be taken, with a few specified exceptions.

The appeal must be dismissed.

The granting of a writ of error from the Supreme Court of the United States to a circuit court, allowable because the final judgment on conviction was rendered subsequent to March 3, 1891, cannot create a right to a bill of exceptions which did not exist at the time of the conviction. *Re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735.

d. When construction or application of Federal Constitution is involved.

The right to vote for members of Congress of the United States has its foundation in the Constitution of the United States, and therefore a case involving the question may be brought directly from the circuit court to the Supreme Court under the 5th section of the act of March 3, 1891. *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17.

And the question whether or not the Constitution of the United States allows regulations of the treasury department adopted by merely executive officers to be regarded as having the force of law is one that involves the construction or application of the Constitution of the United States within the meaning of this section. *Boske v. Comingore*, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701.

And a case which presents the question whether certain business is interstate commerce within the meaning of U. S. Const. art. 1, § 8, and whether a certain ordinance amounts to a regulation of interstate commerce, and as such discriminates against complainant's business, involves the construction and application of the United States Constitution, and therefore a judgment of the circuit court therein is reviewable only in the Supreme Court. *Macon v. Georgia Packing Co.* 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 781.

And a habeas corpus case, in which the traverse of the sheriff's return alleges that the petitioner is detained in custody in violation of the Constitution of the United States, involves the construction or application of such Constitution, and an appeal therein can therefore only be taken to the Supreme Court. *Ex parte Jacobi*, 104 Fed. 681.

But a determination by a circuit court as to the force and effect to be given to a foreign judgment or decree does not involve the construction or application of the Federal Constitution so as to deprive the circuit court of appeals of jurisdiction to review such determination, but rather involves the interpretation of the acts of Congress of May 26, 1790, and March 27, 1804, defining the full faith and credit which by the Federal Constitution must be given to a foreign judgment or decree. *Merritt v. American Steel-Barge Co.* 21 C. C. A. 525, 40 U. S. App. 127, 75 Fed. 813.

Because the circuit court directed the jury to find a verdict for defendant, this does not

give the Supreme Court of the United States jurisdiction to review the judgment on the theory that the plaintiff was deprived of the right to trial by jury, and therefore the case involves the construction or application of the Constitution of the United States. *Treat Mfg. Co. v. Standard Steel & I. Co.* 157 U. S. 674, 39 L. ed. 553, 15 Sup. Ct. Rep. 718.

The construction or application of the Constitution of the United States must be involved as controlling, in order to warrant direct review of the judgment therein by the Supreme Court. *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; *World's Columbian Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 651.

Hence, the fact that a complaint in a suit to set aside the decree of foreclosure and sale alleges irregularities, errors, and jurisdictional defects in the foreclosure proceedings and fraud in respect thereof, and in the subsequent transaction which might have enabled the mortgagor upon the direct appeal to have avoided the decree of sale, or which might have justified the circuit court in setting aside the decree, does not so raise a question of due process of law as to warrant a direct appeal to the Supreme Court, on the theory that the case involves the construction or application of the Constitution of the United States. *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

So, a plea that parties had been improperly or collusively joined to make the case cognizable by the circuit court under the act of March 3, 1875, which, if true, required the dismissal of the suit as one of which that court could not take cognizance under that act, does not involve or require the construction or application of the Constitution of the United States within the meaning of the act of March 3, 1891, so as to give the Supreme Court of the United States jurisdiction of a direct appeal from the circuit court. *Merritt v. Boudoin College*, 169 U. S. 551, 42 L. ed. 850, 18 Sup. Ct. Rep. 415.

And the dismissal of a petition for habeas corpus does not, on the theory that petitioner was deprived of his liberty without due process of law, so involve the construction or application of the Federal Constitution as to warrant a direct appeal from the circuit to the Supreme Court of the United States, where the petitioner did not proceed on any such theory, but only on that of the want of jurisdiction over the subject-matter and the person of petitioner in a prior suit in which an injunction had been issued, for a violation of which the petitioner was imprisoned, and the discharge was refused by the circuit court because jurisdiction existed. *Ex parte Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

A definite issue as to the possession of a right under the United States Constitution must be distinctly deducible from the record before the

judgment of the circuit court can be reviewed by the Supreme Court under the fifth section of the act of March 3, 1891, as a case involving the construction or application of the Constitution of the United States. *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

The constitutional objection that the sentence of an army court-martial imposed a double punishment for the same offense can hardly be deemed to be so raised in the United States circuit court as to authorize a direct appeal to the Supreme Court, by the bare averment, in a petition for a writ of habeas corpus, that, petitioner having suffered the punishment of dismissal and of publication, his "imprisonment is without authority of law," and his further punishment and detention "and the carrying out of said sentence are contrary to law and the provisions of the Constitution of the United States, and are illegal." *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713.

Nor can a case be said to involve the construction or application of the Constitution of the United States, or the validity or construction of a treaty, so that a writ of error will lie directly from the Supreme Court of the United States to the circuit court, merely because the complaint in ejectment states reliance on a certain article of a treaty and on the 5th Amendment to the Constitution, without asserting that any right, title, privilege, or immunity is derived from either Constitution or treaty, or indicating in what way the cause of action is claimed to arise from either, where the court does not decide any question as to the application or construction of the Constitution, or validity or construction of the treaty. *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

A case cannot be brought from the United States circuit court direct to the Supreme Court on the single ground that it involves the construction or application of the Constitution of the United States when no construction or application of the Constitution was either expressed or asked for in the circuit court. *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969.

And an assignment of errors cannot be availed of to import this question into a cause which the record does not show was raised in the court below, and a ruling asked thereon, so as to give jurisdiction to the Supreme Court of the United States to review the judgment of a circuit court. *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229.

The circuit courts of appeals have in a number of cases dismissed appeals from, or writs of error to, a circuit court because the construction and application of the Constitution of the United States was deemed to be so involved as to give the Supreme Court appellate jurisdiction. *Westerly v. Westerly Waterworks Co.* 22 C. C. A. 278, 33 U. S. App. 723, 76 Fed. 467; *Hamilton v. Brown*, 3 C. C. A. 639, 2 U. S. App. 540, 53 Fed. 753; *Illinois C. R. Co. v. Adams*, 35 C. C. A. 635, 93 Fed. 852; *Davis v. Burke*, 38 C. C. A. 299, 97 Fed. 501; *J. C. Hubinger Co. v. Quincy Horse R. & Carrying Co.* 39 C. C. A. 336, 98 Fed. 897; *Dawson v. Columbia Ave. Saving Fund*, S. D. Title & T. Co. 42 C. C. A. 258, 102 Fed. 200; *Seattle v. Thompson*, 114 Fed. 96.

No right to sue out a writ of error in a criminal case was conferred upon the United States by the provision of act of March 3, 1891, § 5, by which appeals or writs of error may be taken from the district or circuit courts directly to

the Supreme Court in any case involving the construction or application of the Constitution of the United States. *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609.

The contention that a new incorporation of a city bringing in people, who were not formerly in such city, without giving them any opportunity to be heard, is in violation of their constitutional rights, cannot be made by the city on behalf of such people, who have not objected to the incorporation on that ground, so as to raise a constitutional question for the purpose of a direct appeal to the Supreme Court in an action against the city on unpaid coupons for interest on bonds issued after the new incorporation. *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368.

e. *When constitutionality of Federal law, or validity or construction of treaty, is drawn in question.*

A case which involves the constitutionality of a law of the United States is within the appellate jurisdiction of the Supreme Court of the United States over a circuit court, by virtue of the provisions of the 5th section of the act establishing circuit courts of appeals. *Ekin v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522.

It is only when the constitutionality of the law of the United States is drawn in question, not incidentally, but necessarily and directly, that the jurisdiction of the Supreme Court of the United States to review a judgment of the circuit court under this section, can be invoked on the theory that the case is one "in which the constitutionality of a law of the United States is drawn in question." *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

And the constitutionality of a law of the United States cannot be deemed so drawn in question, nor the construction or application of the Federal Constitution so involved, as to defeat the jurisdiction of the circuit court of appeals to review the judgment of the circuit court because the constitutionality of certain acts of Congress on which appellees relied might have been challenged by their adversaries, where the ground of the decision had no reference to the construction or application of the Constitution or the validity of the acts of Congress in respect of that instrument, and the conclusions upon which the order of the circuit court was entered were unaffected by any considerations of that character. *World's Columbian Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654. The court said: "Cases in which the construction or application of the Constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which present an issue upon such construction or application or constitutionality the decision of which is controlling; otherwise every case arising under the laws of the United States might be said to involve the construction or application of the Constitution, or the validity of such laws."

The constitutionality of a law of the United States is not so drawn in question as to give jurisdiction to the Supreme Court of the United States of an appeal from a circuit court, where the record does not show that the question was presented to the court below, and merely shows that the question was contained in an assignment of errors made for the purpose of an appeal. *Arkansas v. Schlierholz*, 179 U. S. 598,

45 L. ed. 335, 21 Sup. Ct. Rep. 229. See also cases cited *supra*, II. d.

Where the Supreme Court of the United States has acquired jurisdiction to review a judgment of a district or circuit court because the constitutionality of a law of the United States is drawn in question, it acquires jurisdiction to dispose of the entire case and of all the questions involved in it. *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397.

The construction or validity of a treaty of the United States is not involved for the purpose of a writ of error from the Supreme Court of the United States to a circuit court, where the plaintiffs in error did not connect themselves with, or claim, any rights under such treaty, or under any of the parties thereto. *Budzisz v. Illinois Steel Co.* 170 U. S. 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 503.

Nor will mere allegations to the effect that the construction or validity of a treaty is drawn in question, not based on the facts of the case, create a case which the Supreme Court of the United States can review on writ of error to a circuit court. *Ibid.*

The validity or construction of the treaty of 1842 with Great Britain is not so involved on an application in a circuit court for habeas corpus as to warrant a direct appeal to the Supreme Court of the United States from the order discharging the writ, where the only question arising under such treaty, and decided by the commissioner and by the circuit court, was a question of fact as to whether the petitioner was or was not at the time of his arrest seeking an asylum in the United States within the meaning of such treaty. *Re Newman*, 79 Fed. 615.

And a proceeding in admiralty in which the district court held that the waters north of the boundary line established by the treaty with Great Britain of June 15, 1846, are not "foreign waters" within the meaning of U. S. Rev. Stat. § 4370, imposing a penalty upon other than United States officers engaged in towing vessels of the United States, except where the towing in whole or in part is within or upon foreign waters, does not involve the validity or construction of the treaty, within the meaning of the 5th section of the circuit court of appeals act. *The Pilot*, 3 C. C. A. 392, 7 U. S. App. 457, 53 Fed. 11.

But a suit to establish a land claim in which it was contended, on the one side, that title was absolutely confirmed by a treaty with Spain, and, on the other that, as it was not a suit brought under any of the acts of Congress in that behalf, the treaty could not be held to be self-executing, is properly brought by direct appeal from the circuit court to the Supreme Court of the United States as involving the construction of such treaty. *Mitchell v. Furman*, 180 U. S. 402, 45 L. ed. 596, 21 Sup. Ct. Rep. 430.

Inasmuch as, prior to the act of March 3, 1891, appeals were allowed in habeas corpus cases, an appeal, and not a writ of error, from a decision of a district court denying an application for a discharge on a writ of habeas corpus where the construction of the extradition treaty is involved, is authorized by the 5th section of the court of appeals act. *Rice v. Ames*, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406.

f. When state law or Constitution is claimed to violate Federal Constitution.

The jurisdiction of the Supreme Court of the United States to review a judgment of a circuit

court in a case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below. *Holder v. Aultman, M. & Co.* 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269.

Nor does such jurisdiction depend upon the question whether or not the claim is well founded. *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

And such jurisdiction is not limited to a case in which the constitutional question is raised by the plaintiff, but extends to every case in which either party claims that the state law is in contravention of the Constitution, and that claim is either sustained or rejected if the unsuccessful party seeks to have the decision reviewed by the Supreme Court. *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

There is an intimation in *Indianapolis v. Central Trust Co.* 27 C. C. A. 580, 53 U. S. App. 658, 83 Fed. 529, that if the claim were made in bad faith it would not confer jurisdiction on the Supreme Court.

And good faith seems to be regarded, in *Hastings v. Ames*, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726, as essential to sustain the jurisdiction of the Supreme Court on this ground.

So, in *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223, the court said that the claim that a state law violates the Federal Constitution must be real and colorable, not fictitious and fraudulent.

City ordinances are the equivalent of laws of a state, within the meaning of the provision of the 5th section of the act of March 3, 1891, giving jurisdiction to the Supreme Court of the United States of an appeal from the circuit court in a case in which a law of a state is claimed to violate the Constitution of the United States. *Ibid.*

A suit to enjoin the collection of a state tax upon the value of patent rights, on the ground that the state statute authorizing the tax contravenes the Federal Constitution, is not a case arising under the patent laws of the United States which the circuit court of appeals has jurisdiction to review, but is one of which the Supreme Court, under this section, has exclusive appellate jurisdiction. *Holt v. Indiana Mfg. Co.* 25 C. C. A. 301, 46 U. S. App. 717, 80 Fed. 1.

For the reason that the circuit court of appeals was of the opinion in the following cases that a state Constitution or law was challenged as in violation of the Federal Constitution, appeals from or writs of error to the circuit court were dismissed. *Hamilton v. Brown*, 3 C. C. A. 639, 2 U. S. App. 540, 53 Fed. 753; *Chicago, M. & St. P. R. Co. v. Evans*, 7 C. C. A. 290, 19 U. S. App. 233, 58 Fed. 433; *Hastings v. Ames*, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726; *Barr v. New Brunswick*, 19 C. C. A. 71, 39 U. S. App. 187, 72 Fed. 689; *Westerly v. Westerly Waterworks*, 22 C. C. A. 273, 33 U. S. App. 723, 76 Fed. 467; *Indianapolis v. Central Trust Co.* 27 C. C. A. 580, 53 U. S. App. 658, 83 Fed. 529; *Pauley Jail Bldg. & Mfg. Co. v. Crawford County*, 28 C. C. A. 579, 56 U. S. App. 53, 84 Fed. 942; *Wrightman v. Boone County*, 31 C. C. A. 570, 60 U. S. App. 100, 88 Fed. 435; *Illinois C. R. Co. v. Adams*, 35 C. C. A. 635, 93 Fed. 852; *J. C. Hubinger Co. v. Quincy Horse R. & Carrying Co.* 39 C. C. A. 336, 98 Fed. 897; *St. Clair County v. Interstate Sand & Car Transfer Co.* 49 C. C. A. 169, 110 Fed. 785; *Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co.* 42 C. C. A. 258, 102 Fed. 200.

But in *American Sugar Ref. Co. v. New Or-*
184 U. S.

leans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646, the court, though assuming that a municipal ordinance had been challenged as in violation of the Federal Constitution, so that a direct resort to the Supreme Court of the United States might be had in a case in which the jurisdiction of the circuit court attached solely by reason of diverse citizenship, held that the circuit court of appeals was not deprived of its jurisdiction of an appeal, or justified in declining to exercise that jurisdiction.

And because the case was of considerable importance, and a dismissal would almost inevitably lead to a delay of years in its determination, the circuit court of appeals refused to dismiss an appeal from the circuit court, although admitting that the case was one in which the law of a state was claimed to be in contravention of the Constitution of the United States. *Pike's Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1.

A general exception to an instruction in favor of the plaintiff's right to recover under a state statute will not sustain a writ of error to the circuit court of the United States from the Supreme Court under this section, as a case in which it is claimed that a state law is in contravention of the Federal Constitution. *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822.

The jurisdiction of the circuit court of appeals of an appeal from an order of the circuit court sustaining a preliminary injunction against the enforcement of a state statute reducing street railway fares is not defeated on the theory that the street railway company had a vested right not to have such fares reduced except by general law, and therefore a question of the impairment of the obligation of a contract was so involved as to give the Supreme Court exclusive appellate jurisdiction, where the circuit court had jurisdiction by reason of diverse citizenship, and held that the state statute was in violation of the state Constitution, since, under such circumstances, it is unnecessary to determine whether any question of the impairment of the contract is involved. *Indianapolis v. Central Trust Co.* 27 C. C. A. 580, 53 U. S. App. 658, 83 Fed. 529.

The opinion of the circuit court of the United States, regularly filed and which has been annexed to and transmitted with the record to the Supreme Court of the United States in accordance with a rule of that court, may be examined on the question of the jurisdiction to review the case as one under which the Constitution or law of the state is claimed to violate the Federal Constitution, in order to ascertain whether either party made such claim in the lower court. *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174. The court distinguished *England v. Gebhardt*, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287, in which the court had said that the opinion of a circuit court was not a part of the record, on the ground that that decision was merely an adjudication that the opinion could not be referred to for the purpose of ascertaining the evidence or the facts found below upon which the judgment was based, and not as precluding the court from looking into the opinion of the trial court for any purpose whatever.

On the opinion of the court below as part of the record on appeal to the Supreme Court of the United States, see note to *Loeb v. Columbia Twp.* 45 L. ed. U. S. 281.

Where the Supreme Court of the United States has acquired jurisdiction of an appeal from the circuit court on the ground that the case is one in which a state Constitution or law

is claimed to violate the Constitution of the United States, it has the power to consider every question arising in the record. *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 670, 18 Sup. Ct. Rep. 223; *Holder v. Aultman, M. & Co.* 169 U. S. 81, 42 L. ed. U. S. 669, 18 Sup. Ct. Rep. 269; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265.

III. Summary.

The exclusive rule in respect to the appellate jurisdiction of the Supreme Court over circuit and district courts is furnished by the section of the circuit court of appeals act under consideration, which has superseded the provisions of the earlier acts of Congress in respect to such jurisdiction.

Although certain cases are within the appellate jurisdiction of both the Supreme Court and the circuit court of appeals, the same party cannot sue out separate appeals or writs of error in the same case and at the same time to or from both courts. The mere fact, however, that one party may have invoked the appellate jurisdiction of the Supreme Court for the purpose of presenting a question of jurisdiction does not deprive the other party of his right to bring the case on its merits to the circuit court of appeals, but the latter court will continue the cause to await the decision of the Supreme Court on the question of jurisdiction.

Only after final judgment can the appellate jurisdiction of the Supreme Court be invoked for the purpose of presenting a question as to the jurisdiction of the circuit or district court. The jurisdiction of the lower courts which must have been in issue is their jurisdiction as Federal courts, and this issue must have been decided against the party seeking review in the particular case in which such review is sought. Only the question of jurisdiction can be reviewed when that ground is relied on alone to give the Supreme Court appellate jurisdiction, but when such jurisdiction is invoked on any other ground that court has jurisdiction of the entire case. The question of jurisdiction must be certified, but this requirement is met when the record affirmatively shows that the trial court sends up alone for determination a question of its jurisdiction.

Cases in which the construction or application of the Federal Constitution are so involved, or the constitutionality of a law of the United States so drawn in question, as to warrant direct review by the Supreme Court, are cases which present an issue upon such construction or application or constitutionality. And assignments of errors cannot be availed of to import such an issue into the cause which the record does not show was presented to the court below.

To obtain a review in the Supreme Court of a circuit-court judgment on the theory that the construction or validity of a treaty is involved, the party invoking such jurisdiction must connect himself with, or claim rights under, such treaty or the parties thereto.

The appellate jurisdiction of the supreme court over circuit or district courts in cases in which a state Constitution or law is claimed to violate the Federal Constitution extends to every case in which either party makes such claim in good faith, and that claim is sustained or rejected, and such jurisdiction is invoked, by the unsuccessful party. The opinion of the circuit court may be examined for the purpose of ascertaining whether either party made such claim in that court.

[676]*FREDERICK C. HOWARD, James L. Lombard, and John C. Gage, *Plffs. in Err.*,
v.
UNITED STATES to Use of DAVID STEWART.

(See S. C. Reporter's ed. 676-694.)

Error to the circuit court of appeals—case arising under laws of the United States—money paid into court—authority of clerk of court to receive—action by private suitor on official bond of clerk.

1. A suit on the bond of a clerk of a court of the United States, which depends upon the scope and effect of the bond and the meaning of the statutes in conformity with which it was given, is a suit arising under the laws of the United States, of which a circuit court has original jurisdiction without diversity of citizenship.
2. Error lies to the circuit court of appeals to review a final judgment of that court in a case in which the jurisdiction of the circuit court was not dependent entirely upon the diversity of citizenship shown by the petition, but was also rightfully invoked on Federal grounds, but which could not have been brought to the Supreme Court of the United States directly from the circuit court.
3. A clerk of a circuit court of the United States must be deemed to have authority to receive money paid into court by a private suitor in a pending cause, with the sanction of the court, in view of U. S. Rev. Stat. § 828, giving commissions to the clerk "for receiving, keeping, and paying out money in pursuance of any statute or order of court," when read in connection with §§ 798, 995, 996, 5504, 5505, which manifestly proceed on the ground that money paid into court under its sanction may be received by the clerk, whose duty it then is to deposit the amount in the name and to the credit of the court.
4. A clerk of a court of the United States who fails to deposit as required by law, but appropriates to his own use, money deposited with him by a private suitor with the sanction of the court in a pending cause, is liable for the amount so appropriated on the bond given by him to the United States, under U. S. Rev. Stat. § 795, as amended by the act of February 22, 1875, to insure the faithful discharge of the duties of his office.
5. A bond of a clerk of a circuit court of the United States, given to the United States in compliance with U. S. Rev. Stat. § 795, as amended by act of February 22, 1875, providing that such bond may be required for an amount not exceeding \$40,000, to insure the faithful discharge of the duties of his office and the seasonable record of the decrees, judgments, and determinations of the court, is for the protection of any suitor injured by

the failure of the clerk to comply with its conditions.

6. A private suitor has the right without express statutory authority to sue in the name of the United States for his benefit on the bond of a clerk of a circuit court of the United States, given to the United States in compliance with U. S. Rev. Stat. § 795, as amended by act of February 22, 1875, to insure the faithful discharge of his duties and the seasonable record of the decrees, judgments, and determinations of the court, since the court, which by the terms of the statute retains custody of the bond, is to be regarded as the trustee for any party injured by a breach of its conditions.

[No. 121.]

Argued January 20, 1902. Ordered Submitted to Full Bench January 27, 1902. Submitted February 24, 1902. Decided March 24, 1902.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western Division of the Western District of Missouri in favor of plaintiff in a suit on the official bond of the clerk of the circuit court. *Affirmed.*

See same case below, 42 C. C. A. 169, 102 Fed. 77.

The facts are stated in the opinion.

Mr. John C. Gage argued the cause for plaintiffs in error on oral argument.

Messrs. Sanford B. Ladd and Frank Hagerman submitted the cause for plaintiffs in error on submission to full bench:

In the absence of any provision in the statute expressly giving a right of action on an official bond to individuals, the bond must be held to be exclusively for the protection of the government or the subdivision thereof authorized to require it.

Murfree, *Official Bonds*, § 504; *State ex rel. Bailey v. Nichol*, 8 Lea, 657; *Crocker v. Fales*, 13 Mass. 262; *Auditor v. Dryden*, 3 Leigh, 703; *McRea v. McWilliams*, 58 Tex. 328; *Clark v. United States*, 60 Ga. 156; *Idaho Gold Reduction Co. v. Croghan* (Idaho) 56 Pac. 164; *White v. Wilkins*, 24 Me. 299; *Com. v. Hatch*, 5 Mass. 191; *Kansas City ex rel. Blumb v. O'Connell*, 99 Mo. 357, 12 S. W. 791; *Washington use of McCue v. Young*, 10 Wheat. 406, 6 L. ed. 352.

The contract of suretyship cannot be extended by implication and by congressional construction ascertained from other legislation upon similar subjects.

Sutherland, *Stat. Constr.* § 430; *Recse v. United States*, 9 Wall. 13, 19 L. ed. 541; *Miller v. Stewart*, 9 Wheat. 680, 6 L. ed. 189; *United States v. Boecker*, 21 Wall. 652, 22 L. ed. 472; *United States v. Hough*, 103 U. S. 71, 26 L. ed. 305.

Bonds from mail carriers are required, but the courts say an individual cannot sue thereon.

McRea v. McWilliams, 58 Tex. 328.

A bond from a collector is required by U. S. Rev. Stat. § 3143, with like conditions as in the clerk's bond, yet it gives no right

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7, and *Bailey v. Mosher*, 11 C. C. A. 309.

On the right of a third party to sue on a contract made for his benefit—see note to *Jefferson v. Asch* (Minn.) 25 L. R. A. 257.

As to liability of surety on official bond—see notes to *United States v. Giles*, 3 L. ed. U. S. 708; *Postmaster-General v. Early*, 6 L. ed. U. S. 577, and *American Surety Co. v. Pauly*, 42 L. ed. U. S. 987.

of action to individuals, and it has been expressly ruled that an individual cannot sue thereon.

Clark v. United States, 60 Ga. 156.

So the statute requires bond from a postmaster, but an individual cannot sue thereon.

Idaho Gold Reduction Co. v. Croghan (Idaho) 56 Pac. 164.

Money is paid into court when, and when only, it is so deposited, be it in whose actual possession it may, that it is actually subject to the order of the court, and it makes no difference whether the money be held by the clerk of the court, by the regular depositary, by a special depositary, or by any other instrumentality, a trust company, or any individual or corporation whatsoever.

Ex parte Prescott, 2 Gall. 146, Fed. Cas. No. 11,388.

If the facts themselves, before being written upon the record of the court, did not place the money subject to its control so that it could not be withdrawn without its order consenting thereto, the recording of the facts could not change or alter, increase or diminish, their force or effect. They were the same before being recorded that they were afterwards. They meant the same thing. They had the same effect.

Gampbell v. Booth, 8 Md. 107.

Judgment in favor of plaintiff against Henry county for the full amount owed by it to him was improperly rendered if the money had been lawfully paid into court by the county for plaintiff.

Voss v. McGuire, 26 Mo. App. 452; *Levan v. Sternfeld*, 55 N. J. L. 41, 25 Atl. 854; *Turner's Sons v. Lee Gin & Mach. Co.* 98 Tenn. 604, 38 L. R. A. 549, 41 S. W. 57.

The clerk had no authority to receive money for the court without an order placing this money in the custody of the clerk as money paid into court.

Hammer v. Kaufman, 39 Ill. 87; *Baker v. Hunt*, 1 Wend. 103; *Lewis v. Johnson*, Walk. (Miss.) 261; *Carey v. State ex rel. Farley*, 34 Ind. 105; *Doepfner v. State ex rel. Altland*, 36 Ind. 111; *State ex rel. La Plante v. Woodman*, 36 Ind. 511; *State ex rel. Arnold v. Givan*, 45 Ind. 267; *Bowers v. Fleming*, 67 Ind. 541; *State ex rel. Blake v. Enslow*, 41 W. Va. 744, 24 S. E. 679; *National Docks & N. J. Junction Connecting R. Co. v. United New Jersey R. & O. Co.* 52 N. J. Eq. 366, 28 Atl. 673; *Turner's Sons v. Lee Gin & Mach. Co.* 98 Tenn. 604, 38 L. R. A. 549, 41 S. W. 57; *People use of Howard v. Cobb*, 10 Colo. App. 478, 51 Pac. 523.

Mr. Edwin A. Krauthoff argued the cause, and, with Messrs. J. V. C. Karnes, Alexander New, and David D. Stewart, filed a brief for defendant in error:

Whether the bond sued on is in the form prescribed by statute or not, it "is a contract voluntarily entered into upon a sufficient consideration for a purpose not contrary to law," and in the absence of a statute enlarging or restricting its operation, it is to be determined by a resort to the principles of the common law.

184 U. S.

State v. Wood, 51 Ark. 205, 10 S. W. 624; *Bay County v. Broek*, 44 Mich. 45, 6 N. W. 101; *Com. v. Reed*, 2 Bush, 618; *Thompson v. Buckhannon*, 2 J. J. Marsh. 416; *Thomas v. White*, 12 Mass. 367; *Wolfe v. McClure*, 79 Ill. 564; *State ex rel. Williams v. Lynch*, 6 Blackf. 395; *Sweetser v. Hay*, 2 Gray, 49; *Gathwright v. Callaway County*, 10 Mo. 663; *Goodrum v. Carroll*, 2 Humph. 490, 37 Am. Dec. 564; *Williams v. Coleman*, 49 Mo. 325; *Carnegie v. Hulbert*, 16 C. C. A. 498, 36 U. S. App. 81, 70 Fed. 209.

One of the most important of the duties of a clerk is to receive, keep, and pay out money.

Kitchen v. Woodfin, 1 Hughes, 340, Fed. Cas. No. 7,855; *Fagan v. Cullen*, 28 Fed. 843; *Blake v. Hawkins*, 19 Fed. 204; *Re Goodrich*, 4 Dill. 230, Fed. Cas. No. 5,541; *Smith v. The Morgan City*, 39 Fed. 572; *The Avery*, 2 Gall. 308, Fed. Cas. No. 671; *Northwestern Mut. L. Ins. Co. v. Quinn*, 69 Fed. 462.

The words "faithfully discharge the duties of his office," when applied to an officer in whose custody money is to be placed, make him responsible for such money.

Farmington v. Stanley, 60 Me. 472; *Porter v. Stanley*, 47 Me. 518, 74 Am. Dec. 501; *United States v. Tingey*, 5 Pet. 115, 8 L. ed. 66; *Amherst Bank v. Root*, 2 Met. 538; *United States v. Hodge*, 6 How. 279, 12 L. ed. 437; *Gaussen v. United States*, 97 U. S. 584, 24 L. ed. 1009; *United States v. Hodson*, 10 Wall. 395, 19 L. ed. 937; *Middlesex Mfg. Co. v. Lawrence*, 1 Allen, 339; *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. ed. 552.

An implied promise or covenant in the premises, and growing out of the relations between the respective parties, arises that suit might be brought in the name of the trustees for the benefit and protection of the *cestuis que trust*, viz., the suitors in the court.

Sweetser v. Hay, 2 Gray, 49.

The bond is a contract. "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of its enforcement. This is the breath of its vital existence. . . . The ideas of right and remedy are inseparable."

Edwards v. Kearzey, 96 U. S. 600, 24 L. ed. 796.

When an act of the legislature of a state or of Congress prescribes a bond or other form of security or obligation, to be given by any of its officers for the protection of parties whom the acts of such officer may injure, if no special form of remedy is given by the statute, the inference must follow that the remedy afforded by the common law is to be resorted to, and that the legislature regarded such remedy appropriate and ample, and intended it to be pursued.

Knowlton v. Ackley, 8 Cush. 97.

The case is exactly like and is supported by *Maryland use of Markley v. Baldwin*, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278. See also *Broune v. Strode*, 5 Cranch, 303, 3 L. ed. 108; *McNutt v. Bland*, 2 How. 9, 11

L. ed. 159; *Walden v. Skinner*, 101 U. S. 589, 25 L. ed. 968; *Huff v. Hutcheson*, 14 How. 586, 14 L. ed. 553.

A statutory bond has the effect which in reason must have been intended by the statute.

Chladek v. Brown, 58 Ill. App. 379.

The clerk's bond was intended as security for the payment of all moneys deposited in the court in the due course of proceedings in court, and in the absence of a statute authorizing a party injured to bring suit in his own name on the bond, the statute implies an authority to maintain such suit in the name of the United States as irrevocable trustees for the injured party.

Stephenson v. Monmouth Min. & Mfg. Co. 28 C. C. A. 292, 54 U. S. App. 499, 84 Fed. 114; *Kiersted v. State use of Costello*, 1 Gill. & J. 231; *Ing v. State use of Lewis*, 8 Md. 287; *The Governor v. Allen*, 8 Humph. 176; *Hubert v. Mendheim*, 64 Cal. 213, 30 Pac. 633; *McMeechen v. Baltimore*, 2 Harr. & J. 41, 3 Harr. & J. 534; *Brown v. Lester*, 13 Smedes & M. 392; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625.

The clerk and his sureties are estopped to deny the legality of the payment of money to him.

State ex rel. Scotland County v. Ewing, 116 Mo. 129, 22 S. W. 476.

Any act which, if done genuinely and honestly by an officer would be an official act, is, if done dishonestly and fraudulently, an act done by virtue of his office.

National Bank v. Rutledge, 84 Fed. 400.

Messrs. Edwin A. Krauthoff and David D. Stewart submitted the cause for defendant in error on submission to full bench. Messrs. J. V. C. Karnes and Alexander New were with them on the brief.

[676] *Mr. Justice Harlan delivered the opinion of the court:

Were the appellants entitled, of right, to [677] bring this case here *from the circuit court of appeals? Has a clerk of a circuit court of the United States authority to receive money brought into court by a private suitor, and is he responsible upon his bond if he does not deposit it as required by statute and appropriates it to his own use? Is the bond of the clerk for the protection of private suitors, as well as of the United States? Has a private suitor the right, without express statutory authority, to sue on the bond of the clerk in the name of the United States for his benefit?

These questions are presented by the record, and will be examined after we shall have stated the facts set out in the special findings made by the circuit court.

On the 3d day of March, 1887, Warren Watson was duly appointed clerk of the circuit court of the United States for the western division of the western district of Missouri; and on the same day he executed, and the court approved, his bond to the United States in the penalty of \$20,000.

He died March 24th, 1892, while acting as clerk, and an administrator of his estate was appointed April 2d, 1892. Notices, as

required by the local law, having been previously given for the presentation of claims, the administration of the estate was closed and the administrator discharged on the 11th day of September, 1894. At no time did the United States or the relator, Stewart, exhibit or present any claim against Watson's estate.

Stewart instituted, February 6th, 1891, in the circuit court of the United States, a suit at law against Henry county, Missouri, upon three bonds of the county, two for \$1,000 each and one for \$500. His petition contained three counts. In the first count he asked for judgment for \$1,010, with interest from September 1st, 1887, as the amount due on the first bond of \$1,000. The second count was upon the other bond for \$1,000; the third, upon the \$500 bond.

On the 3d day of March, 1891, the county filed its answer alleging as to the first count that on September 6th [1st], 1887, there was due on the bond therein referred to \$1,010, and on that date it had deposited that sum in the National Bank of Commerce of New York for the payment of the bond and interest, *and tendered the same to the [678] plaintiff as full payment thereof, but that the plaintiff had refused to accept such payment. The answer further alleged that the defendant had "at all times been ready and willing to pay plaintiff said sum of \$1,010 in full payment of said bond and unpaid interest, and now here again tenders to plaintiff said sum of \$1,010 in full payment of said bond and unpaid interest due thereon, on September 6th [1st], 1887, and now brings the said sum into court." The answer to the second and third counts was exactly the same except that as to the third count the amount named was \$505, instead of \$1,010.

On the same day, March 3d, 1891, there was entered on the records of the court in said cause the following order: "This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of \$2,525 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein."

It was found as a fact that Henry county did hand to Watson the sum of \$2,525 as recited in that order.

On June 27th, 1891, Stewart, the plaintiff in that suit, filed a reply, which was a general denial of the facts alleged in the answer.

On July 2d, 1894, more than two years after Watson's death, there was entered on the records of the court in the cause the following: "This day come the parties by their attorneys, the plaintiff by Karnes, Holmes, & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement, with leave to the parties to file briefs."

On the 11th day of February, 1895, the following order was made in that case: "A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment on the 1st day of September, 1887, and that after the plaintiff instituted this action in this court, and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of \$1,010." The findings on the other counts differed only as to amounts.

[679]

The order in the same case then proceeded: "It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars (\$2,525), the aggregate amount found to be owing to him under the three counts of the petition, and that plaintiff pay the costs of this action, and that execution issue therefor. And it further appearing to the court that the said sum of \$2,525, so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk, or otherwise: It is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid."

No appeal was taken from this judgment, and the same became final and remained in full force and effect and unpaid.

No order or direction as to this money was ever made except as indicated in the order of February 11th, 1895.

[680]

When the \$2,525 was paid by Henry county to Watson, he deposited it the same day in a bank to his individual credit, and it was not at any time treated by him as in the depository of the court. He never presented to the court any account of the money, nor paid it either to Henry county or to Stewart. During the pendency of the Stewart suit against the county neither party took any steps for an order in relation to the money, other than was actually made as above stated, nor made any objection to the method in which the money was received. Stewart, however, had no knowledge of the acts of Watson.

It was further found that no demand was ever made on the defendants or on Watson

for the money other than is to be inferred from the institution of the suit.

The present action was brought October 19th, 1895, against the sureties in Watson's bond, in the name of the United States, at the relation and to the use of David D. Stewart. One of the sureties, McDonald, pleaded his discharge in bankruptcy, and that plea was sustained. Judgment was entered against the sureties (except McDonald) for the sum of \$2,525, with interest at 6 per cent from the commencement of this suit, making total of \$3,057.77. 93 Fed. 719. That judgment was affirmed in the circuit court of appeals. 42 C. C. A. 169, 102 Fed. 77.

1. The first question is one of the jurisdiction of this court. The defendant in error insists that the judgment of the circuit court of appeals was final, and that therefore no writ of error lay to this court.

Is this a correct interpretation of the statutes defining and regulating the jurisdiction of the courts of the United States?

In all cases in which the judgments of a circuit court of appeals are not made final by the act of March 3d, 1891, chap. 517, there is of right an appeal or writ of error to this court where the matter in controversy exceeds \$1,000 in value besides costs. 26 Stat. at L. 826, 828.

Among the cases in which the judgments or decrees of the circuit courts of appeals are made final are those in which the jurisdiction of the circuit court "is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." 26 Stat. at L. 828, chap. 517.

The opposite parties here are Stewart, the relator, a citizen of Maine, for whose benefit the suit was brought, and the sureties on the bond of Watson, who are all citizens of Missouri. The government is the nominal, while Stewart is the real, plaintiff. His citizenship is to be regarded in any inquiry as to jurisdiction. *Browne v. Strode*, 5 [681] Cranch, 303, 3 L. ed. 108; *McNutt v. Bland*, 2 How. 9, 11 L. ed. 159; *Maryland use of Markley v. Baldwin*, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278.

But does it not appear from the petition itself that the case was one of which the circuit court could take cognizance independently of the citizenship of the real parties in interest? This question must receive an affirmative answer. The suit was directly upon a bond taken by the circuit court in conformity with the statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those statutes. It was therefore a suit arising under the laws of the United States, of which the circuit court (concurrently with the courts of the state) was entitled to take original cognizance, even if the parties had been citizens of the same state. 25 Stat. at L. 434, chap. 866. This court has heretofore decided that a suit upon a bond of a marshal of the United States was one arising under the laws of the United States.

Feibelman v. Packard, 109 U. S. 421, 423, 27 L. ed. 984, 985, 3 Sup. Ct. Rep. 289; *Bachrack v. Norton*, 132 U. S. 337, 33 L. ed. 377, 10 Sup. Ct. Rep. 106; *Reagan v. Aiken*, 138 U. S. 109, 34 L. ed. 892, 11 Sup. Ct. Rep. 283; *Bock v. Perkins*, 139 U. S. 628, 630, 35 L. ed. 314, 315, 11 Sup. Ct. Rep. 677. The same principle must be held to be applicable to suits upon the bond of a clerk of a court of the United States. It could not be that a suit upon the bond of a marshal was one arising under the laws of the United States, and that a suit upon the bond of a clerk of a court of the United States was not of that class.

It results that, although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon Federal grounds. And as the case was one which could not have been brought here directly from the circuit court, the final judgment of the circuit court of appeals could be reviewed in this court upon writ of error sued out by the defendants.

2. We now come to the merits of the case. The bond in suit was taken under the authority of § 795 of the Revised Statutes as amended by the act of February 22d. 1875 (18 Stat. at L. 333, chap. 95). That section reads: "§ 795. The clerk of every court shall give bond, in a sum to be fixed and with sureties to be approved by the court which appoints him, faithfully to discharge [682] the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk; and a new bond may be required whenever the court deems it proper that such bond should be given. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safe keeping as the court may direct. A certified copy of such entry shall be prima facie proof of the execution of such bond and of the contents thereof."

The conditions of the bond, as set forth in this section, were the same as those prescribed by the judiciary act of 1789 (1 Stat. at L. 76, chap. 20).

It will be observed that § 795 does not name the obligee in the bond, and leaves its amount to be fixed by the court. But the 3d section of the act of 1875 provided, as did the judiciary act of 1789, that the clerks should give bond to the United States. The act of 1875 also required bond "in the sum of not less than five and not more than twenty thousand dollars, to be determined and regulated by the Attorney General of the United States." And the same act authorized the Attorney General to require a bond in a sum not to exceed \$40,000 whenever the business of the courts should make it necessary.

It must be taken as indisputable that the money in question was paid by Henry county in satisfaction of Stewart's claim or cause of action. It must also be taken as indisputable, upon this record, that the

deposit was made with Watson as clerk in the presence and with the assent of the court, although no order was entered expressly requiring the money to be paid to the clerk or expressly directing him to receive it. But all this is necessarily to be implied from the terms of the order of March 3d, 1891, which states that Henry county—presumably in the presence of the court—*deposited the money with the clerk*. It would be a very narrow interpretation of the words of that order to hold that the money was paid to Watson without the knowledge, approval, or sanction of the court, or that it was paid to him as an individual, and not in his capacity as clerk. The *order was equivalent to one expressly [683] stating that the money was paid by direction of the court to Watson as clerk.

But it is suggested that, in the absence of a statute distinctly so providing, the clerk was not entitled to receive the money deposited in payment and satisfaction of Stewart's claim. It is true that no statute declares in words that a clerk may receive money brought into court for the purposes of a pending suit. But it is clear that Henry county was entitled to bring into court and tender to its adversary the amount it was willing to pay in satisfaction of his claim. It cannot be that it was the duty of the judge of the court himself to have received the money and personally deposited it as required by law. No one has ever supposed that a judge was under obligation to perform such services. Who, then, was to receive the money? Plainly it was the duty of the clerk, who was the arm of the court, kept its records showing money paid in by suitors or officers, and was under bond conditioned that he would faithfully perform all the duties of his office. He was allowed by statute a commission "for receiving, keeping, and paying out money in pursuance of any statute or order of court." Rev. Stat. § 828. It was well said by Judge Caldwell, delivering the unanimous judgment of the circuit court of appeals, that "for more than a century the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner, and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such clerks."

That the clerk was authorized, with the sanction or by order of court, to receive money paid into court in a pending cause, is clearly to be implied from the legislation of Congress. It will be well to trace the history of this question through the statutes enacted from time to time.

By the act of March 1st, 1793, chap. 20, clerks of district courts were allowed 1½ per cent commission on "all money deposited in court." 1 Stat. at L. 332, 333; *Ibid.* 625, chap. 19, § 3. Money received by a marshal in a prize cause was held by *Mr. Justice [684]

Story to be properly paid over to the *clerk*, and that he was entitled to commissions under the statute. That practice, he held, was of great importance for the "security of suitors." *The Avery* (1814) 2 Gall. 308, 311, Fed. Cas. No. 671. See also *Blake v. Hawkins*, 19 Fed. 204; *Re Goodrich*, 4 Dill. 230, Fed. Cas. No. 5,541; *Smith v. Morgan City*, 39 Fed. 572. In *Fagan v. Cullen*, 28 Fed. 843, 844, Mr. Justice Brown held that moneys received by the marshal should, under §§ 995 and 996 of the Revised Statutes, either be immediately deposited by him "or paid to the clerk and by him deposited."

By an act approved April 18th, 1814, chap. 62, it was provided that upon the payment of money into a district or circuit court, to abide the order of the court, the same should be deposited in an incorporated bank to be designated by the court, there to remain until it was decided to whom it of right belonged. If there was no such bank, then the court could "direct" the money to be deposited according to its discretion. 3 Stat. at L. 127. Could not such direction have been given to the clerk?

The act of 1814 was supplemented by one approved March 3d, 1817, chap. 108, making it the duty of circuit and district courts "to cause and direct" all moneys remaining in such courts, and all moneys subject to their order, to be deposited in a branch of the Bank of the United States, in the name and to the credit of the court. § 1. The same direction was given by the act as to all moneys thereafter paid into said courts, "or received by the officers thereof." § 2. All payments out of such moneys were to be entered of record by the clerk. § 3. It was further provided that if any "clerk of such court," or other officer thereof, "receiving any such moneys," should refuse or neglect to obey the order of the court for depositing the same, such clerk or other officer was liable to be forthwith proceeded against by attachment for contempt. § 4. The same act imposed upon the clerk the duty of presenting an account at each session of court of all moneys remaining therein. § 5. 3 Stat. at L. 395.

The acts of 1814 and 1817 were technically repealed by the act of March 24th, 1871, entitled "An Act Relating to Moneys Paid into the Courts of the United States." 17 [685] Stat. at L. 1, chap. 2. But *the act of 1871 retained substantially all the provisions of the two former acts, and added others. That act provided, among other things, that all moneys in the registry of any court of the United States, or "in the hands or under the control of any officer of such court, which were received in any cause pending or adjudicated in such court," should within thirty days after the passage of the act be deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court; that all such moneys which were thereafter paid into such courts, "or received by the officers thereof," should be forthwith deposited in like manner; that if any *clerk* or other officer of a 184 U. S.

court of the United States deposited any money belonging in the registry of the court in violation of that act, or should retain or convert it to his own use, or to the use of any other person, he should be deemed guilty of embezzlement, and on conviction be punished by a fine of not less than \$500 and not more than the amount embezzled, or by imprisonment for a term of not less than one year nor more than ten years, or both, at the discretion of the court; and that if any person should knowingly receive from a *clerk* or other officer of a court of the United States any money belonging in the registry of the court as a deposit, loan, or otherwise, in violation of the act, he should be deemed guilty of embezzlement, and be punished as therein provided.

These provisions of the act of 1871 have been substantially reproduced in the following sections of Revised Statutes:

"§ 798. At each regular session of any court of the United States the *clerk* shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court."

"§ 995. All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court: *Provided*, That nothing herein shall be construed to prevent *the de-[686] livery of any such money upon security, according to agreement of parties, under the direction of the court.

"§ 996. No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the *clerk*; and every such order shall state the cause in or on account of which it is drawn."

"§ 5504. Every *clerk* or other officer of a court of the United States who fails forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the Treasurer [and] assistant treasurer, or [of] a designated depository of the United States, in the name and to the credit of such court, or who retains or converts to his own use or to the use of another any such money, is guilty of embezzlement, and shall be punished by fine not less than five hundred dollars, and not more than the amount embezzled, or by imprisonment not less than one year, nor more than ten years, or by both such fine and imprisonment; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement, of parties under the direction of the court.

"§ 5505. Every person who knowingly receives, from a *clerk* or other officer of a court of the United States, any money belonging

in the registry of such court as a deposit, loan, or otherwise, is guilty of embezzlement, and shall be punished as prescribed in the preceding section."

[687] The statutory provisions to which we have referred, taken in connection with § 828 of the Revised Statutes, giving commissions to clerks for receiving, keeping, and paying out money in pursuance of any statute or order of court, show the relation in which clerks of district and circuit courts have always stood to moneys paid into court in pending causes. They manifestly proceed on the ground that money paid into court, under its sanction, may be received by a clerk, his duty upon receiving it being forthwith to deposit the amount with the Treasurer, assistant treasurer, or designated depository of the United States, in the name and to the credit of the court. *As soon as he receives the money he becomes responsible for it under his bond, and that responsibility does not cease until he deposits it as required by law. If after receiving the money he appropriates it to his own use, or, which is the same thing, if he deposits it in bank to his individual credit, he becomes liable on his bond for the amount so misappropriated.

3. But it is said that, the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the government, and therefore no suit can be maintained on it for the benefit of an individual suitor, although such suitor may have been damaged by the failure of the clerk to discharge his duty. This results, it is supposed, from the fact that there is no statute expressly authorizing such a suit. If this position be well taken, it would follow that the bonds required to be given by clerks of the Federal courts are not in any case for the protection of private suitors. We are of opinion that Congress never intended that any such condition of things should exist, but intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to \$40,000. It is impossible to suppose that, when requiring a clerk to give bond to the United States "faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court," Congress had in mind the interests of the United States alone, and purposely refrained from making any provision whatever for the security of private suitors in the Federal courts. Such a conclusion would be inconsistent with the practice of a century, and would greatly surprise the profession. As may well have been anticipated when those courts were first established, the great mass of litigation in the district and circuit courts of the United States has always been between individuals, and consequently the words above quoted, it must be assumed, had reference to individual suitors as well as to the United States. In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge

his duties or seasonably to record the decrees, judgments, and determinations of the court. It must have been so understood *when the courts of the United States were [688] established and provision made for the appointment of clerks who should be entitled to receive the moneys of suitors when paid into court under its sanction or pursuant to any statute.

A well-considered case upon this general subject is that of *McDonald v. Atkins*, 13 Neb. 568, 14 N. W. 532. That was an action on a clerk's bond to recover the amount received by him from a sheriff who had collected it on an execution. The point was made that the clerk was not authorized by statute to accept payment of a judgment, and so the court of original jurisdiction held in that case. The supreme court of the state said: "No one can doubt, we think, that this ruling was in direct conflict with the general understanding of the legal profession of this state as to the duty of court clerks in the receipt and disbursement of money paid upon judgments, from the first organization of our judicial system, through all its changes, down to the present time. Indeed, we doubt exceedingly that anyone, especially a practising lawyer, has ever supposed that upon the rendition of a money judgment, the defendant could not prevent a further accumulation of costs and interest, and have a satisfaction legally entered of record, by at once paying to the clerk of the court the amount which it calls for. If he could not—if clerks are really without authority to receive money on judgments in their custody, then to whom, in the absence of the plaintiff and his attorney, could payment be legally made?"

. . . While it is true that we have no statute which in express terms declares that the clerks of the several courts shall accept payment of judgments in their custody, it is very evident that the legislature contemplated and intended that they should do so. . . . And, even in the absence of such provision, can it be doubted that a party against whom a money judgment is sought by action may, upon being summoned, pay the amount demanded 'into court,' and thereby prevent the making of any further costs? But how is it to be effected? In the case of inferior courts—those not of record, and unprovided with clerks—the payment can, of course, only be made to the judge or magistrate in person; but in courts of record, where all the steps taken in the progress of the case, from the commencement to *the sat- [689] isfaction of final judgment, are recorded and preserved, and where a clerk for the performance of this duty is specially provided, it is otherwise. In these courts payments of money are never made to the judge, but the uniform practice in this state has always been to make them to his clerk, to whose custody and care the files, records, and whatsoever else relates to cases in court, are confided. And this practice, so universal, although not positively directed by any act of the legislature, conflicts with none, and, as we have shown, is recognized

by and in perfect harmony with several." These observations are strikingly applicable in the present case.

Two cases often cited in support of the contrary view are *Com. v. Hatch*, 5 Mass. 191, and *Crocker v. Fales*, 13 Mass. 260. These cases will be found, upon examination, to rest upon grounds not applicable here.

Com. v. Hatch was a suit upon a bond given by an inspector of beef for the faithful performance of his duties. The suit was brought in the name of the commonwealth for the benefit of one alleged to have been injured by the unfaithfulness of the inspector in his office. It was held that the action could not be sustained—the decision being placed, in part, upon the ground that it appeared "by the statute directing the bond, and by the bond, that it was given for the sole use of the commonwealth." Surely, it cannot be said that it appears by the statutes and by the bond in the present case that it was given for the sole use of the United States.

Crocker v. Fales was an action upon a bond of a clerk in the penalty of \$1,000, the obligee being a county treasurer, and the action being in his name for the use of one claiming to be injured by his neglect to pay certain moneys that came to his hands. The court held that the action could not be maintained, assigning as reasons for that conclusion that there was "nothing in the act" under which the bond was taken showing "a design to protect individual sufferers against the negligence of the clerk to pay over moneys which may come into his hands;" that the penalty—between fifty and three hundred pounds—was discretionary with the court, "the largest of these sums being wholly inadequate if it was intended [690] *to cover all possible delinquencies of a clerk;" that the damages recovered by one plaintiff "might consume the whole penalty; and the public be left without any of the security which was intended for the preservation of the records;" and that, in addition, "the statute makes such an appropriation of the sum which may be recovered by the treasurer on a suit as is wholly inconsistent with the supposition that an individual has an interest in the bond." Of course, these things cannot be predicated of the statutory provisions relating to the bonds of clerks of Federal courts, and therefore the case cited is not in point here.

The suggestion that the amount of the bond was insufficient to protect both the United States and private suitors is not controlling: for, by the act of March 3d, 1863 (12 Stat. at L. 768, chap. 93), reproduced in § 795 of the Revised Statutes, the court could fix the amount of the bond, and require a new one whenever it deemed proper and by the act of February 22d, 1875 (18 Stat. at L. 333, chap. 95), the Attorney General could require a bond for as much as \$40,000.

4. A further contention is that, even if the bond was for the protection of individual litigants, it could not be put in suit by
184 U. S.

a private person, unless with the consent of the United States expressed in an act of Congress.

It is supposed that the case of *Washington v. Young*, 10 Wheat. 406, 409, 6 L. ed. 352, 353, is authority for this position. That was an action brought in the name of the corporation of Washington for the use of one McCue and others, to recover from a manager of a lottery scheme the prize drawn by the purchasers of a certain ticket. The lottery was drawn in pursuance of an ordinance of the corporation, and the bond of the manager, in the penalty of \$10,000, was conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance." The suit was brought in the name of the corporation without its previous assent. Upon examination of the record in that case it will be found that the lottery was drawn under an act of Congress, approved May 4th, 1812, chap. 75, amending the charter of the city of Washington, and which gave the corporation of Washington power "to authorize *the [691] drawing of lotteries for effecting any important [public] improvement in the city which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of ten thousand dollars: and provided also that the object for which the money is intended to be raised shall be first submitted to the President of the United States, and shall be approved of by him." 2 Stat. at L. 721, 726, § 6. Chief Justice Marshall, speaking for the court, said: "They [the proprietors of the ticket] had undoubtedly 'a right to apply to the corporation to direct the suit, and the corporation could not, consistently with their duty, have refused such application,' if the purpose of the bond was to secure the fortunate adventurers in the lottery, not to protect the corporation itself. But the propriety of bringing such suit was a subject on which the obligees had themselves a right to judge. If the proprietors of one prize ticket had an interest in this bond, the proprietors of every other prize ticket had the same interest; and it could not be in the power of the first bold adventurer who should seize and sue upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs against their own will. No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment."

That case undoubtedly is authority for the proposition that, generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent. But it also sustains the proposition that consent may, under some circumstances, be assumed to have been given; that is, may arise by legal intendment.

In the case just cited it was deemed plain from the ordinance of the corporation that the bond was taken, primarily at least, for its protection, and not for the benefit of ticket holders. The object for which the corporation was empowered to establish lotteries was in its nature temporary and local, namely, to aid in *making important public improvements. It was to secure the accomplishment of that object that the managers were required to execute bond. It was not unreasonable to suppose that in taking such a bond the corporation had in mind to protect itself in making the public improvements which it was authorized to undertake. In the present case, courts of the United States were established in order that its jurisdiction might be invoked by all entitled to do so, and the requirement that the clerk should execute a bond for the faithful discharge of his duties and for the seasonable recording of the judgments, decrees, and determinations of the court—no distinction being made between public and private suitors—was an assurance to all suitors that, within the limit of the penalty of any bond taken from him by the government, their rights would be protected against any act or omission on his part resulting to their injury. By the terms of the statute a clerk's bond remained in the custody or subject to the order of the court. In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be held to be the legal intendment of existing statutory provisions. The United States, or rather the court which had custody of the bond, is to be regarded as a trustee for any party injured by a breach of its conditions.

Murfree in his *Treatise on Official Bonds* says: "§ 323. It is usually provided in statutes authorizing official bonds to be required of state, county, or municipal officers, that suits may be brought upon them in the name of the official obligee 'upon the relation' or 'to the use' of the party injured by the breach of the bond or interested in its enforcement. Whenever, however, this express provision is omitted in the statute itself the deficiency is supplied by the construction given to such statutes by the courts whenever a proper case for such a ruling is presented. In a Maryland case (1858), *State use of Baltimore v. Norwood*, 12 Md. 177, 194, the court held that it was not necessary for a plaintiff before instituting a suit upon an official bond payable to the state, to obtain the state's permission to do so; and this *although there was in the statute which prescribed the bond no specific provision for making the bond payable to the state, or for giving the party interested the right to sue upon it. The court adds, however, that 'there is no doubt that it is incumbent on the party suing on the

bond to show that he has an interest in it, before he could recover in a regular trial prosecuted to verdict.' The *rationale* of official bonds is well expressed by the court in this case: 'The laws which provide for the execution of bonds similar to the one before us do not require them for the purpose of protecting the rights of the state alone. They are also designed to secure the faithful performance of official duties, in the discharge of which individuals and corporations have a deep interest, and, therefore, they should have the privilege of suing [on] such bonds for injuries sustained by them, through the negligence and malconduct of the officers.'" The same author: "Many bonds of a strictly official character are executed by persons in places of public trust, prescribed by statute, and made payable to the 'state,' 'people,' or 'commonwealth,' or else to the governor, president, or other chief officer, which are designed not only to secure public interests, but to redress wrongs to individuals. Actions on such bonds must, of course, be brought in the name of the obligee, whether the object of the suit be to enforce the rights of the state or to protect private interests. In the latter case it is usual to bring the suit as by the obligee, 'at the relation' or 'for the use' of the real party in interest." [§ 475.]

Stress is laid upon the fact that in the case of a marshal of the United States the statute expressly gives a right of action upon his bond to any one injured by his neglect of duty,—the suit to be in the name of the party injured and for his sole use. Rev. Stat. § 784; 2 Stat. at L. 372, 374, chap. 21. A similar provision is made in the case of consular officers who are required to give bond for the faithful performance of their duties,—such suit to be in the name of the United States for the use of the person injured. Rev. Stat. § 1735. These provisions in relation to marshals and consular officers undoubtedly furnish some ground for the contention that Congress, having made no such express provision in the case of the bonds of *clerks, did not intend that private[694] suits should be maintained upon their bonds. We are of opinion that this argument, although not without force, ought not to prevail against the legal intendment of the statutory provisions relating to clerks, who hold a peculiar relation to the courts appointing them, as well as to the public.

As the clerk had the right to receive the money in question; as he failed, to the injury of the suitor from whom he received it, with the sanction of the court in a pending cause, to deposit it as required by law, and appropriated it to his own use; and as his bond was for the protection of private suitors as well as for the government, there is no sound reason why the plaintiff could not enforce his rights by a suit in the name of the United States for his benefit.

Perceiving no error in the record the judgment is affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[695] MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*, *Plaintiffs in Error*, v. GEORGIA C. ELLIOTT *et al.* [No. 92.]
In Error to the United States Circuit Court of Appeals for the Eighth Circuit.
Messrs. James Hagerman, C. L. Jackson, and J. M. Bryson for plaintiffs in error.
Messrs. Wm. T. Hutchings and Preston C. West for defendants in error.

January 20, 1902. Judgment *affirmed* with costs, by a divided court, and cause remanded to the United States Court for the northern district of the Indian territory.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Petitioner*, v. FRANK E. DINGLEY, Administrator, etc. [No. 104.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Edward Lyman Short, F. D. McKenney, John B. Allen, and Julien T. Davies, for petitioner.

No counsel opposed.

January 20, 1902. Judgment of the United States circuit court of appeals and of the circuit court of the United States for the district of Washington *reversed* with costs, on the authority of *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106, and cause remanded to said circuit court for further proceedings in conformity to law.

TOWN OF WESTON, *Appellant*, v. JAMES A. TIERNEY. [No. 102.]

Appeal from the Circuit Court of the United States for the District of West Virginia.

Messrs. Malcolm Jackson, E. A. Brannon, and R. G. Linn for appellant.

Messrs. W. W. Brannon and John Bassel for appellee.

January 27, 1902. Decree *reversed* with costs, and cause remanded to the Circuit Court of the United States for the Northern District of West Virginia, with directions to [696] dismiss *the bill for want of jurisdiction, on the authority of *United States v. Sayward*, 160 U. S. 47, 40 L. ed. 509, 16 Sup. Ct. Rep. 371; *Holt v. Indiana Mfg. Co.* 176 U. S. 68-73, 44 L. ed. 374-377, 20 Sup. Ct. Rep. 272. 184 U. S.

ALEXANDER M. BOGY, *Appellant*, v. J. M. DAUGHERTY *et al.* [No. 241.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Jos. K. McCammon and Jas. H. Hayden for appellant.

Messrs. Wm. M. Mellette and Edgar Smith for appellees.

February 3, 1902. *Dismissed* for the want of jurisdiction, on the authority of *Rice v. Sanger*, 144 U. S. 197, 36 L. ed. 403, 12 Sup. Ct. Rep. 664; *Haseltine v. Central Nat. Bank*, 183 U. S. 130, *ante*, 117, 22 Sup. Ct. Rep. 49.

L. A. BIGGER, *Plaintiff in Error*, v. C. A. RYKER, County Treasurer of Reno County, Kan., *et al.* [No. 364.]

In Error to the Supreme Court of the State of Kansas.

Mr. Geo. A. Vandever for plaintiff in error.

Mr. Thomas T. Taylor for defendants in error.

February 3, 1902. *Dismissed* for want of jurisdiction, on the authority of *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; *Tyler v. Registration Court Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, *Appellant*, v. STATE NATIONAL BANK AT FRANKFORT. [No. 306.]

Appeal from the Circuit Court of the United States for the District of Kentucky.

Messrs. Ira Julian and W. H. Julian for appellant.

Mr. T. L. Edelen for appellee.

March 17, 1902. Decree *reversed* with costs, and cause remanded to the Circuit Court of the United States for the Eastern District of Kentucky, with directions to remand to the State Court, on authority of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, *ante*, 144, 22 Sup. Ct. Rep. 47, and cases cited.

[697] *CHARLES L. BERNARD, *Plaintiff in Error*,
v. PEOPLE OF THE STATE OF MICHIGAN.
[No. 409.]

In Error to the Supreme Court of the State of Michigan.

Messrs. M. C. Burch, John L. Lott, and Dwight Goss for plaintiff in error.

Messrs. Horace M. Oren and David Anderson for defendant in error.

March 17, 1902. *Dismissed* for want of jurisdiction, on the authority of *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Connecticut ex rel. New York & N. E. R. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976, and cases cited.

GEORGE H. DOBBS *et al.*, *Plaintiffs in Error*,
v. STATE OF KANSAS. [No. 486.]

In Error to the Supreme Court of the State of Kansas.

Messrs. Sidney Hayden and John Stowell for plaintiffs in error.

Messrs. A. A. Godard and J. S. West for defendant in error.

March 17, 1902. *Dismissed* for the want of jurisdiction, on the authority of *Brown v. New Jersey*, 175 U. S. 174, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 576, 40 L. ed. 540, 16 Sup. Ct. Rep. 389.

STATE OF MISSOURI AT THE RELATION OF
THE DELMAR JOCKEY CLUB *et al.*, *Plaintiffs in Error*,
v. WILLIAM ZACHRITZ,
Judge, etc. [No. 535.]

In Error to the Supreme Court of the State of Missouri.

Messrs. Wilbur F. Boyle and Fred. W. Lehmann for plaintiffs in error.

Mr. Edward C. Crow for defendant in error.

March 17, 1902. *Dismissed* for the want of jurisdiction, on the authority of *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Wilson v. North Carolina*, 169 U. S. 595, 42 L. ed. 871, 18 Sup. Ct. Rep. 435.

AMERICAN ARISTOTYPE COMPANY, *Appellant*,
v. UNITED STATES. [No. 204.]

Appeal from the Court of Claims.

Messrs. Wm. B. Hornblower, Geo. A. King, and Wm. B. King for appellant.

Attorney General, Mr. C. C. Binney, and [698] *Assistant Attorney General Pradt for appellee.

March 24, 1902. Judgment affirmed on the authority of *Dunlap v. United States*, 173 U. S. 65, 43 L. ed. 616, 19 Sup. Ct. Rep. 319

LAKELAND TRANSPORTATION COMPANY, *ETC.*,
et al., *Petitioners*, v. PETER P. MILLER *et al.* [No. 479.]

Second petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Harvey D. Goulder, Frank S. Master, and Frank S. Bright for petitioners.

Mr. F. H. Canfield for respondents.

January 20, 1902. *Denied*.

DAVEY PEGGING MACHINE COMPANY, *Petitioner*,
v. ISAAC PROUTY & Co., Incorporated, *et al.* [No. 462.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. F. P. Fish and W. K. Richardson for petitioner.

Mr. Louis W. Southgate for respondents.

January 20, 1902. *Denied*.

PRESIDENT, *ETC.*, OF THE INSURANCE COMPANY OF NORTH AMERICA *et al.*, *Petitioners*,
v. STEAMSHIP HARROGATE. [No. 514.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Robert D. Benedict and Lawrence Kneeland for petitioners.

Mr. Harrington Putnam for respondent.

January 20, 1902. *Denied*.

SINGER MANUFACTURING COMPANY, *Petitioner*,
v. HERMAN CRAMER. [No. 507.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Charles K. Offield for petitioner.

Mr. John H. Miller for respondent.

January 20, 1902. *Granted*.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Petitioner*,
v. L. BUCKI & SON LUMBER COMPANY. [No. 513.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. R. H. Liggett for petitioner.

Messrs. H. Bisbee and George C. Bedell for respondent.

January 20, 1902. *Granted*.

JOSEPH J. MARTIN *et al.*, *Petitioners*, v. STEAMSHIP SOUTHWARK. [No. 451.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. Horace L. Cheyney and John F. [699] Lewis for petitioners.

Mr. J. Rodman Paul, for respondent.

January 20, 1902. *Granted*.

ASA M. SWAIN, *Petitioner, v. HOLYOKE MACHINE COMPANY.* [No. 505.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Cansten Browne, Charles F. Perkins and Charles H. Drew for petitioner.

Mr. Elmer P. Howe for respondent.

January 27, 1902. *Denied.*

JAMES CONSIDINE, *Petitioner, v. UNITED STATES.* [No. 515.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Thomas F. Shay for petitioner.

Attorney General and Solicitor General Richards for respondent.

January 27, 1902. *Denied.*

GEORGE H. B. MARTIN *et al.*, *Petitioners, v. PEOPLE'S BANK OF BUFFALO, N. Y., et al.* [No. 520.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. F. H. Busbee and N. T. M. Melliss for petitioners.

Messrs. Norris Morcy and Jas. E. Shepherd for respondents.

February 24, 1902. *Denied.*

PROVIDENT SAVINGS ASSURANCE SOCIETY OF NEW YORK, *Petitioner, v. REBECCA T. MCCLAIN.* [No. 531.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Francis Rawle for petitioner.

Mr. Joseph Hill Brinton for respondent.

February 24, 1902. *Denied.*

WM. A. MILLIKEN, *Petitioner, v. MARTIN H. SULLIVAN.* [No. 536.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. W. A. Blount and W. W. Howe for petitioner.

Messrs. Thos. H. Watts, Alexander Troy, and Francis G. Caffey for respondent.

February 24, 1902. *Denied.*

PETER P. MILLER *et al.*, *Petitioners, v. LAKE-LAND TRANSPORTATION COMPANY.* [No. 537.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. John C. Shaw and Harrington Putnam for petitioners.

Mr. Frank H. Canfield for respondent.

February 24, 1902. *Denied.*

184 U. S.

*NATIONAL NICKEL COMPANY, *Petitioner, v. NEVADA NICKEL SYNDICATE, Limited.* [No. 528.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Joseph C. Campbell for petitioner.

Messrs. W. E. F. Deal and E. Tauszky for respondent.

March 3, 1902. *Denied.*

SOUTHERN RAILWAY COMPANY, *Petitioner, v. ATLANTA NATIONAL BANK.* [No. 555.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Fairfax Harrison for petitioner.

Mr. Benj. F. Abbott for respondent.

March 3, 1902. *Denied.*

HERBERT W. GRAY, *Petitioner, v. UNITED STATES.* [No. 560.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. W. Wickham Smith for petitioner.

Attorney General, Solicitor General Richards, and Assistant Attorney General Hoyt for respondent.

March 3, 1902. *Denied.*

AUSTIN P. BALDWIN *et al.*, *Petitioners, v. UNITED STATES.* [No. 561.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. W. Wickham Smith for petitioners.

Attorney General, Solicitor General Richards, and Assistant Attorney General Hoyt for respondent.

March 3, 1902. *Denied.*

WILLIAM H. HURD, Administrator, etc., *Petitioner, v. BOSTON & MAINE RAILROAD.* [No. 530.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. W. D. Davidge, Jr., for petitioner.

Mr. John S. H. Frink for respondent.

March 10, 1902. *Denied.*

C. & A. POTTS & Co., *Petitioners, v. ANDERSON FOUNDRY & MACHINE WORKS.* [No. 542.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Charles Martindale for petitioner.

Mr. E. E. Wood for respondent.

March 10, 1902. *Denied.*

GEORGE H. MCFADDEN *et al.*, *Petitioners, v. J. E. & W. E. HENDERSON.* [No. 553.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Thomas H. Clark for petitioners.

Mr. Warren S. Reese for respondents.

March 10, 1902. *Denied.*

[701]**ERIE RAILROAD COMPANY, Petitioner, v. JAMES MOORE.* [No. 577.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Cecil D. Hine and M. E. Olmsted for petitioner.

Mr. A. W. Jones for respondent.

March 10, 1902. *Denied.*

UNION BANK OF RICHMOND, VA., Petitioner, v. BOARD OF COMMISSIONERS OF THE TOWN OF OXFORD et al. [No. 580.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. James E. Shepherd and C. M. Busbee for petitioner.

Mr. A. A. Hicks for respondent.

March 10, 1902. *Denied.*

JOHN C. CROMWELL, Petitioner, v. BURTON H. GEDGE. [No. 594.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Philip Monro for petitioner.

Mr. Geo. B. Parkinson for respondent.

March 24, 1902. *Denied.*

BLYTHE COMPANY, Petitioner, v. FLORENCE BLYTHE HINCKLEY et al. [No. 527.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Geo. W. Towle, Jr., Thomas B. Reed, and John F. Dillon for petitioner.

Messrs. Wayne MacVeagh, F. D. McKenney, Robert Y. Hayne, W. H. H. Hart and E. S. Heller for respondents.

March 24, 1902. *Denied.*

CASES

ARGUED AND DECIDED

IN THE

S U P R E M E C O U R T

OF THE

UNITED STATES

AT

OCTOBER TERM, 1901.

Vol. 185.

REFERENCE TABLE
OF SUCH CASES
DECIDED IN U. S. SUPREME COURT,
OCTOBER TERM, 1901,
AND REPORTED HEREIN,
VOLUME 185,
AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 185 U. S.	Title.	Here In.	Off. Rep. 185 U. S.	Title.	Here In.
1-2	Tulare Irrig. Dist. v. Shepard	773	74-77	Vicksburg Waterworks Co. v.	
2-4	"	774		Vicksburg	813
4-7	"	775	77-79	"	814
7	"	776	79-82	"	815
7-8	"	777	82-83	"	816
8-10	"	778	83-84	Rodgers v. United States	816
10-13	"	779	84-86	"	817
13-16	"	780	86-88	"	818
16-18	"	781	88-91	"	819
18-21	"	782	91-93	"	820
21-23	"	783	93	New York v. Pine	820
23-26	"	784	93-96	"	821
26	"	785	96-97	"	822
27	Stockard v. Morgan	785	97-100	"	823
27-28	"	786	100-102	"	824
28-29	"	787	102-105	"	825
29	"	788	105-108	"	826
29-30	"	789	108	"	827
30	"	791	108-109	Filhiol v. Maurice	827
30-33	"	792	110-111	"	828
33-35	"	793	111	"	829
35-38	"	794	112-113	Michigan Sugar Co. v. Michi-	
38-40	Sweringen v. St. Louis	795		gan ("Michigan Sugar Co.	
40	"	796		v. Dix")	829
40-41	"	797	113-114	"	830
41-43	"	798	114-115	Eastern Bldg. & L. Asso. v.	
43-46	"	799		Ebaugh	830
46-47	"	800	115-118	"	831
47-48	French-Glenn Live Stock Co.		118-119	"	832
	v. Springer	800	119-122	"	833
48-49	"	801	122	"	834
49-52	"	802	122	McIntosh v. Aubrey	834
52-54	"	803	122-123	"	835
54-55	French-Glenn Live Stock Co.		123-124	"	836
	v. Colwell	804	124	"	837
55-56	Wilson v. Iseminger	804	124-125	"	838
56-58	"	805	125-127	Kansas v. Colorado	838
58-60	"	806	127-129	"	839
60-63	"	807	129-132	"	840
63-65	"	808	132-135	"	841
65	Vicksburg Waterworks Co. v.		135-137	"	842
	Vicksburg	808	137-139	"	843
66-68	"	809	139-142	"	844
68-69	"	810	142-144	"	845
69-71	"	811	144-147	"	846
71-74	"	812	147	"	847

REFERENCE TABLE.

Off. Rep. 185 U. S.	Title.	Here In.	Off. Rep. 185 U. S.	Title.	Here In.
148	Erie R. Co. v. Purdy	847	265-267	{ United States v. Green	
148-149	" "	848		{ Christie v. United States	904
149-151	" "	849	267-270	" "	905
151-154	" "	850	270-273	Covington v. Covington First	
154	" "	851		Nat. Bank ("Covington v.	
155-156	Hitz v. Jenks	851		First Nat. Bank")	906
156-159	" "	852	273-275	" "	907
159-162	" "	853	275-277	" "	908
162-164	" "	854	278-280	United States v. Van Duzee	909
164-167	" "	855	280-281	" "	910
167-169	" "	856	282	Excelsior Wooden Pipe Co. v.	
169-171	" "	857		Pacific Bridge Co.	910
172	Talbot v. Sioux City First		282-284	" "	911
	Nat. Bank ("Talbot v. First		284	" "	912
	Nat. Bank")	857	284-287	" "	913
172-174	" "	858	287-289	" "	914
174-177	" "	859	289-292	" "	915
177-179	" "	860	292-294	" "	916
179-180	" "	861	294-295	" "	917
180-181	" "	862	296-297	Fok Yung Yo v. United States	
182	Talbot v. Sioux Nat. Bank	862		("Fok Young Yo v. United	
182-185	" "	863		States")	917
185-187	" "	864	297-298	" "	918
187	" "	865	298-300	" "	919
188	" "	866	300-303	" "	920
189	United States v. Pendell	866	303-305	" "	921
189	" "	867	306	Lee Gon Yung v. United	
189-192	" "	868		States	921
192-195	" "	869	306-307	" "	922
195-197	" "	870	308	Fidelity Mut. L. Asso. v. Met-	
197-200	" "	871		tler	922
200-202	" "	872	308-309	" "	923
203	St. Louis Consolidated Coal		309-312	" "	924
	Co. v. Illinois ("Consolidat-		312-315	" "	925
	ed Coal Co. v. Illinois")	872	315	" "	926
207-204	" "	873	315	" "	928
204	" "	874	315-318	" "	929
205-207	" "	875	318-321	" "	930
207-209	" "	876	321-323	" "	931
209-212	" "	877	323-326	" "	932
212	" "	878	326-329	" "	933
213	United States v. Lee Yen Tai	878	329-331	" "	934
213-215	" "	880	331-334	" "	935
215-218	" "	881	334-336	" "	936
218-220	" "	882	336	New Orleans Waterworks Co.	
220-223	" "	883		v. Louisiana	936
223-225	United States v. Borchering	884	336-338	" "	937
225-227	" "	885	338-341	" "	938
227-230	" "	886	341-342	" "	939
230	" "	887	343	" "	940
231-232	" "	888	343-345	" "	941
232-234	" "	889	346-348	" "	942
234-236	" "	890	348-351	" "	943
236-237	United States v. Finnell	890	351-353	" "	944
237-240	" "	891	353-354	" "	945
240-242	" "	892	354-356	Woodworth v. Northwestern	
242-245	" "	893		Mut. L. Ins. Co.	945
245-248	" "	894	356-357	" "	946
248-251	" "	895	357-359	" "	947
251-253	" "	896	359-361	" "	948
253-254	" "	897	361-363	" "	949
254-256	Washington v. Northern Se-		364	Travelers' Ins. Co. v. Connect-	
	curities Co.	897		icut	949
256	" "	898	364-366	" "	950
256-257	{ United States v. Green		366-367	" "	952
	{ Christie v. United States	898	367-370	" "	953
257-260	" "	899	370-372	" "	954
260-263	" "	900	373	Minnesota v. Hitchcock	954
263-264	" "	901	373-375	" "	955
264-265	" "	903	375-377	" "	956

REFERENCE TABLE.

Off. Rep. 185 U. S.	Title.	Here In.	Off. Rep. 185 U. S.	Title.	Here In.
377-380	Minnesota v. Hitchcock	957	457-460	Carnegie Steel Co. v. Cambria	
380-381	" "	958		Iron Co.	994
382-384	" "	961	460-462	" "	995
384-387	" "	962	462-465	" "	996
387-390	" "	963	465-467	" "	997
390-392	" "	964	467-470	" "	998
392-395	" "	965	470-473	" "	999
395-397	" "	966	473-475	" "	1000
397-400	" "	967	476-478	" "	1001
400-402	" "	968	478-480	" "	1002
403	Carnegie Steel Co. v. Cambria		480-483	" "	1003
	Iron Co.	968	483-485	" "	1004
403-404	" "	969	485-487	" "	1005
404-406	" "	970	487-488	Swafford v. Templeton	1005
406-408	" "	971	488-490	" "	1006
408-409	" "	972	491-492	" "	1007
410	" "	975	492-494	" "	1008
410-413	" "	976	495	United States v. Copper Queen	
413-415	" "	977		Min. Co. ("United States v.	
415-418	" "	978		Copper Queen Consolidated	
418-421	" "	979		Min. Co.")	1008
421-423	" "	980	495-497	" "	1009
423-426	" "	981	497-499	" "	1010
426-428	" "	982	499-500	Southwestern Coal Co. v. Mc-	
428-431	" "	983		Bride ("Southwestern Coal	
431-434	" "	984		& Improv. Co. v. McBride")	1010
434-436	" "	985	500-502	" "	1011
436-439	" "	986	502-504	" "	1012
439-441	" "	987	505	McFaddin v. Evans-Snyder-	
441-444	" "	988		Buel Co.	1012
444-446	" "	989	505-507	" "	1013
446-449	" "	990	507-510	" "	1017
449-452	" "	991	510-512	" "	1018
452-454	" "	992	512-514	" "	1019
454-457	" "	993			
185 U. S.					371

THE DECISIONS

OF THE

Supreme Court of the United States

AT
OCTOBER TERM, 1901.

[1]*TULARE IRRIGATION DISTRICT,
George G. Kelly, and G. Garibaldi, as Ex-
ecutor of the Last Will of B. W. Jauch-
ius, Deceased, *Plffs. in Err.*,

v.

ALFRED SHEPARD.

(See S. C. Reporter's ed. 1-26.)

*Bonds of irrigation district—defective or-
ganization—estoppel of landowners—de
facto corporation.*

1. A *de facto* corporation was constituted by a bona fide attempt to organize an irrigation district under the California irrigation act of March 7, 1887 (providing for the creation of such districts as public municipal corporations), accompanied by an actual user of the corporate franchise.
2. Defective organization of an irrigation district, under the California irrigation act of March 7, 1887, because of the insufficiency of the notice of the intended presentation to the board of supervisors of the petition for the formation of such district, cannot be raised, as against bona fide holders for full value and without notice of bonds issued by such district, by the owners of land within the district, who acquiesced in the issue of the bonds and received the full benefit of the proceeds, where the board of supervisors, in the exercise of their statutory authority, had decided that the district was duly organized, and filed a copy of such determination with the county recorder as required by such statute, and the bonds contained a recital, in compliance with § 15 of that act,

that they were issued by authority of such act, stating its title and date of approval.

3. A *de facto* corporation which has received full consideration for bonds issued by it cannot set up the fact that it was never legally incorporated, as a defense to a suit, by a bona fide holder for value and without notice, to recover the interest due on such bonds.

[No. 508.]

*Submitted January 13, 1902. Decided
March 24, 1902.*

IN ERROR to the Circuit Court of the United States for the Southern District of California to review a judgment for plaintiff in an action to recover the interest due on bonds issued by an irrigation district. *Affirmed.*

See same case below on demurrer, 94 Fed. 1.

Statement by Mr. Justice **Peckham**:

This is a writ of error to the circuit court of the United States for the southern district of California, sued out for the purpose of reviewing a judgment of that court in favor of the defendant in error in an action brought by him against the irrigation district only, to recover interest due on certain coupons *attached to bonds issued by the dis- [2] trict for the purpose of raising money to build its irrigation works. It appeared from the complaint that the plaintiff was a resident of Michigan, and that the Tulare

NOTE.—On *municipal bonds generally*—see notes to *Sutliff v. Lake County*, 37 L. ed. U. S. 145; *Harper County v. Rose*, 35 L. ed. U. S. 344; *Rich v. Mentz*, 33 L. ed. U. S. 1075, and *Citizens' Sav. & L. Asso. v. Perry County*, 39 L. ed. U. S. 585.

As to *estoppel by silent acquiescence*—see notes to *Relchert v. St. Louis & S. F. R. Co.* (Ark.) 5 L. R. A. 183; *Brookhaven v. Smith*

(N. Y.) 7 L. R. A. 755; *Tarkington v. Purvis* (Ind.) 9 L. R. A. 607, and *Michigan ex rel. Atty. Gen. v. Flint & P. M. R. Co.* 38 L. ed. U. S. 478.

On *estoppel by receiving benefits*—see notes to *Katz v. Bedford* (Cal.) 1 L. R. A. 826; *Tarkington v. Purvis*, 9 L. R. A. 607, and *Michigan ex rel. Atty. Gen. v. Flint & P. M. R. Co.* 38 L. ed. U. S. 478.

irrigation district had at all times since September 2, 1889, been a corporation duly incorporated under the laws of the state of California, and since that time had been acting as such corporation; that under the laws of such state the irrigation district duly issued its bonds for the amount of \$500,000, with coupons attached; that the plaintiff was a bona fide purchaser and holder of certain of those coupons, and that he had paid full value for the same, in the usual course of business, and before any of them were due or dishonored, and in good faith and without any notice of any defect or invalidity of the same or any of them. Judgment for \$13,185 and interest was demanded. The defendant demurred to the complaint, the demurrer was overruled (94 Fed. 1), and the defendant then answered.

The answer, among other things, set up various alleged irregularities and omissions which occurred in the attempted formation of the irrigation district, on account of which, as contended, the corporation never was legally formed and never had power to issue bonds, and whatever bonds may have been issued were for those reasons void. The individual defendants at this stage applied to the court for an order permitting them to intervene in the action as parties therein, and to unite with the defendant corporation in resisting the claims of the plaintiff in this action. The court thereupon ordered that the petitioners' complaint in intervention should be filed without prejudice to the plaintiff's motion to strike out the same. They then filed what they termed their complaint in intervention in this action (which is nothing more than an answer to the complaint), in which they set up that the defendant Kelly was a citizen of the United States and a resident of the state of Massachusetts, and that ever since January 1, 1889, he had been, and was at the time of the commencement of the suit, the owner of the land which is described, and which was situate within the boundaries of the county of Tulare, California, and within the boundaries of the alleged Tulare irrigation district; that Jau-
[3]chins, the other defendant, *was a citizen of the United States and a resident of the state of California, and that he, ever since January 1, 1889, had been the owner of certain other described real property also situate in the district, and they alleged that they were interested in the subject-matter of the action and in the success of the defendant; that if the bonds and coupons mentioned in the plaintiff's complaint were adjudged valid claims against the district, then the property of interveners in the district would be assessed and taxes levied thereon to pay the claim of the plaintiff. They then set up substantially the same defenses that were pleaded by the irrigation district in its answer; also, that to permit the collection of the bonds would take defendants' property without due process of law and in violation of the Federal Constitution.

The chief defect as set up in both plead-

ings and specially argued here was in regard to the organization of the district, the defect being an alleged insufficiency of the notice of the intended presentation of the petition to the board of supervisors, by reason of which, as averred, no legal notice was given, and, therefore, all subsequent proceedings were void and of no effect. Subsequently to the service of the answer Jau-chius died, and his executor was made a party in his place.

The case came to trial upon a stipulation to waive a jury, was submitted upon an agreed statement of facts, and thereafter the court made its general findings in favor of the plaintiff, assessed his damages at the sum of \$13,185, and ordered judgment against the irrigation district for that sum.

It was stipulated that any of the facts contained in the statement might be offered in evidence by any party to the action, and when so offered the party not offering the same might object to such facts or any of them upon legal grounds which might exist against their admissibility. The statement of facts contained twenty-one paragraphs. The first twelve were offered in evidence on the part of the plaintiff, and received by the court under the defendant's objection and exception. The facts thus admitted showed that under the provisions of the irrigation act of the state of California, approved March 7, 1887, an effort was made in the county of Tulare to form an irrigation district *to be [4] known as "Tulare irrigation district," and such proceedings were had in that behalf that what purported to be a certified copy of an order of the board of supervisors of that county was duly filed with the county recorder on September 14, 1889; that order recited that the board of supervisors of Tulare county, state of California, met as a board of canvassers on Monday, September 2, 1889, for the purpose of determining the result of the special election held in Tulare county on August 24, 1889, to vote upon the subject of the organization of the Tulare irrigation district and officers therefor, by which it appeared that there were 484 votes cast in favor of forming the district, and 7 against it. The order then continued as follows: "And we further declare the territory embraced in the following described limits, to wit: [describing territory] an irrigation district duly organized under the name and style of 'Tulare irrigation district,' being situate in the county of Tulare, state of California." This declaration was made in accordance with § 3 of the act to form irrigation districts. The order further declared the election of the directors in the various divisions of the district.

The material sections of the act under which the attempt to form the district was made are to be found set forth in the case of *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 116, 17 L. ed. 369, 370, 17 Sup. Ct. Rep. 56.

The persons declared by the order of the board of supervisors to have been elected as officers of the district immediately thereafter assumed to organize as such officers, and

thereupon entered upon their duties the same as though said district had been legally organized and as though they had been legally elected as such officers, and they and their successors in office have ever since continued to act as such officers and to maintain the name of "Tulare irrigation district," and in its name have caused the defendant to act as though it was in every respect legally organized as an irrigation district under the act of the legislature, and in that behalf it has at all such times had the name "Tulare irrigation district" printed upon a sign above a door in front of an office in which the archives and papers of said defendant are kept; and its board of directors have met from time to time in such room from the time of such purported organization thereof until the present, weekly and sometimes oftener, averaging [5] *twice a month. In June, 1890, pursuant to the provisions of the statute, an election was held within the district to determine whether its bonds should be issued, resulting in favor of issuing the same, and in the years 1891, 1892, 1893 its board of directors purported to issue bonds of such Tulare irrigation district in the sum of \$500,000, being 1,000 bonds of the face value of \$500 each, and levied assessments on the property embraced in said district, purporting to act in so doing under the act of the legislature, and previous to July 1, 1896, it assessed, levied, and collected taxes upon the lands in such district of over \$100,000, and paid the same out through its treasurer as interest upon such bonds; the proceeds arising from the sale of the bonds have been used by the district in constructing a system of canals, ditches, and laterals through the lands of the district, by means of which such lands have been irrigated; it has engaged in litigation as plaintiff in suits before the issuing of such bonds, and therein alleged that it was a corporation under the provisions of the act of the legislature, and from the time of its purported organization until the present time, whatever it has done and performed, it has done and performed in the same manner as if it had been legally organized as such district, in full compliance with the law, and so continues to act and hold itself out as a corporation organized under that law. No one ever brought suit or took any action to prevent the issuing of any of the bonds, nor was any suit or action ever brought to annul or cancel or have declared void any of the bonds until after the year 1896. No action in the nature of a quo warranto was ever commenced, nor any other proceeding, to test the validity of the organization of the district.

The plaintiff at the commencement of the action was the holder and owner of the coupons upon which action was brought, and became the holder of the coupons on which he brought his action under the circumstances detailed in the agreed statement of facts, showing that he was a bona fide holder for value without notice.

The plaintiff also offered, and the same

was received, in evidence, the judgment roll in the *Matter of Tulare Irrigation District*, in the superior court of Tulare county, which was a *proceeding under what is [6] called the California confirmation act in regard to irrigation districts, and which is mentioned in *Tregea v. Modesto Irrig. Dist.* 164 U. S. 179, 181, 41 L. ed. 395, 396, 17 Sup. Ct. Rep. 52. The proceedings under this confirmation act showed a judgment of the court confirming the validity of the organization of the district. This was duly objected to, and received under the exception of the defendants. After some oral evidence had been given in regard to the execution of the bonds by the officers of the district, the plaintiff rested.

The defendants then offered separately each of the remaining paragraphs from thirteen to twenty-one, both inclusive, in the agreed statement of facts, and each, under the objection of the plaintiff and exception of the defendants, was excluded. From the facts thus offered it appears that a petition addressed to the board of supervisors of Tulare county was on July 1, 1889, filed with the board at a regular meeting; that this petition was printed and published prior thereto for two weeks during the month of June, 1889, and in a newspaper printed and published in Tulare county. The petition contained a statement that the petitioners were freeholders owning land within the district which was described in the petition, and that it was all situated within Tulare county, and that the petitioners desired to provide for the irrigation of the same; that the proposed district as described was susceptible of one mode of irrigation from a common source and by the same system of works, by conveying the waters of Kaweah river by means of dams thereon and by main and distributing canals therefrom. The petitioners prayed that the district described in the petition be organized into an irrigation district under the act of the legislature of California approved March 7, 1887. The petition then gave the boundaries of the proposed district, and asked that it be designated as the Tulare irrigation district. This petition was signed at the end thereof, each petitioner stating the number of acres owned by him. Following these signatures was a paper like this:

Notice.

Pursuant to the statutes in such cases made and provided, notice is hereby given that the above and foregoing petition *will [7] be presented to the board of supervisors in and for the county of Tulare, at their first regular meeting in the month of July, 1889, to wit, on Monday the 1st day of July, 1889, at which time any person or persons desiring so to do may present their objections, if any they have, why said petition should not be granted.

The signatures to the petition were not repeated at the end of the notice. This no-

tice was in the same type as the petition, and in the newspaper it was inclosed, with the petition, between two black lines across the column, the first at the head of the petition and the last at the end of the notice.

The alleged defect in this publication consists in the fact that although the petition was printed in full and the names of the signers with the number of acres owned by them follow the petition, yet as the notice of the presentation of the petition follows the signatures to such petition, and the notice is not signed by the petitioners, it lacks those essential signatures, and for that reason is not a valid notice, and becomes in law no notice whatever.

The defendants also offered in evidence a second judgment in the *Matter of the Tulare Irrigation District*, setting aside the former judgment of confirmation and refusing to confirm the validity of the organization of the district. The judgment was excluded upon the objection of the plaintiff. All these offered facts having been excluded, the court made a general finding in favor of the plaintiff. The individual defendants now contend that the court, in granting judgment for the plaintiff, did in effect permit the taking of their property without due process of law, in violation of the Constitution of the United States.

Messrs. George H. Maxwell and John Garber submitted the cause for plaintiffs in error. **Messrs. Calvin L. Russell, G. W. Zartman, and R. M. F. Soto** were with them on the brief:

The notice was insufficient to vest jurisdiction in the board of supervisors to proceed on the petition for organization because of the absence therefrom of the signature of the petitioners.

Re Central Irrig. Dist. Bonds, 117 Cal. 382, 49 Pac. 354. See also *Doerr v. Southwestern Mut. Life Asso.* 92 Iowa, 39, 60 N. W. 225; *Finch v. Tehama County*, 29 Cal. 453; *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287.

The records of no tribunal can import such verity as to preclude a party whose rights are affected by a judgment from setting up and proving that the court never obtained jurisdiction, and that the purported judgment is a nullity.

Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; *Beaudrias v. Hogan*, 23 App. Div. 83, 48 N. Y. Supp. 468; *Maxtin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149; *Goudy v. Hall*, 30 Ill. 109; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Harris v. Hardeman*, 14 How. 334, 14 L. ed. 444; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761.

A fortiori, it must be permissible, even in a collateral action, to prove the falsity of recitals as to jurisdictional facts appearing in the records of an inferior tribunal of special and limited jurisdiction.

Chemung Nat. Bank v. Elmira, 53 N. Y. 54; *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; *Mulligan v. Smith*, 59 Cal. 206; *Allen v. Port-*

land, 35 Or. 509, 58 Pac. 509; *Aplin v. Fisher*, 84 Mich. 128, 47 N. W. 574. See also *Kahn v. San Francisco*, 79 Cal. 388, 21 Pac. 849; *People v. Hagar*, 49 Cal. 232; *Lent v. Tillson*, 72 Cal. 422, 14 Pac. 71; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755, 28 Pac. 272, 675; *Lower Kings River Reclamation Dist. No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 355.

The same principle which controls cases of this character must apply to cases involving such a jurisdictional defect as the failure to publish the notice of the petition for the formation of an irrigation district, as required by the act of 1887.

Re Central Irrig. Dist. Bonds, 117 Cal. 382, 49 Pac. 354; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 Pac. 369, 17 Sup. Ct. Rep. 56.

Where even "a municipal corporation is wholly void *ab initio*, as being created without warrant of law, it can create no debts and incur no liabilities."

Shapleigh v. San Angelo, 167 U. S. 655, 42 L. ed. 314, 17 Sup. Ct. Rep. 957.

If this district was organized without compliance with the substantial conditions precedent prescribed by the statute, the organization was void *ab initio*, and not merely voidable.

Re Central Irrig. Dist. Bonds, 117 Cal. 382, 49 Pac. 354.

In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*.

New York Cable Co. v. New York, 104 N. Y. 43, 10 N. E. 332. See also *Reclamation Dist. No. 537 v. Burger*, 122 Cal. 442, 55 Pac. 156; *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588; *Bradley v. Fallbrook Irrig. Dist.* 68 Fed. 948, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

If the statutory notice had been given, and yet when, in obedience to it, we appeared, the board had struck out our appearance, and without any hearing had organized the district, we certainly could show that fact, even though it involved a collateral attack upon the organization of the district.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

A fortiori, we may show that no notice was given, or the legal notice was not given.

Mr. S. F. Leib submitted the cause for defendant in error:

The district is a *de facto* public corporation. This is as far as bona fide purchasers of its bonds need go.

Shapleigh v. San Angelo, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 34 L. ed. 784, 11 Sup. Ct. Rep. 185; *Macon County v. Shores*, 97 U. S. 277, 24 L. ed. 890. See also *Ralls County v. Douglass*, 105 U. S. 730, 26 L. ed. 958; *Aller v. Cameron*, 3 Dill. 198, Fed. Cas. No. 243; *Quint v. Hoffman*, 103 Cal. 507, 37

Pac. 514, 777; *People v. Linda Vista Irrig. Dist.* 128 Cal. 484, 61 Pac. 86; *Hamilton v. San Diego County*, 108 Cal. 284, 41 Pac. 305; *Herring v. Modesto Irrig. Dist.* 95 Fed. 712; *Miller v. Perris Irrig. Dist.* 85 Fed. 698; *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742; *Dallas County v. Huidekoper*, 154 U. S. 654, 25 L. ed. 974, 14 Sup. Ct. Rep. 1200; *Presque Isle County v. Thompson*, 61 Fed. 914; *Coler v. Dwight School Twp.* 3 N. D. 249, 28 L. R. A. 64, 55 N. W. 587; *Dean v. Davis*, 51 Cal. 406; *Reclamation Dist. No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779; *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866; *Reclamation Dist. No. 542 v. Turner*, 104 Cal. 334, 37 Pac. 1038; *Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co.* 67 Fed. 55; *Fitzpatrick v. Rutter*, 160 Ill. 282, 43 N. E. 392; *State v. Leatherman*, 38 Ark. 81; *State ex rel. Brown v. Westport*, 116 Mo. 582, 22 S. W. 888; *Re Short*, 47 Kan. 250, 27 Pac. 1005. See also *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; 7 Am. & Eng. Enc. Law, 2d ed. p. 668; 8 Am. & Eng. Enc. Law, 2d ed. p. 769; *Simonton, Municipal Bonds*, p. 5; *Cooley, Const. Lim.* 6th ed. 309, 310; 1 Dill. Mun. Corp. 4th ed. 418.

If this were a private transaction, there is no question but what the district and these taxpayers would be estopped from denying the liability.

Williams v. Paine, 169 U. S. 55, 42 L. ed. 658, 18 Sup. Ct. Rep. 279; *Douglas County v. Bolles*, 94 U. S. 110, 24 L. ed. 48; *Morgan v. Chicago & A. R. Co.* 96 U. S. 720, 24 L. ed. 744; *Swain v. Scamens*, 9 Wall. 254, 19 L. ed. 554; *Dolbeer v. Livingston*, 100 Cal. 621, 35 Pac. 328; *Ions v. Harbison*, 112 Cal. 271, 44 Pac. 572; *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. ed. 619; *Carry v. Dowdell*, 115 Cal. 687, 47 Pac. 695; *Scott v. Jackson*, 89 Cal. 263, 26 Pac. 898; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.* 90 N. Y. 613; *Muncey v. Joest*, 74 Ind. 413.

A corporation, public or private, is held to just as strict a liability as a private individual, where a question of right is concerned.

Hackett v. Ottawa, 99 U. S. 96, 25 L. ed. 365; *National L. Ins. Co. v. Huron Bd. of Edu.* 10 C. C. A. 637, 27 U. S. App. 244, 62 Fed. 784; *Meyer v. Brown*, 65 Cal. 589, 4 Pac. 25, 625, 26 Pac. 281; *Andes v. Ely*, 158 U. S. 312, 39 L. ed. 996, 15 Sup. Ct. Rep. 954; *Zabriskie v. Cleveland, C. & C. R. Co.* 23 How. 400, 16 L. ed. 489.

The defendant and its taxpayers have ratified the organization of the district.

Anderson County v. Bcal, 113 U. S. 240, 28 L. ed. 971, 5 Sup. Ct. Rep. 433; *Bissell v. Jeffersonville City*, 24 How. 299, 16 L. ed. 665; *Derby v. Modesto*, 104 Cal. 517, 38 Pac. 900; *Foster v. Bear Valley Irrig. Co.* 65 Fed. 846; *Racine & M. R. Co. v. Farmers' Loan & T. Co.* 49 Ill. 331, 95 Am. Dec. 595; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

The determination of the board of super-
185 U. S. U. S., Book 46.

visors that notice had been given is conclusive in favor of bona fide holders of bonds.

Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579; *Douglas County v. Bolles*, 94 U. S. 107, 24 L. ed. 47; *Johnson County v. January*, 94 U. S. 202, 24 L. ed. 110; *Oregon v. Jennings*, 119 U. S. 74, 30 L. ed. 323, 7 Sup. Ct. Rep. 124; *Bernards Twp. v. Morrison*, 133 U. S. 524, 33 L. ed. 728, 10 Sup. Ct. Rep. 333; *Miller v. Perris Irrig. Dist.* 99 Fed. 147.

Where there is a valid law under which bonds could be legally issued, and the bonds recite that they were issued by "authority" of that law, the recital is conclusive in favor of bona fide holders of such bonds, as to their validity, and as to the due performance of every act to make them valid.

Douglas County v. Bolles, 94 U. S. 107, 24 L. ed. 47; *San Antonio v. Mehaffy*, 96 U. S. 314, 24 L. ed. 817; *Macon County v. Shores*, 97 U. S. 278, 24 L. ed. 889; *Provident Life & T. Co. v. Mercer County*, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Knox County v. Aspinwall*, 21 How. 539, 16 L. ed. 208; *De Voss v. Richmond*, 98 Am. Dec. 687, note, 18 Gratt. 338; *Humboldt Twp. v. Long*, 92 U. S. 645, 23 L. ed. 754; *Reeve v. Kennedy*, 43 Cal. 643. See also *McCaulley v. Fulton*, 44 Cal. 361; *Reiley v. Lancaster*, 39 Cal. 354; *Eitel v. Foote*, 39 Cal. 440; *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283; *Walker v. Cronkite*, 40 Fed. 133; *Sargeant v. State Bank*, 12 How. 371, 13 L. ed. 1028; *Tilton v. Coffield*, 93 U. S. 163, 23 L. ed. 858; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

If a court, having jurisdiction of the subject-matter, and required to determine all jurisdictional questions, either expressly or impliedly adjudges that notice was given, its decision will repel a collateral attack, unless the record of the court affirmatively shows that no notice was given; and this is so although the record shows a defective and irregular notice.

Isaacs v. Price, 2 Dill. 347, Fed. Cas. No. 7,097; *Harrington v. Wofford*, 46 Miss. 31; *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Thompson v. Tolmie*, 2 Pet. 157, 7 L. ed. 381; *Muncey v. Joest*, 74 Ind. 411.

*Mr. Justice **Peckham**, after making the [7] foregoing statement of facts, delivered the opinion of the court:

*It is agreed in the statement of facts in [8] this case that the moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received the full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and, while acting as a corporation, at all times, still sets up that it was never

legally organized, and hence had no legal right to issue any bonds.

In the case of *Douglas County v. Bolles*, 94 U. S. 104, 110, 24 L. ed. 46, 48, a case involving facts somewhat similar, this court said: "Common honesty demands that a debt thus incurred should be paid." That sentiment has lost no force by the lapse of time, and we think it applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed.

The sole ground of defense which has been urged at the bar has been an alleged defect in the notice of the intended presentation of the petition to form the district, to the board of supervisors, the defect consisting in the omission to add at the end of the notice the names of the signers to the petition which immediately precedes it.

Section 2 of the act approved March 7, 1887, commonly called the "Wright act" of the California legislature, provides that the petition for the organization of an irrigation district shall be presented to the board of supervisors of the county in which the lands are situated, signed by the required number of freeholders mentioned in the 1st section, which petition must describe the proposed boundaries of the district, and pray that the same may be organized under the provisions of the act. The petition must be presented at a regular meeting of the board of supervisors, and be published, for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where the petition is to be presented, "together with a notice stating the time of the meeting at which the same [9] will be presented." *In this case a proper petition complying with the provisions of the act was made and signed by the requisite number of freeholders. The petition, with the signatures of such freeholders appended, was published in the proper newspaper, together with a notice as provided for in the act, but the signatures of the freeholders which were appended to the petition were not reproduced at the end of the notice. The petition, signatures, and notice were published in the same column and as one entire proceeding, separated from the rest of the contents of the newspaper by a black line across the column immediately preceding the petition, and another black line across the column at the end of the notice. In this way it was separated from all other matter in the paper. It is now urged that this failure to reprint the signatures to the petition at the end of the notice rendered it of no effect in law, and that the result was the same as if no notice at all had been published. It is therefore argued that the action of the board of supervisors when the petition was in fact presented and proof taken in regard to the facts stated therein, in accordance with the published notice, was without legal effect, and the determination of the board of supervisors, after a

hearing before it, that some of the lands described in the petition would be benefited by irrigation, including those of the individual plaintiffs in error, was wholly without validity, because the board acquired no jurisdiction over the subject on account of the absence of notice; the board, having no jurisdiction, could make no valid determination as to the organization of the district; the district could issue no valid bonds; and the fact of the absence of notice could be shown as a defense to bonds that were issued, no matter under what circumstances the defense should arise. It was then contended that to permit a recovery would result in the taking of the property of the individual defendants by means of an assessment and without due process of law.

It is not urged here that the plaintiff below was not a bona fide purchaser for full value without notice of any defective organization or want of power in the corporation to issue the bonds. Upon the stipulation of facts no such defense could prevail. The whole force of the defense rests, therefore, upon *this alleged defective notice because of [10] the failure to reprint the names of the signers to the petition at the end of such notice. Is this such a defect as to practically amount to an absence of notice so that the board of supervisors could acquire no jurisdiction upon presentation of the petition? Certainly the notice could mislead no one. It gave full and detailed information in regard to the time and place at which the petition would be presented to the board of supervisors. It cannot be claimed that the notice itself did not give all the information provided for by the statute, and it warned all persons who might desire so to do to present their objections, at the time and place named, why the petition should not be granted. Anyone on reading the notice obtained thereby all necessary knowledge to enable him to attend at the time and place mentioned and present any objection that he might have against the granting of the petition. The petition which preceded the notice was signed by a sufficient number of landowners, and the notice which followed the signatures to the petition evidently formed part of the proceeding inaugurated by the signers to the petition to take the necessary steps to organize an irrigation district. The whole thing, petition, names of signers thereto, and notice, was published the statutory time and also posted as required. As published, it evidently formed but one proceeding, and the notice was part thereof. Could anyone fairly misunderstand the fact that the notice was part of the action of the signers to the petition, and, when precisely in accordance with the terms stated in the notice, the petition was publicly presented to the board of supervisors, was not the statute sufficiently complied with to give jurisdiction to that body to proceed to determine the facts in accordance with the provisions of the statute? Was not the notice fairly and substantially

authenticated as a notice given by the signers to the petition?

[11] In the case of *Re Central Irrig. Dist. Bonds*, 117 Cal. 382, 49 Pac. 354, the supreme court of that state has held that the publication of a notice similar to this, unsigned and unauthenticated, was invalid, and the defect could not be cured by proof of actual notice or knowledge on the part of those to be affected thereby. It is urged that this decision of the supreme court *of the state should be followed by us, because it is in effect the construction given by the state court to a statute of the state. We are not entirely persuaded that this claim is well founded. It might, on the contrary, be urged with much force that the decision was based upon principles of general law as to whether a notice presupposes by its very terms, and makes absolutely necessary in all cases, a signature at the end thereof, and it might be claimed that the case came within the principle decided in *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583, where this court refused to follow the prior decisions of the court of appeals of the state of New York made in cases arising upon a New York statute and under a similar state of facts, on the ground that those decisions did not present a case of statutory construction. See also *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612. And again, the bonds in question here were issued not later than 1893, while the decision of the California state court was not made until June, 1897, and there being no other decision of the state court upon the particular point it might be reasonably maintained that the matter should be regarded as open to be decided in accordance with our own views of the subject.

We do not deem it necessary to decide the question here, because there are other facts upon which we can base our judgment without impugning the decision of the state court. Assuming, therefore, for the purpose of this case, though not deciding, that the notice was insufficient, and did not fully comply with the statute, it will be seen that the case above referred to does not decide that the question of the defective organization could be raised as against bona fide holders of bonds issued by the district. The action in that case was commenced under a California statute providing for the taking of proceedings to confirm the validity of the organization of an irrigation district, and although the statute under which an irrigation district is to be formed provides for a determination of the fact of due organization by the board of supervisors, yet the proceedings under the confirmation act are expressly directed to be had to review the determination of that board, so that there is express statutory authority to go behind that determination in that proceeding.

[12] *But assuming that the failure to sign the notice resulted in a failure to organize a *de jure* irrigation district, and that in a direct proceeding, such as is provided for by the confirmation act, or in a quo warranto action, the determination of the board

of supervisors could be reviewed, it does not follow that such determination could be reviewed in a collateral action on the part of a bona fide holder of bonds to recover the principal or interest thereon. In the case spoken of, the supreme court of California, while deciding upon the invalidity of the organization, refused to pass upon the question whether the bonds of the district were void for the reason that proper notice was not given; and the court in refusing to decide the question remarks that "it is not proper because some of the bonds (it is insisted) had been sold and had passed into the hands of bona fide purchasers before the institution of this proceeding. . . .

After the issue and before the sale of any bonds it may well be of advantage to the district and to intending purchasers that the judgment of a court should be invoked to pass upon the regularity of the action of the district officers, but after sale different questions present themselves. The bonds are negotiable; public corporations are estopped from setting up many defenses of irregularity against the innocent holders of such negotiable securities. Whether or not the holder be an innocent purchaser and a purchaser without notice is itself a question which cannot be determined in this proceeding. From all these considerations, and others which will readily suggest themselves, it is proper, in cases where bonds of a district have been actually sold before institution of confirmation proceedings, to refuse consideration to questions of the regularity of such sales, leaving their determination to that forum before which appropriate action may be brought to test the questions, for it is only in such an action before such a court that there will be found full and unquestioned jurisdiction of the subject-matter, and of all the necessary parties, as well as power to determine all objections and defenses." We may therefore proceed to the inquiry as to the liability of the corporation to a bona fide holder of its bonds, without further reference to the above case.

*The supreme court of the state has held [13] that irrigation districts were public municipal corporations (*Central Irrig. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. 825; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755, 28 Pac. 272, 675; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514, 777), and the statute providing for their creation has been held to be one that should be liberally construed. 79 Cal. 351, 21 Pac. 825, *supra*. The supreme court of California and this court have also decided that the irrigation act is a valid statute, and that it violates neither the state nor the Federal Constitution. *Fallbrook Case*, 164 U. S. 112-159, 41 L. ed. 369-388, 17 Sup. Ct. Rep. 56, and cases cited.

Even though the irrigation district failed to become organized as a *de jure* corporation, it may still have been acting as a corporation *de facto*. That there may be such a corporation cannot be doubted. *Baltimore & P. R. Co. v. Fifth Baptist Church*,

137 U. S. 568, 571, 34 L. ed. 784, 786, 11 Sup. Ct. Rep. 185; *Shapleigh v. San Angelo*, 167 U. S. 646, 655, 42 L. ed. 310, 313, 17 Sup. Ct. Rep. 957; see also cases decided by the Federal courts in California, *Miller v. Perris Irrig. Dist.* 85 Fed. 693, again reported in 99 Fed. 143; *Herring v. Modesto Irrig. Dist.* 95 Fed. 705; also *Lanning v. Galusha*, 81 Hun, 247, 30 N. Y. Supp. 767, affirmed by the court of appeals on the opinion of the court below in 151 N. Y. 648, 45 N. E. 1132; *Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362; *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 11 L. R. A. 515, 8 So. 658; *American Salt Co. v. Heidcnheimer*, 80 Tex. 344, 15 S. W. 1038; Taylor, Corp. 4th ed. § 146.

From the authorities, some of which are above cited, it appears that the requisites to constitute a corporation *de facto* are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise. The case at bar contains these requisites. There was a general valid law under which a corporation such as the defendant is claimed to be could be formed, there was undoubtedly a bona fide attempt to organize thereunder, and there has been actual user of the corporate franchise. In the progress of the attempt to organize the district the determination of the board of supervisors was made, under the provisions of the statute, declaring the body to be a duly organized irrigation district. Subsequently officers were [14] elected *and took office and have ever since discharged the duties thereof under the statute, and a special election was held to determine the question of issuing bonds, and the bonds were issued pursuant to the result of such election, and suits have been commenced in the name of the corporation. In brief, if anything can constitute a *de facto* corporation, the defendant herein constitutes one.

The case of *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121, contains no doctrine in opposition. In that case the state court of Tennessee had held that the so-called board of commissioners of Shelby county, organized under the act of March 9, 1867, had no lawful existence; that it was an unauthorized and illegal body, and its members were usurpers of the functions and powers of the justices of the peace of the county; that their action in holding a county court was void, and that their acts in subscribing to the stock of the Mississippi Railroad Company and issuing bonds in payment therefor were void. Those acts the bondholders had endeavored to sustain by claiming that they were the acts of *de facto* officers, and that under such circumstances it was not material whether the board of commissioners had a lawful existence or not. This court held there could be no *de facto* officer where the office itself had no legal existence. If there be no office to fill, there can be no officer either *de jure* or *de facto*, and as the act attempt-

ing to create the office never became a law, the office itself never came into existence; it was a misapplication of terms to call one on officer who holds no office, and a public office could exist only by force of law.

In the case now before us there was a valid law providing for the creation of just such a corporation as the defendant claimed to be. There was a bona fide attempt to organize under it, and there had been a user of the franchise, and within the authorities already cited a corporation *de facto* was thereby constituted.

Being a *de facto* corporation, the general rule is that none but the state can call its existence in question. The courts of California agree that such is the rule. *People v. Montecito Water Co.* 97 Cal. 276, 32 Pac. 236; *Quint v. Hoffman*, 103 *Cal. 506, 37 [15] Pac. 514, 777, *supra*; see also Cooley, Const. Lim. 4th ed. p. 312; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389, 393. The rule as stated by Cooley is as follows:

"In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such. . . . And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, and private parties could not enter upon any question of regularity. And the state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition."

It was held in *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957, *supra*, that none but the state could impeach the validity of the creation of a municipal organization, and that if it acquiesced therein the corporate existence could not be collaterally attacked. The court, through Mr. Justice Shiras, said:

"The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void *ab initio*, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody except the state acting by direct proceedings. Such an organization is merely voidable, and if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor."

*It cannot be said that this corporation [16] was created without warrant of law. There

was a valid law and there was a bona fide attempt to organize under it, and the most that can be said is that there was a failure to comply with all the directions of the statute by which a corporation *de jure* might be organized.

It is contended, however, that there is an exception to the general rule in such a case as this, because the proceedings of the corporation may result in the levy of an assessment upon lands of private owners within the district, and such owners are therefore permitted to raise at any time the question of the illegality by reason of the want of notice of the organization of the corporation. The case in 117 Cal. 382, 49 Pac. 354, *supra*, also the cases of *Reclamation Dist. No. 537 v. Burger*, 122 Cal. 442, 55 Pac. 156, and *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 170, 41 L. ed. 369, 392, 17 Sup. Ct. Rep. 56, are cited to show the illegality of an organization without notice. On the other hand, *Reclamation Dist. No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779, holds that the landowner could not collaterally attack the validity of the organization of the district. It is true there was a validating statute passed in that case, and the assessment was made after the date of the passage of such act, but the act assumed to cure the irregularities of an organization prior thereto. In *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866, it was again held that no attack upon the organization could collaterally be made, even in an action to recover an assessment. But whatever may be the decisions in California, the plaintiffs in error claim that this court in *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56, *supra*, has held that there must be notice to the landowner and an opportunity to contest the question of alleged benefits to his property by the organization of the irrigation district, or else the organization is invalid and the landowner can show it in a collateral action and at any time the question may arise. It is not denied that the statute provides for a notice and an opportunity to be heard, but the allegation simply is there was not any notice in fact.

The *Fallbrook Case* held that the statute did provide for notice and opportunity to show that the land would not be benefited by being included in the district. It did not [17] hold that under *all circumstances the landowner could, at any time, show the absence of notice even against a bona fide purchaser of bonds subsequently issued, and we think that the landowner may be prevented from showing want of notice in such a case as the one presented herein,—a bona fide holder of bonds for full value without notice, and a landowner sleeping upon his rights.

The case of *New York Cable Co. v. New York*, 104 N. Y. 1, 43, 10 N. E. 332, is cited to the point that where it is sought to take the property of an individual under powers granted by the state to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the 185 U. S.

powers granted be strictly pursued and all the prescribed conditions performed, and that hence, if the corporation be simply a *de facto*, and not a *de jure*, corporation, it cannot take private property *in invitum*. The case simply asserts the principle that the right of eminent domain cannot be exercised by a corporation *de facto*, and that the question of valid organization could be raised when such a corporation sought to condemn lands. That is one of the exceptions to the general rule in regard to a corporation *de facto*. When a corporation seeks to divest title to private property and to take it for the purposes of its incorporation, it must then show that it is a corporation *de jure*, for the law has only given the right to take private property to that kind of a corporation. But even in such case it may happen that a party would be precluded from setting up the defense by matters *in pais* amounting to an estoppel or an admission.

It is enough to say here, however, that this action by an individual plaintiff against a corporation *de facto*, to recover a money judgment for a debt due the plaintiff, bears no similarity to a proceeding by a corporation to condemn land for its own use, in which case it must be a corporation *de jure*.

In this case we have the fact that the plaintiff is a bona fide purchaser of the coupons, for value and without notice of any defect in their validity, and an examination of the statute shows provision for the determination by the board of supervisors of the fact that the district has been duly organized. The record shows the entry of an order by the board of supervisors, by *which [18] that board declared the territory embraced in the limits therein described to be an irrigation district, duly organized under the name and style of the Tulare irrigation district, situated in the county of Tulare and state of California. A copy of this order was filed in the office of the county recorder, and after the date of such filing the statute declares the organization shall be complete. Section 15 of the statute provides that when the bonds shall be issued "said bonds shall express on their face that they were issued by authority of this act, stating its title and date of approval."

It thus appears that the statute confided to and imposed upon the board of supervisors the duty of inquiry by proof as to compliance with the statute and required a decision by it in regard thereto, and when the provisions of the statute had been complied with, and the corporation organized, the duty was imposed upon the board (§ 3) to "declare such territory duly organized as an irrigation district under the name and style theretofore designated." All this was done. The board of supervisors made its determination; it was the body provided for and appointed by the statute to make it, and it was to be made by an order duly entered and a copy of it filed with the county recorder, thus making a full and complete record of the fact of the determination by the board of the question of organization confided to the board for decision by the statute itself.

The proof shows that officers were duly elected, entered upon the duties of their various offices, and that an election was held and the district determined to issue bonds. The landowners acquiesced in the action of the board of supervisors from the time of the presentation of the petition to that body, so far that none questioned the validity of the organization by quo warranto or otherwise, and no suit of any kind was instituted to prevent the issue of the bonds. Not only were no steps taken to prevent their issue or test the right of the district to issue them, but their sale was made after a public election, and the proceeds arising therefrom were used to create and build the irrigation system, which is still in active operation and now in the possession of the company. Interest has been paid on the bonds thus issued (which issue was not later than [19] 1893) up to 1896. Assessments *to pay the interest arising during that time have been levied and collected from the owners of lands in the district. Under these circumstances and by reason of the statute and the recitals in the bonds we think the landowner is estopped from setting up the defense of the want of notice, as against the plaintiff in this case, because he is a bona fide holder for full value without notice, and because the landowners acquiesced in the issue of the bonds and have received the full benefit of their proceeds.

The bonds in this case contained a recital in accordance with the provisions of the statute, as follows: "This bond is one of a series of bonds amounting in the aggregate to \$500,000, caused to be issued by the board of directors of said Tulare irrigation district, by authority and pursuant to the provisions of an act of the legislature of the state of California entitled 'An Act to Provide for the Organization and Government of Irrigation Districts and to Provide for the Acquisition of Water and Other Property, and for the Distribution of Water Thereby for Irrigation Purposes, Approved March 7, 1887,' and also by authority of and in accordance with the vote of the qualified electors of said irrigation district at a special election held on the 7th day of June, 1890." The provision in the statute, that the bonds should express on their face that they were issued by authority of the act, stating its title and date of approval, was evidently for the purpose of giving them greater negotiability. A recital as directed by the statute, that the bond was issued by the authority of the statute, and also pursuant to the provisions thereof, and in accordance with the vote of the qualified electors, was a statement upon which a purchaser would have the right to rely, and to assume therefrom that all prior acts necessary to be done to give the bond validity had been done, because otherwise the bond would not be issued under the authority and pursuant to the provisions of an act which provided for certain things to be done when they were not done in the particular case in hand.

But even if the recital were not broad enough to conclude the party who issued the

bonds, which we do not at all admit, yet as the statute invested the board of supervisors with power to *decide whether the dis- [20] trict had been duly organized, the exercise of that power by the board, and its determination that the district had been legally and duly organized (such determination being evidenced by the order duly recorded as provided for in the statute), was a finding of fact upon which the purchaser had a right to rely, as it was the record provided by the statute, made by a body directed by it to determine the very fact in question, and in such cases the finding is conclusive in favor of a bona fide holder of bonds. *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583.

In *Bissell v. Jeffersonville*, 24 How. 287, 16 L. ed. 664, the common council of the city had authority to subscribe for stock in a railway company and to issue bonds for such subscription upon the petition of three fourths of the legal voters of the city. The common council made a determination that the petition presented contained three fourths of such legal voters, and the bonds were thereupon issued. The bonds having been issued, the city defaulted in the payment of the interest, and an action was brought to recover such instalments in the circuit court of the United States for the district of Indiana. After the plaintiff had given evidence from the records of the common council that it had determined that three fourths of the legal voters of the city had petitioned for the issuing of such bonds, the defendant offered parol testimony to show that three fourths of the legal voters of the city did not so petition. The evidence was admitted under objection, and under the rulings the jury returned a verdict in favor of the defendants, and the case was brought here for review. This court, upon that question, through Mr. Justice Clifford, said (page 296, L. ed. p. 670):

"Unless three fourths of the legal voters had petitioned, it is clear that the bonds were issued without authority, as by the terms of the explanatory act it could only apply to a case where the common council of a city had contracted the obligation or liabilities therein specified upon the petition of three fourths of the legal voters of such city; and if no such petition had been presented, or if it was not signed by the requisite number of the legal voters, the law did not authorize the common council to ratify and affirm the subscription. That fact, however, had *been previously ascertained and [21] determined by the board to which the petition was originally addressed."

The court then considered the effect of the determination by the common council as between the defendant and the holders for value of the bonds without notice of the supposed defects in the proceedings under which they were issued and put upon the market, and stated as follows (p. 299, L. ed. p. 672):

"Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition, as described in the

explanatory act, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended, constituted three fourths of the legal voters of the city, else the board could not act at all. None other than the common council, to whom the petition was required to be addressed, is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of *Knox County v. Aspinwall*, 21 How. 544, 16 L. ed. 210, we are of the opinion that 'this board was one, from its organization and general duties, fit and competent to be the depository of the trust confided to it.' Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint. When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value."

[22] The statute in the present case distinctly provides for the determination of the question of fact by the board of supervisors, and for the embodying of such determination in an order, *to be entered and a certified copy to be filed with the county recorder. It is not left to inference as to which is the body to make the determination.

In *Anderson County v. Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433, the question arose as to whether there had been the requisite length of notice of the election to determine the question whether or not the bonds should be issued. The statute required that at least thirty days' notice of the election should be given, and it was thereby made the duty of the board of county commissioners to subscribe for the stock and issue the bonds after such assent of the majority of the voters had been given. Subsequently in a suit against the board of county commissioners on coupons due on the bonds that had been issued and which had been bought by a bona fide purchaser, the record showed an order for the election made thirty-three days before it was to be held, and that subsequently to the election the board canvassed the returns and certified that there was a majority of the voters in favor of the proposition, and that the board had made such vote the basis of their action in subscribing to the stock and issuing the bonds to the company. The bonds recited on their face that they were issued "in pur-

suance to the vote of the electors of Anderson county of September 13, 1869." It was held that the statement in the bonds as to the vote was equivalent to a statement that the vote was one lawful and regular in form, such as the law then in force required as to prior notice, and that, as respected the plaintiff, evidence by the defendant to show less than thirty days' notice of the election could not avail. At page 238, L. ed. p. 970, Sup. Ct. Rep. p. 438, the court said:

"The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson county of September 13, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county. The *provi-[23] sion of § 51 is 'that when such assent shall have been given' it shall be the duty of the county commissioners to make the subscription. What is the meaning of the words 'such assent?' They mean the assent of the prescribed majority, as the result of an election held in pursuance of such notice as the act prescribes. The county commissioners were the persons authorized by the act to ascertain and determine whether 'such assent' had been given; and necessarily so, because, on the ascertainment by them of the fact of 'such assent,' they were charged with 'the duty'—that is the language—of making the subscription, and the duty of issuing the bonds. They were equally charged with the duty of ascertaining the fact of the assent. The record evidence of their proceedings shows that their order for the election was made thirty-three days before the election was to be held; that they met 'pursuant to law for the purpose of canvassing returns of the election;' that they discharged that duty and certified that there was a majority of votes in favor of the proposition; that in November, 1869, they resolved that, 'in accordance with the vote, heretofore had and taken, of the electors of said county to that effect,' they subscribed for the stock; and that in July, 1870, in their order authorizing the bonds to be delivered by Joy to the company, they recited that the bonds were issued 'according to the provisions of the vote of the electors of said county.' In view of all this, the statement by the commissioners, in the bonds, that it is issued 'in pursuance to the vote of the electors of Anderson county of September 13, 1869,' is equivalent to a statement that 'the vote' was a vote lawful and regular in form, and such as the law then in force required, in respect to prior notice. The case is therefore brought within the cases, of which there is a long line in this court, illustrated by *Coloma v. Eaves*, 92 U. S. 484, 491, 23 L. ed. 579, 581, and which hold, in the language of that case, that 'where legislative authority has been given to a municipality

or to its officers to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment [24] that "the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." This doctrine is adhered to by this court. *Dixon County v. Field*, 111 U. S. 83, 93, 94, 28 L. ed. 360, 364, 4 Sup. Ct. Rep. 315."

In *Andes v. Ely*, 158 U. S. 312, 39 L. ed. 996, 15 Sup. Ct. Rep. 954, the doctrine was affirmed that where an officer is charged by law with the duty to decide certain facts, his decision thereon is conclusive and takes the form of a judgment, only to be reviewed by a higher court. At page 324, L. ed. p. 1002, Sup. Ct. Rep. p. 959, the court said: "Whether the various steps were taken which in this particular case justified the issue of the bonds was a question of fact; and when the bonds on their face recite that those steps have been taken it is the settled rule of this court that, in an action brought by a bona fide holder, the municipality is estopped from showing the contrary."

In *Provident Life & T. Co. v. Mercer County*, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788, where the fact whether a condition precedent had been performed before the issuing of the bonds was confided for decision to a trustee, it was held that his decision that the condition precedent had been complied with was conclusive in favor of a bona fide holder, even though the condition had in fact not been performed.

And in the case of *Watte v. Santa Cruz*, 184 U. S. 302, ante, 552, 22 Sup. Ct. Rep. 327, decided at this term, many authorities upon this question are cited in the opinion by Mr. Justice Harlan. Those authorities need not be repeated here, a reference to them as contained in that opinion being all that is necessary.

The case of *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98, had nothing to do with the principles governing the law relating to bona fide owners of municipal bonds, or with the effect of recitals contained in such bonds. It was a case of an alleged invalid assessment levied to collect the cost of paving one of the public streets in the city. There was a direct attack made upon the validity of the assessment, founded upon an alleged lack of jurisdiction on the part of the common council. [25] The action was "maintained under a well-recognized head of equity jurisdiction, on the ground that the assessment, valid on its face, constituted a cloud upon the plaintiff's title, which required evidence *aliunde* to remove.

In addition to the strength of the position of the plaintiff in the action as a bona fide

purchaser and holder of the bonds, the position of the defendants merits due consideration. Regarding the individual defendants, it is scarcely possible to believe that they were not aware of the proceedings above recited, taken to organize the corporation, and thereafter to issue its bonds, even though it should be admitted that the published notice was not legally sufficient to comply with the statute. They were the owners of land within the proposed district. The proceedings were all of a public nature, and two public elections were held within the district before the bonds were issued. Of these facts, already detailed, we say it is impossible to believe that the individual defendants did not have knowledge at the time of their occurrence, and yet they took no action to prevent the issuing of the bonds, or to call in question by the slightest hint the validity of the organization of the district as a corporation. On the contrary, they entirely acquiesced in all the proceedings leading up to their issue, in obtaining the moneys therefrom, in the expenditure thereof for the purpose for which the bonds were issued, and in paying during several years the assessments made upon the lands within the district for the purpose of paying the interest on the bonds which had been issued. After all this had been done, we can properly use the language found in the opinion in *Bissell v. Jeffersonville*, 24 How. *supra*, at page 299, 16 L. ed. 672: "It was then too late to call in question the fact determined by the common council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value."

Assuming the insufficiency of the notice of the intended presentation of the petition to the board of supervisors, the defendant landowners could have applied to the attorney general for the commencement of an action in the nature of a quo warranto, to raise and decide the questions, after the board had decided the organization was duly formed. Or they could have themselves "commenced an action to restrain the [26] proposed issue of bonds on the ground there was no valid corporation, and therefore no valid body to issue them. Their interest as landowners in the district would be sufficient to permit them to maintain such action. On the contrary, they did nothing, and in view of all the facts above detailed, and giving due effect to the provisions of the statute referred to and the determination of the supervisors, together with the recitals in the bonds, it is clear to us that they waived their right to thereafter object on the ground stated, as against a bona fide holder of the bonds for value. As to the defendant corporation, it seems so clear that it cannot be heard to set up the invalidity of the bonds on the ground that it was not legally incorporated, that we do not think it necessary to further discuss the question. Taylor, Corp. 4th ed. § 146, and cases cited in note.

We have given no weight to the two judg-

ments taken under the confirmation act of the California legislature, the first of which was entered before the bonds were issued, and confirmed the validity of the organization, while the second was entered years after the bonds were issued, and refused to confirm the organization. In the view we take of this case it is unnecessary, and it is therefore needless for us to here discuss or determine the question of the effect which ought to be given them under other circumstances. The plaintiff below occupies an unassailable position upon the facts of the case as a bona fide purchaser, without reference to either judgment.

We are of opinion there is no error in the record, and the judgment of the court below is therefore affirmed.

[27]*B. A. STOCKARD and R. C. Jones, Composing the Firm of Stockard & Jones, et al., Plffs. in Err.,

v.

CLINT MORGAN and J. N. McCutcheon.

(See S. C. Reporter's ed. 27-38.)

Constitutional law—tax on interstate commerce—privilege tax on agent soliciting orders for nonresident principal.

A privilege tax imposed by a state statute upon residents of that state as merchandise brokers whose business is exclusively confined to soliciting orders from jobbers and wholesale

dealers within the state, as agents for nonresident parties, firms, or corporations, for goods to be shipped by such nonresident principals to such jobbers or dealers, is an unconstitutional invasion of the commerce clause of the Constitution of the United States.

[No. 195.]

Submitted March 19, 1902. Decided April 7, 1902.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment reversing a judgment of the Court of Chancery of Hamilton County in favor of complainants in a suit to enjoin the collection of a privilege tax. *Reversed.*

See same case below, 105 Tenn. 412, 58 S. W. 1061.

Statement by Mr. Justice Peckham:

This is a writ of error to the supreme court of the state of Tennessee, brought to review a judgment of that court reversing a judgment of the court of chancery of Hamilton county in favor of complainants, and dismissing their bill.

The complainants sought to enjoin the collection of a tax imposed upon them under a statute of Tennessee, upon the ground that they were not liable for the tax because they were agents and brokers exclusively for the sale of the property of nonresident principals, and did no business of any kind for residents of the state. They also averred that the state statute, properly con-

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* (Va.) 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041, and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

Peddlers and drummers as related to interstate commerce.

This subject is discussed in a note appended to the case of *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97. From the cases there cited it seems that a state tax on peddlers who carry goods and deliver them when they sell them is not unconstitutional as a regulation of interstate commerce if no discrimination is made against persons or property of other states. *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Re Wilson*, 8 Mackey, 341, 12 L. R. A. 624; *State v. Emert*, 103 Mo. 241, 11 L. R. A. 219, 3 Inters. Com. Rep. 527, 15 S. W. 81; *Com. v. Gardner*, 133 Pa. 284, 7 L. R. A. 666, 19 Atl. 550.

But a sale, by sample or otherwise, of goods not yet brought into the state and owned by a nonresident cannot be subjected to a state tax or license fee, as that would constitute a regulation of interstate commerce. *Robbins v. Shelby County Taxing Dist.* 120 U. S. 490, 30 L. ed. 695, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; *Asber v. Texas*, 128 U. S. 130, 32 L. ed. 369, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 611, 9 Sup. Ct. Rep. 256; *Ex parte Mur-*

ray, 93 Ala. 78, 3 Inters. Com. Rep. 574, 8 So. 868; *McLaughlin v. South Bend*, 126 Ind. 471, 10 L. R. A. 357, 26 N. E. 185; *State v. Agee*, 83 Ala. 110, 2 Inters. Com. Rep. 21, 3 So. 856; *State v. Bracco*, 103 N. C. 349, 9 S. E. 404; *Ft. Scott v. Pelton*, 39 Kan. 764, 18 Pac. 954; *Ferraris v. Kyle*, 19 Nev. 435, 14 Pac. 529; *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848, 2 So. 592; *Re Spain*, 47 Fed. 208, 14 L. R. A. 97, 3 Inters. Com. Rep. 738; *Ex parte Stockton*, 33 Fed. 95.

And a tax on peddlers of goods manufactured out of the state, not imposed if the goods are of home manufacture, is an unconstitutional regulation of interstate commerce. *Rodgers v. McCoy*, 6 Dak. 238, 44 N. W. 990; *Ex parte Thomas*, 71 Cal. 204, 12 Pac. 53; *State v. Pratt*, 59 Vt. 590, 1 Inters. Com. Rep. 299, 9 Atl. 556.

For other cases, see the note referred to *supra*.

A review of the more recent cases shows some conflict, due principally to different interpretations put by the various courts upon the decisions of the Federal Supreme Court on this question.

It is well settled that a state can impose no tax upon a person engaged in soliciting orders for goods for his nonresident employer, by whom such goods are to be delivered from without the state. *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, Reversing *Titusville v. Brennan*, 143 Pa. 642, 14 L. R. A. 100, 3 Inters. Com. Rep. 735, 22 Atl. 893; *Louisiana v. Lagarde*, 60 Fed. 186; *State ex rel. Sellger v. O'Connor*, 5 N. D. 629, 67 N. W. 824; *McClelland v. Marietta*, 96 Ga. 749, 22 S. E. 329; *Martin v. Rosedale*, 130 Ind. 109, 29 N. E. 410;

strued, did not include their business, but if it did, it was void as contravening the Federal Constitution in its interstate commerce clause.

The defendants by answer averred that they sought to collect the tax under the authority of the statute of the state of Tennessee, providing for the collection of a privilege tax on the occupation of the complainants as merchandise brokers, and that such statute was valid.

Other parties similarly situated commenced suits against the defendants to obtain like relief. By an agreement, which was approved by the court, all the cases were consolidated under the style of *Stockard & Jones v. Morgan and others*, under which title it was agreed that they should thereafter proceed as one case.

The case came to trial in the chancery

court upon the following agreed statement of facts:

"In this consolidated cause the following agreement is made as to the facts relating to the matters in controversy, viz.:

"It is agreed that the several complainants in the original bills, to wit, J. H. McReynolds, Stockard & Jones, W. G. Oehmig, T. M. Carothers, and J. H. Allison are residents of Hamilton county, Tennessee.

"That said J. H. McReynolds has been carrying on business in Chattanooga, said county and state, during the present year, 1900; that said Stockard & Jones, W. G. Oehmig, T. M. Carothers, and J. H. Allison have been carrying on business in said city during the years 1897, 1898, 1899 and 1900.

"That the character of said business so carried on by the respective complainants,

Richardson v. State (Miss.) 11 So. 934; *Clemens v. Casper*, 4 Wyo. 494, 35 Pac. 472.

And so far as a state statute requires the payment of a license fee by persons engaged in soliciting by sample orders for their nonresident employer's goods for future delivery, it is unconstitutional as an unlawful interference with interstate commerce. *Re Mitchell*, 62 Fed. 576.

And a provision in a municipal ordinance imposing license taxes on canvassers and peddlers, exempting from its operation persons soliciting orders for the manufacture of goods manufactured outside of the state, is not sufficient to harmonize the ordinance with the commerce clause of the Federal Constitution, as there are many other articles of extensive interstate commerce besides manufactured goods. *Port Clinton v. Shafer*, 5 Pa. Dist. R. 583.

So, a state statute requiring solicitors for orders to pay a license fee is void so far as it applies to a traveling salesman selling goods by sample for a nonresident employer. *State v. Rankin*, 11 S. D. 144, 76 N. W. 299.

And a state statute under which a person soliciting orders for pianos and organs by sample for a nonresident manufacturer is required to pay a tax before engaging in such business is an unlawful regulation of interstate commerce. *Ex parte Hough*, 69 Fed. 330, 5 Inters. Com. Rep. 327.

And one engaged in selling groceries by sample, as an employee of a nonresident, is engaged in interstate commerce, and cannot be required to pay a tax for pursuing such occupation. *Turner v. State* (Tex. Crim. App.) 55 S. W. 835.

Soliciting orders for pictures to be enlarged outside the state is interstate commerce, and therefore not subject to the privilege tax imposed by a state statute on all persons other than photographers of the state who do such soliciting. *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1.

And persons so engaged cannot be affected by a state statute requiring a license tax to be paid by persons soliciting orders for photographs and pictures. *Ex parte Holman*, 36 Tex. Crim. Rep. 255, 36 S. W. 441.

A state statute prohibiting the solicitation or receipt of orders for spirituous liquors without a license is an unlawful restriction of interstate commerce so far as it applies to a person soliciting and receiving orders for the sale of liquor by a nonresident who, in pursuance of the order, ships the liquor into the state consigned to the purchaser. *State v. Lichtenstein*, 44 W. Va. 99, 28 S. E. 753.

786

So, an ordinance of the city of Chicago which made it incumbent upon all dealers in distilled or fermented liquors to take out a license was, in *Re Lebolt*, 77 Fed. 587, held to violate the commerce clause of the Federal Constitution so far as it applied to a representative of the California wine association, whose business was to sell the wines of those houses to Chicago dealers.

And, so far as the South Carolina dispensary act prohibiting the solicitation of orders for intoxicating liquors attempts to prevent the representatives of a liquor house in another state from soliciting orders on his house within the state, it makes an unconstitutional restriction on commerce. *Ex parte Loeb*, 72 Fed. 657.

A state statute prohibiting the soliciting of orders for intoxicating liquors was, however, in *Westheimer v. Welsman*, 8 Kan. App. 75, 54 Pac. 332, held not to violate the commerce clause, although applied to a sale of liquor by an agent of nonresident wholesale liquor dealers whose orders were subject to the approval of such dealers at their place of business, and were filled by them. This case was reversed on other grounds in 60 Kan. 753, 57 Pac. 969, and in a recent case the Kansas supreme court has held that, so far as a state law prohibiting the taking or receiving of orders for intoxicating liquors applies to the taking or soliciting of orders for such liquors by a nonresident salesman for a nonresident liquor merchant, which orders are subject to approval or rejection at the latter's election, it is repugnant to the commerce clause of the Federal Constitution. *State v. Hickox* (Kan.) 68 Pac. 35.

The court relied upon the case of *Re Bergen*, 115 Fed. 343, in which the same law was held to be an unconstitutional interference with interstate commerce so far as it applied to a nonresident traveling salesman representing citizens and residents of other states, who comes into the state of Kansas and merely solicits orders for the sale of intoxicating liquors of those who desire them for their personal consumption, and transmits such orders to his employers beyond the boundaries of the state, to be there passed upon by them.

In harmony with the decision in *Stockard v. Morgan* is *Adkins v. Richmond*, 98 Va. 91, 47 L. R. A. 583, 34 S. E. 967, where it was held that a license tax on merchandise brokers is invalid as a regulation of interstate commerce when applied to a citizen and resident of the city whose sole occupation is the solicitation of orders in the city by personal application, and by exhibition of samples for nonresident merchants who are his principals, for the negotia-

185 U. S.

or the manner of conducting the business of each, is and has been as follows:

"The complainant, as the representative of nonresident parties, firms, or corporations, solicits orders for goods from jobbers or wholesale dealers in Chattanooga, Tennessee, and when such orders are obtained sends them to his nonresident principal or principals. If an order is accepted the goods are shipped by such nonresident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale the goods in all instances belong to the nonresident principal or principals, and are shipped to the state of Tennessee from another state.

"In making sales or soliciting orders for the goods the complainant sometimes exhibits samples to the local jobber or wholesale

dealer, and sometimes takes the orders without showing a sample.

"Unless complainant has been previously authorized by the principal or principals to sell at a fixed price, the orders are taken subject to acceptance or rejection by such nonresident principal or principals, who own the goods.

"At the end of each month, or at stated[29] periods, the complainant is paid a commission by such nonresident principal or principals for goods previously sold on accepted orders. No commission is paid on orders taken but rejected. Complainant does not receive for his services any pay or salary from any local jobber or dealer or resident of Tennessee, nor does he assume to represent or represent or hold himself out as representing, any resident of Tennessee, or nego-

tion of sales of goods which are not in the state.

To the same effect is *Stratford v. Montgomery*, 110 Ala. 619, 20 So. 127, holding that an ordinance requiring a license fee from "local commercial brokers" cannot be applied to a person acting only for nonresident principals in negotiating sales of merchandise which at the time is situated in other states, without an invasion of the commerce clause of the Constitution of the United States.

But persons doing business in a taxing district as general merchandise brokers, who have taken out a license therefor, cannot escape the payment of the privilege tax imposed upon the yearly gross commissions of those engaged in such business because their business chanced for that year to consist wholly or partly in negotiating sales between resident and nonresident merchants of goods situated in another state. *Picklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.

And persons engaged in a commercial street brokerage business, who take orders for goods to be filled by nonresident dealers, placing these orders at their own option, unless otherwise directed, with any of their correspondents, and reselling any goods rejected after their arrival in the state, are not protected by the commerce clause of the Federal Constitution from a municipal tax imposed upon commercial street brokers by the authorities of the city in which they do business. *Walton v. Augusta*, 104 Ga. 757, 30 S. E. 964.

State statutes requiring foreign corporations to comply with certain conditions before doing business in the state have frequently been held inapplicable to a foreign corporation whose only business in the state is selling through traveling agents and delivering goods manufactured outside the state, since any other construction of the statute would render it void as an interference with interstate commerce. *Havens & Co. v. Diamond*, 93 Ill. App. 557; *Coit & Co. v. Sutton*, 102 Mich. 324, 25 L. R. A. 819, 4 Inters. Com. Rep. 768, 60 N. W. 690; *Toledo Commercial Co. v. Glen Mfg. Co.* 55 Ohio St. 217, 45 N. E. 197; *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. Ct. 184; *Mearshon v. Pottsville Lumber Co.* 187 Pa. 12, 40 Atl. 1019; *Bateman v. Western Star Mill Co.* 1 Tex. Civ. App. 90, 4 Inters. Com. Rep. 260, 20 S. W. 931; *Davis & R. Bldg. & Mfg. Co. v. Dix*, 64 Fed. 406; *Woessner v. H. T. Cottam & Co.* 19 Tex. Civ. App. 611, 47 S. W. 678.

So, a contract by which a resident of a state agreed with a foreign corporation to canvass certain territory for the sale of its sewing ma-

chines, which the corporation thereby agreed to sell him on credit and a bond given to secure payment to the corporation of any sum that might become due under the contract, constitute a part of the interstate commerce carried on by the sales of such sewing machines in accordance with said contract, and therefore cannot be affected by a state statute prohibiting business within the state by a foreign corporation which has not complied with certain requirements, such as filing a certificate to designate an agent on whom process may be served. *Gunn v. White Sewing Mach. Co.* 57 Ark. 24, 18 L. R. A. 206, 4 Inters. Com. Rep. 309, 20 S. W. 591.

How the delivery is to be made has been regarded as unimportant. Thus, a state statute taxing the occupation of sample sellers and solicitors is a tax on interstate commerce as applied to an agent negotiating a sale of goods in another state, whether the delivery to a buyer is to be made by a carrier, a postmaster, or by an agent of the seller to whom they are sent for delivery. *Hurford v. State*, 91 Tenn. 669, 20 S. W. 201.

And an ordinance under which a license fee may be required from a traveling agent engaged in soliciting orders for the enlargement of portraits by a nonresident corporation, which after enlargement are shipped to the place where the orders are taken, addressed to the corporation and delivered by an agent of the company to the persons ordering the same, violates the commerce clause of the Federal Constitution. *Re Tinsman*, 95 Fed. 648.

And in a number of cases such a license tax has been held to be an unconstitutional regulation of commerce, although the goods are shipped to the soliciting agent for delivery. Thus, in *McClellan v. Pettigrew*, 44 La. Ann. 356, 10 So. 853, a license tax imposed upon one engaged in soliciting orders for goods for his nonresident employer, to be shipped into the state by the latter, was held to violate the commerce clause of the Federal Constitution, although the goods were shipped directly to the agent to be delivered to the purchaser.

So, traveling salesmen engaged in soliciting orders for goods by sample for their nonresident employer, which are shipped to such salesmen for delivery, are engaged in interstate commerce, and cannot therefore be required by municipal ordinance to pay an occupation or license tax. *Baxter v. Thomas*, 4 Okla. 605, 46 Pac. 479; *People v. Bunker (Mich.)* 87 N. W. 90.

And one soliciting orders by sample for a nonresident manufacturer for goods to be shipped to him for delivery and the collection of the

tiate any sales of goods for residents of Tennessee. His principals are all residents of other states of the United States, and the goods sold are shipped from such other state to the state of Tennessee for delivery to buyers who reside in Tennessee.

"The complainant has an office or 'head-quarters' in Chattanooga, Tennessee, where he keeps samples, stationery, and other articles; but he travels around on foot daily or frequently in drumming or soliciting orders for goods, as before stated. His principals are specific parties, firms, or corporations, all nonresidents of Tennessee and residents of other states in the United States, and he does not represent or hold himself out as representing the public in general, or negotiate or sell for any resident of Tennessee.

"The defendants and solicitors for the state of Tennessee and Hamilton county

first instalment of the purchase money as a part of his commission cannot be required by municipal ordinance to pay the privilege tax and procure the license required of transient peddlers. *Overton v. Vicksburg*, 70 Miss. 558, 13 So. 226.

So, a person soliciting orders for goods for his nonresident employers by whom the goods were shipped in response to such orders consigned to themselves, and were unpacked and delivered by him direct from the car to the purchasers, who were notified of the time and place to come for their goods, is engaged in interstate commerce, and is therefore not subject to an occupation tax. *Turner v. State* (Tex. Crim. App.) 55 S. W. 835.

So, portraits and frames manufactured in another state in compliance with orders taken by a traveling salesman, and shipped into the state consigned to the maker, whereupon the salesman delivers them to the persons ordering them and collects the price agreed upon when the orders are given, are the subject of interstate commerce; and such agent cannot be subjected to a license tax by state authority. *State v. Willingham* (Wyo.) 52 L. R. A. 198, 62 Pac. 797.

And an occupation tax is a tax on interstate commerce so far as it requires a license fee from a person soliciting orders for lightning rods for a nonresident employer by whom the rods are shipped into the state in obedience to such orders, the soliciting agent collecting the purchase price, and when required to do so assisting in putting up the rods. *Talbutt v. State*, 39 Tex. Crim. Rep. 64, 44 S. W. 1091.

To the contrary is *Racine Iron Co. v. McCommons*, 111 Ga. 536, 51 L. R. A. 134, 36 S. E. 866, which holds that a traveling agent for a nonresident principal, who makes executory contracts for the sale of goods, and who, when the goods are shipped into the state to him, receives them in bulk, breaks the original package and distributes the contents among his customers, is not exempt from a state license tax on the ground that he is engaged in interstate commerce. The court disapproved *McClellan v. Pettigrew*, 44 La. Ann. 356, 10 So. 853, saying that "it appears very plain to us that when a travelling salesman so far departs from the vocation ordinarily pursued by a commercial traveler as to actually vend the goods for which he solicits orders he ceases to be a mere 'drummer' in the sense in which that term is used by Mr. Justice Bradley in *Robbins's Case*."

So, an ordinance taxing persons engaged in selling or delivering picture frames or pictures has been held not to interfere with interstate

commerce as applied to the agent of a nonresident portrait company who receives pictures and frames from such company, and, after putting them together, delivers them to customers previously obtained by other agents of the company. *State v. Caldwell*, 127 N. C. 521, 37 S. E. 138.

And a person soliciting orders in Pennsylvania for a grocery firm in Ohio, which he afterwards fills by delivering the quantity of goods ordered from a carload of such goods consigned by the Ohio firm to themselves after receiving his orders, such deliveries being made either in broken packages or in small packages which were placed in large open boxes for transportation, there being no obligation to accept the goods unless equal to sample, and the purchase price to be paid only upon delivery, cannot be regarded as engaged in interstate commerce, and may therefore be required by municipal ordinance to pay a license fee. *New Castle v. Cutler*, 15 Pa. Super. Ct. 612.

In several cases the state courts have held, sometimes reluctantly but believing their course necessitated by the decisions of the Supreme Court of the United States, that persons engaged in peddling goods for their nonresident employers were engaged in interstate commerce, although the goods sold were usually delivered to the purchaser at the time of sale.

Thus, an agent of a nonresident organ company, who travels by wagon, carrying an organ with him, which he sells whenever he can do so, or, in lieu thereof, takes an order for a different organ, which, when shipped to him, he delivers to the purchaser, is, in *French v. State* (Tex. Crim. App.) 52 L. R. A. 160, 58 S. W. 1015, held to be engaged in interstate commerce so as to be exempt from an occupation tax on peddlers under a state law. The court denied that there was any distinction between cases which were sales by sample and of goods carried around by a dealer or drummer and sold or delivered from his wagon, and said: "If interstate commerce protects an article of traffic between states in transit and after its arrival at a warehouse and until it is sold therefrom and delivered thence to the purchaser by the seller who acts as the agent of the foreign company, it is difficult to see how the same article will not be protected while the agent of the foreign company carries it around with him, and, when he finds a purchaser, then sells and delivers it to such purchaser. It is not the vehicle, as we take it, that gives character to the traffic, but it is the fact that the property has not become mingled with the common mass of the property of the citizens of the state; and if this is not done in the

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further, that the revenue laws of Tennessee [30] applicable *to 'merchandise brokers' do not include these complainants, so as to make them subject to privilege taxes; but even if such laws do include complainants, yet they are inoperative and void as against complainants, who are engaged solely in interstate commerce."

By agreement of the parties two questions only were argued in the state court: (1) Whether or not complainants were merchandise brokers and subject by statute to tax as such; (2) whether or not their business constituted interstate commerce, and therefore was beyond the reach of the state's taxing power.

The chancellor held that the complainants were not liable for the privilege tax and enjoined its collection perpetually, and adjudged the costs against Hamilton county.

one case until a sale and delivery by the foreign company from its warehouse, we fail to see how it becomes mingled with the mass of the property of the citizens of the state until it is sold by the agent of the foreign company to the purchaser from his wagon. If it is a sale in the one case that terminates its character as interstate commerce, we think it equally does so in the other."

And a salaried employee of a nonresident manufacturer engaged in peddling buggies for his employer, usually delivering them to the purchaser at the time of the sale, was, in *Kirkpatrick v. State* (Tex. Crim. App.) 60 S. W. 762, held to be engaged in interstate commerce, and therefore not liable to an occupation tax.

So, an ordinance imposing a license tax on occupations is invalid as against a person selling picture frames for his nonresident employer, where he sells them only on pictures made by his employer in another state pursuant to orders theretofore given. *Laurens v. Elmore*, 55 S. C. 477, 45 L. R. A. 249, 33 S. E. 560.

And even if a state statute against hawkers and peddlers can be construed to apply to the sale of a frame for a portrait made in another state to fill an order taken by a canvasser in the state where it was delivered, where the order for the portrait contained a provision that it should be delivered in a frame which the purchaser of the portrait should have the option of buying at wholesale price, it would be unconstitutional as an interference with interstate commerce. *State v. Coop*, 52 S. C. 508, 41 L. R. A. 501, 30 S. E. 609.

Salesmen for a New York corporation, engaged in selling from house to house in Pennsylvania articles manufactured by said company, and also in taking orders by sample, are not amenable to a Pennsylvania statute prohibiting peddling. *Com. v. Mooney*, 12 Lanc. L. Rev. 209.

And a license tax for hawking and peddling cannot be required of a citizen of New York selling goods in Pennsylvania for a New York firm. *Com. ex rel. Overfield v. Walker*, 3 Pa. Dist. R. 534.

These decisions are manifestly in conflict with *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367, in which a state statute making it unlawful to peddle without a license was held not to be an unconstitutional interference with interstate commerce as applied to one who travels from place to place selling sewing machines made in another state by a corporation of that state, which it has sent to him to sell on its account and as its agent.

185 U. S.

From the judgment so entered the defendants appealed to the supreme court of the state, which, as stated, reversed the judgment and dismissed the bill, holding the complainant's business was covered by the statute, and that it did not violate the Constitution of the United States.

Mr. Robert Pritchard submitted the cause for plaintiffs in error. *Messrs. J. B. Sizer and R. P. Woodard* were with him on the brief:

The negotiation of the sale of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and a state cannot require a license, or exact a tax, as a condition precedent to negotiating the sale.

Robbins v. Shelby County Taxing Dist.

The Texas court of criminal appeals recognized the existence of this conflict in *Saulsbury v. State* (Tex. Crim. App.) 63 S. W. 568, and therefore overruled *French v. State* (Tex. Crim. App.) 52 L. R. A. 160, 58 S. W. 1015, and *Kirkpatrick v. State* (Tex. Crim. App.) 60 S. W. 762, saying that at the time of deciding those cases its attention had not been called to the distinction between peddlers and drummers which was drawn in *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

The authorities are numerous which hold that peddlers who carry goods manufactured in another state, and deliver them to the purchaser at the time of sale, are not engaged in interstate commerce.

Thus, resident agents of a nonresident manufacturer, who carry its goods from place to place and deliver them to purchasers at the time of the sale, are not engaged in interstate commerce; and therefore a state statute which requires them, in common with all other agents selling such goods, whether residents of the state or not, to pay a license fee, does not violate the commerce clause of the Federal Constitution. *American Harrow Co. v. Shaffer*, 68 Fed. 750, 5 Inters. Com. Rep. 336.

And an employee of a nonresident wagon manufacturer who has wagons and parts of wagons shipped to him from his employer, and after unpacking them puts the parts together and proceeds from place to place offering the wagons for sale, is not so engaged in interstate commerce as to be exempt from the payment of an occupation tax, although in some instances he sells wagons on orders which he sends to his employer to be filled. *Saulsbury v. State* (Tex. Crim. App.) 63 S. W. 568.

And the license fees exacted of hawkers and peddlers by a state statute are not a tax upon interstate commerce as applied to an agent of a nonresident portrait company who attempts, while delivering pictures, orders for which have previously been taken, to sell frames in his possession appropriate to such pictures. *State v. Montgomery*, 92 Me. 433, 43 Atl. 13.

So, a state statute prohibiting or restricting hawking and peddling is not an invasion of the exclusive right of Congress to regulate interstate commerce as applied to a person exhibiting and offering for sale from door to door goods sold under the instalment plan. *Com. v. Dunham*, 191 Pa. 73, 43 Atl. 84.

And an ordinance imposing a license tax on hawkers and peddlers does not interfere with interstate commerce as applied to a peddler of chairs imported into the state before his em-

120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

The exacting of a license tax as a condition to doing any particular business is a tax on the occupation, and a tax on the occupation of doing the business is a tax on the business.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leloup v. Port of Mobile*, 127 U. S. 640, 32

L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

This case presents a very different question from that presented in *Picklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810. These plaintiffs in error have not taken out licenses, and have not done a general brokerage business. They have acted as agents for certain nonresident principals, and have done no local or general business, and are not subject to state taxation.

ployment begins, even though the sale by him is conditional and the title remains in the foreign owner. *South Bend v. Martin*, 142 Ind. 31, 29 L. R. A. 531, 41 N. E. 315.

So, a state statute requiring licenses to be taken out by itinerant venders is not void as a tax upon interstate commerce as applied to the agents of a foreign corporation who sell medicines, the property of such corporation, in the same form and shape in which the goods were imported into the state. *Com. v. Newhall*, 164 Mass. 338, 41 N. E. 647.

And a license or tax required of peddlers and itinerant venders of goods at retail is not invalid as a tax on interstate commerce as applied to the agents of a nonresident corporation engaged in selling the latter's goods in an original package. *West v. Mt. Sterling*, 23 Ky. L. Rep. 1670, 65 S. W. 120.

And a reasonable license fee charged upon itinerant venders of drugs or articles intended for the treatment of diseases who publicly profess to cure or treat diseases is not an unconstitutional interference with interstate commerce, although the medicines sold are in original packages brought from another state. *State v. Whedlock*, 95 Iowa, 577, 30 L. R. A. 429, 64 N. W. 620.

A person bringing goods, wares, and merchandise into a state for the purpose of peddling them may be required to pay the peddler's license without violation of the commerce clause of the Federal Constitution. *Rash v. Farley*, 91 Ky. 344, 15 S. W. 862.

A peddler who brings his goods into the state from another state for sale, and delivers the goods, not in the original packages, to the purchaser at the time of taking the order, may be required to pay a license fee without any interference with interstate commerce. *Hall v. State*, 39 Fla. 637, 23 So. 119.

The peddling of the separate articles after the package in which they were shipped from other states has been broken may be lawfully regulated under the police power of a state. *Com. v. Harmel*, 166 Pa. 89, 27 L. R. A. 388, 5 Inters. Com. Rep. 89, 30 Atl. 1036.

The imposition of a tax upon every person alike, whether a resident or a nonresident of the state, who sells within the state a newspaper of a designated character, is not an unconstitutional restriction of interstate commerce as applied to a sale within the state of a newspaper of that character published outside the state. *Preston v. Finley*, 72 Fed. 850.

A state statute imposing a license on peddlers, and providing that any person carrying a wagon, cart, or buggy to exhibit or deliver wares or merchandise shall be considered a peddler, is not, as applied to a foreign corporation doing business in the state, an unlawful interference with interstate commerce. *Wrought*

Iron Range Co. v. Carver, 118 N. C. 328, 24 S. E. 352.

Closely allied to these cases are those which hold that persons soliciting orders for goods manufactured in another state are not engaged in interstate commerce, where the orders are filled from a stock of goods kept within the state.

A municipal ordinance prohibiting peddling without a license is not obnoxious to the commerce clause of the Federal Constitution as applied to a resident of the state whose sales are made from a stock of goods kept in the state, and not in the original packages. *People v. Sawyer*, 106 Mich. 428, 64 N. W. 333.

And a state statute requiring peddlers to take out a license is not void as in violation of the commerce clause of the Federal Constitution as applied to a sale of goods manufactured in another state by an agent of the manufacturer, which goods were either delivered at the time of sale, or the orders were filled by the agent from the stock of goods within the state. *State v. Snoddy*, 128 Mo. 523, 31 S. W. 36.

So, that part of a business conducted by a nonresident through local agents, which relates to the sale and delivery of picture frames from a stock kept within the state to persons who have given orders for portraits, there being no obligation to take and pay for the frames, is not interstate commerce protected by the Federal Constitution from municipal taxation, although no frames are sold except to persons who have ordered pictures. *Chrystal v. Macon*, 108 Ga. 27, 33 S. E. 810.

A tax imposed by a state statute on every sewing machine company selling or dealing in sewing machines by itself or its agents within the state does not amount to an unlawful interference with interstate commerce, where machines have been brought into the state and have become subject to taxation therein. *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249.

Persons engaged in taking orders by sample for a nonresident manufacturer, which orders are filled from a local distributing warehouse to which goods are shipped in advance of orders and stored, are not engaged in interstate commerce, and may therefore be required to pay the license tax imposed upon canvassers by an ordinance of the municipality where such sales are made. *L. B. Price Co. v. Atlanta*, 105 Ga. 358, 31 S. E. 619.

In *Pegues v. Ray*, 50 La. Ann. 574, 23 So. 904, it appeared that orders for goods were taken by sample by representatives of a nonresident manufacturer. The employer kept a warehouse within the state where the goods were stored in the original packages and from which deliveries were made to fill orders. The court held that a license tax could not, under such

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

The statute is not valid because it is a tax on the occupation of merchandise broker.

Stratford v. Montgomery, 110 Ala. 619, 20 So. 127.

That plaintiffs in error reside in Hamilton county, Tennessee, and have offices or headquarters for the convenience of their business, are immaterial circumstances, not inconsistent with the fact that their business is exclusively interstate commerce.

Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *McCall v. San Francisco*, 136 U. S. 104, 34 L. ed. 391, 3 Inters.

circumstances, be imposed on such selling agents, as the goods must be held objects of interstate commerce, stopping merely at the place where the warehouse was situated on their way to a delivery destination contracted for by persons engaged in introducing into the state goods manufactured in another state.

A city ordinance prohibiting peddling without a license is an unlawful interference with interstate commerce as applied to a salaried distributing agent of a publishing firm in another state, where orders for books in several localities are sent to such firm by another salaried agent through a general agency located within the state, and, on being received by such agency, are repacked and shipped to various localities for distribution by such distributing agents. *Huntington v. Mahan*, 142 Ind. 695, 42 N. E. 463.

A license tax on the business of putting up lightning rods is not a tax on interstate commerce in the case of a person who puts up no rods except those which he sells as agent for a nonresident manufacturer, and which are shipped to him in quantities from which deliveries are made as needed, although he puts up such rods without extra charge. *State v. Gorham*, 115 N. C. 721, 25 L. R. A. 810, 20 S. E. 179.

commerce as applied to one who purchases errant merchants to be carried on without a license is not invalid as a regulation of interstate commerce as applied to one who purchases bankrupt stocks wherever he can obtain them to the best advantage, and sometimes buys them in other states, when it makes no discrimination between merchants whose goods are imported into the state and those whose goods are manufactured or purchased in the state, and does not impose any burden on sales in original packages brought into the state. *Carrollton v. Bazzette*, 159 Ill. 284, 31 L. R. A. 522, 42 N. E. 837.

Where the sales are made on the salesman's own account, and not as agent of the nonresident from whom the goods are obtained, the former is not engaged in interstate commerce.

Thus, one selling sewing machines on his own account is not engaged in interstate commerce so as to be protected against taxation by the Federal Constitution, although the machines are manufactured in another state. *State v. Vessell*, 109 N. C. 735, 14 S. E. 391.

So, one taking orders for lightning rods shipped direct to him, sometimes in advance of the orders, who, under his contract with the nonresident manufacturer, paid the freight and put up the rods at his own expense and was to share in the profits, is not engaged in interstate commerce so as to be exempted from the payment of an occupation tax. *Camp v. State* (Tex. Crim. App.) 61 S. W. 401.

185 U. S.

Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. Rep. 958; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

Mr. George W. Pickle submitted the cause for defendants in error.

*Mr. Justice Peckham, after making the [30] foregoing statement of facts, delivered the opinion of the court:

In this case we are bound to give the

And one selling goods by sample which are to be obtained by him from a nonresident is not engaged in interstate commerce so as to be protected by the Federal Constitution from state taxation, where the goods are consigned and charged to him individually and without reference to the purchasers, and are delivered by him, but not in the original packages. *Kimball v. State*, 104 Tenn. 184, 56 S. W. 854.

And one who takes orders in his own name from house to house for articles manufactured in another state, and who in his own name sends a single order to a manufacturer without stating the names of his customers, and on receiving the package containing the articles delivers therefrom the separate article to his customers, is not engaged in interstate commerce so as to be exempt from a tax on the privilege of selling articles of that kind within the county. *Croy v. Obion County*, 104 Tenn. 525, *sub nom.* *Croy v. Epperson*, 51 L. R. A. 254, 58 S. W. 235.

Any discrimination in favor of peddlers of home manufactures and the manufactures of other states violates the commerce clause of the Federal Constitution.

Such an unconstitutional discrimination is made by a provision of a state statute which prohibits peddling without a license, and fixes the punishment therefor, but excepts persons who sell commodities manufactured or raised by themselves in the state. *Ames v. People*, 25 Colo. 508, 55 Pac. 725.

So, an exemption of manufacturers who have paid taxes on capital employed, from the provisions of a state statute imposing a license tax upon peddlers, renders the statute unconstitutional as a regulation of commerce when applied to a nonresident acting as an agent or employee in the sale of goods owned and manufactured by a nonresident corporation. *Com. v. Myer*, 92 Va. 809, 31 L. R. A. 379, 23 S. E. 915.

And a municipal ordinance rendering a nonresident of the state engaged in selling the produce of his farm within the municipality without purchasing a license liable to fine and imprisonment, while no such liability is imposed on farmers residing in the state, violates the implied prohibition of the commerce clause of the Federal Constitution against local legislation tending to impair the uniformity which the grant to Congress was designed to promote. *Com. v. Simons*, 3 Pa. Dist. R. 792.

And a state statute requiring every person selling foreign-grown nursery stock to file an affidavit and bond with the secretary of state, and exhibit to every purchaser a certificate that he has complied with his requirements, imposes an unconstitutional obstruction to commerce in such articles. *Re Schechter*, 63 Fed. 695.

saine meaning to the state statute that was given to it by the supreme court of the state, and the question which remains for us to decide is whether, as so construed, the statute violates any provision of the Federal Constitution.

We think it violates the interstate commerce clause of the Constitution of the United States, and that this court has in several cases decided the principle which invalidates the statute so far as it affects the business of the complainants. The principle is contained in the cases of *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, *and *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347. Subsequently the case of *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, was decided, which is one of the leading cases upon the subject now in hand, and we think that it is decisive of the case before us. That case was tried upon an agreed statement of facts as follows:

"Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the — day of —, 1884, was engaged in the business of drumming in the taxing district of Shelby county, Tennessee, i. e., soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins, & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force, and carried before the Hon. D. P. Hadden, president of the taxing district, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins, & Co.' are engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the taxing district of Shelby county, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest."

The court held upon these facts that the statute of Tennessee of 1881, enacting that "all drummers and all persons not having a regular licensed house of business in the taxing district 'of Shelby county,' offering for sale, or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege," was void as against Robbins.

The opinion of the court was delivered by Mr. Justice Bradley, in the course of which he said (p. 494, L. ed. p. 696, Inters. Com. Rep. p. 47, Sup. Ct. Rep. p. 594):

"In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine [32] of the freedom of that commerce, *except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these

fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one state to sell his goods in another state, without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may adopt it with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and *wait for the people of [33] those states to come to him? This would be a silly and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things."

And again at p. 496, L. ed. p. 697, Inters. Com. Rep. p. 47, Sup. Ct. Rep. p. 595:

"But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits,

and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

Other cases followed the *Robbins Case*, among them, *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, [34] 7 Sup. Ct. Rep. 1118; **Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. These cases exhibit different phases of the same general principle, but all follow that principle as announced in the *Robbins Case*, and deny the right of the state to tax people representing the owners of property outside of the state, for the privilege of soliciting orders within it as agents of such owners for property to be shipped to persons within the state. We think they cover the facts of the case at bar, and render the statute as construed by the state court invalid so far as it affects the business of the complainants described in the agreed statement of facts above set forth.

The defendants in error, admitting the finality of the decisions above referred to in regard to the questions therein decided, claim that they do not in truth cover the case before us, and they urge that it is controlled by *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810. A reference to that case shows important and

material distinctions of fact which render it unlike the one now before us. The opinion of the court was delivered by the present chief justice, who, while recognizing and approving the *Robbins* and other similar cases, distinguished them from the one then under review. In the course of his opinion he said (p. 20, L. ed. p. 606, Inters. Com. Rep. p. 84, Sup. Ct. Rep. p. 811):

"In the case at bar the complainants were established and did business in the taxing district as general merchandise brokers, and were taxed as such under § 9 of chapter 96 of the Tennessee Laws of 1881, which embraced a different subject-matter from § 16 of that chapter. For the year 1887 they paid the \$50 tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business, and became liable to pay the privilege tax in question, which was fixed in part, and in part graduated according to the amount of capital invested in the business, or if no capital were *invested, by the [35] amount of commissions received. Although their principals happened during 1887, as to the one party, to be wholly nonresident, and, as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for nonresidents. In the case of *Robbins* the tax was held, in effect, not to be a tax on *Robbins*, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."

And again, at p. 24, L. ed. p. 607, Inters. Com. Rep. p. 86, Sup. Ct. Rep. p. 813, it was said:

"We agree with the supreme court of the state that the complainants having taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record."

From these extracts from the opinion it is seen that a material fact in the case was that *Ficklen* had taken out a general and unrestricted license to do business as a broker, and he was thereby authorized to do any and all kinds of commission business, and therefore became liable to pay the

privilege tax exacted. Although Ficklen's principals happened in the year 1887 to be wholly nonresidents, the fact might have been otherwise, as was stated by the Chief Justice, because his business was not confined to transactions for nonresidents.

[36] In this case the complainants did not represent or assume to represent any residents of the state of Tennessee, and each of the complainants represented only certain specific parties, firms, or corporations, all of whom were nonresidents of Tennessee. They did no business for a general public. We attach no importance to the fact that in the *Robbins Case* the individual *taxed resided outside of the state. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the state affect the question. If while so acting and soliciting orders within the state for the sale of property for one nonresident of the state, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm, or corporation, all being nonresidents of the state of Tennessee. The fact that the state or the court may call the business of an individual, when employed by more than one person outside of the state, to sell their merchandise upon commission, a "brokerage business," gives no authority to the state to tax such a business as complainants'. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce. As was said by Mr. Justice Bradley, in the *Robbins Case*, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592: "The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce?" It is still a carrying on of interstate commerce, whether the party is acting for one or more principals residing outside of the state and selling their goods through his procurement, acting for them as their agent.

We cannot see that the *Ficklen Case* rules the one before us. Although it is plain from the opinion of the Chief Justice that there was not the slightest intention of casting any doubt upon the correctness of the decisions in the *Robbins* and other cases above cited, it is subsequently stated in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, that the *Case of Ficklen* "is no departure from the rule of decision so firmly established by the prior cases." In speaking of the distinguishing features of the *Ficklen Case*, Mr. Justice Brewer, in delivering the opinion of the court in *Brennan*

v. Titusville, said, at p. 307, L. ed. p. 725, Inters. Com. Rep. p. 664, Sup. Ct. Rep. p. 834: "In other words, the *tax imposed was for [37] the privilege of doing a general commission business within the state, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the state had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the state therefor."

Although it is said in the opinion of the state court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the state selling the goods of his principal who is a nonresident of the state, it is in effect a tax upon interstate commerce, and that fact is not in anywise altered by calling the tax one upon the occupation of the individual residing within the state while acting as the agent of a nonresident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.

That such a tax amounts to an invasion of the commerce clause of the Constitution of the United States is held in *Stratford v. Montgomery*, 110 Ala. 619, 20 So. 127, in a most satisfactory opinion by Chief Justice Brickell. In speaking of the tax under the Alabama statute, he said (p. 628, So. p. 129): "While, as we have shown, the business of the defendant was general, so as to constitute him a broker, it by no means follows that it required he should also take local business. He might, as he did, confine himself to interstate business and still be a 'broker,' without becoming liable to the tax." The statute of Alabama is similar to the one in Tennessee, and the facts in the above case are almost identical with those agreed upon herein.

Although the state has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the state.

*We regard this case as within the *Rob-* [38] bins and other similar cases above referred to, and it follows that the judgment of the Supreme Court of Tennessee, holding the complainants liable to pay the tax demanded, was erroneous. The judgment of that court is therefore reversed, and the case remanded for further proceedings not inconsistent with the opinion of this court.

It is so ordered.

Mr. Justice Gray took no part in the decision of this case.

MARTHA J. SWERINGEN, *Plff. in Err.*,
v.

CITY OF ST. LOUIS.

(See S. C. Reporter's ed. 38-47.)

*Error to state court—Federal question—
when sufficiently alleged.*

1. A decision of a state court that the courses alleged and distances set forth in a patent from the United States do not, as a matter of fact, bring the eastern boundary of the land to the waters of the Mississippi river, raises no Federal question which gives to the Supreme Court of the United States, under U. S. Rev. Stat. § 709, clauses 1, 3, the right to review the judgment of the state court on writ of error, where the validity of the grant is not in any way controverted or drawn in question, and no question is made as to the authority of the government to convey the land to the water's edge if it chose to do so.
2. A claim of title under an act of Congress is not sufficiently asserted so as to present a question which will give the Supreme Court of the United States a right to review the judgment of a state court on writ of error, where the record does not show that any such claim was made in the trial court, or, upon appeal, in the supreme court of the state.

[No. 187.]

Argued March 4, 5, 1902. Decided April 7, 1902.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment reversing a judgment of the Circuit Court for the City of St. Louis in favor of plaintiff in an action of ejectment. *Dismissed.*

See same case below, 151 Mo. 348, 52 S. W. 346.

Statement by Mr. Justice **Peckham**:

The plaintiff in error, being the plaintiff below, obtained judgment in the state circuit court for the city of St. Louis for the recovery of certain land described in the judgment. Upon appeal to the supreme court of the state of Missouri this judgment was reversed (151 Mo. 348, 52 S. W. 346), and the plaintiff has brought the case here by writ of error.

The action was ejectment for land described in the petition, which also set up a claim for the rents and profits. The answer of the city denied all the allegations of the petition, set up adverse possession for ten years, and acquiescence on the part of the plaintiff in the possession and use of the premises by the city as and for a public wharf. The property described in the petition *is situate in the city of St. Louis, and is bounded on the east by the Mississippi

river. The parties went to trial before the court, a jury being waived, and after the evidence was in the issues were found in favor of the plaintiff, although she recovered judgment for but a portion of the property described in her petition, the portion for which she recovered being part of a public wharf of the city running along the west line of the river, and being 90 feet along the line of the wharf from north to south, and running back its whole depth from the east line on the river to its rear or western line.

The question involved in the case upon the merits is, in substance, whether the plaintiff is entitled to the alluvion caused by the recession of the Mississippi river, to the extent of many hundred feet east of the point where it flowed in 1852, at the time when the plaintiff's predecessor took title to the property by virtue of a patent from the United States called the "Labeaume patent." The trial court held she was, and the supreme court held she was not.

On the trial the plaintiff offered in evidence as the source of her title a patent from the United States to Labeaume, dated in 1852. It was objected to as not tending to support the issues in the case, and as not showing plaintiff's grantor a riparian owner. The objection was overruled and the patent received in evidence. It recites the proceedings which preceded the issuing of the patent, from which recitals it appears a concession was made of the land described, by the lieutenant governor of the Spanish province of Upper Louisiana, July 15, 1799, and a survey thereafter made, and the proceedings confirmed in accordance with the acts of Congress relating to lands in the province named, approved respectively March 2, 1805, and March 3, 1807, and after some other recitals a description of the land conveyed is set forth, which commences as follows:

"Begin at a stake set on the right bank of the Mississippi river between high and low water mark and on the extension line produced eastwardly from Labeaume's southern ditch, the lower and most eastern corner of this survey, and the upper and most northern corner of the survey of Joseph Brazeau, numbered 3332," etc.

*Then follow in the patent what amounts [40] to several printed pages, giving in detail the courses and distances of the outboundaries of the land described in the patent, from the southeastern corner along to the western limit, thence towards the north and thence back towards the east until the description is brought to the northeastern corner of the survey, which is also a corner of the city of St. Louis, being the northern termination of the northwestern boundary line thereof. This corner is marked "F" on the plat accompanying the patent, and the description then proceeds to give the eastern line of the grant parallel with the Mississippi river, and commences that line in the following language: "From the corner of 'F' down the right bank of the Mississippi river, with the meanders thereof, between high and low

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

185 U. S.

water mark, south nine degrees east," etc. The description then goes on with six or eight different courses and distances, altering with the meanders of the river, down "to the place of beginning."

It appears that the east boundary line of the land described in this patent was at the time of the execution of the patent, in 1852, several hundred feet west of the waters of the river, and at the present time is about 1,500 feet west thereof. Between those waters and the east line of the grant there was then what is termed on the plat accompanying and referred to in the patent a sand beach, which was, as stated, several hundred feet in width, thus separating by that beach the east line of the grant from the river.

Messrs. G. A. Finkelnburg, Edward S. Robert, and Edward P. Johnson argued the cause and filed a brief for plaintiff in error:

The construction placed upon the patent by the decision of the state court was such as to impair the validity and efficiency claimed for it by plaintiff in error in the court below, and deprive her of her title to the premises sued for, claimed under it, and, therefore, confers on this court jurisdiction to review such decision.

Gill v. Oliver, 11 How. 529, 13 L. ed. 799; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

In the construction of a patent the construction of the act of Congress under which it was issued is drawn directly in question, and the same is true in the construction of all acts of public officers of the United States, under an act of Congress.

Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

If the intent to present the Federal question clearly appears from the record, or by necessary intendment therefrom, although it may not have been stated in terms in the record or opinion of the state court, it is sufficient, and the same is true if the question was necessarily raised on its record, without directly referring to it in any manner.

Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458.

The Federal question under said patent arises upon the construction of a Federal statute, and the authority exercised by a public official of the United States under it. It comes within the provisions of the 1st clause of said § 709, and therefore need not have been "specially set up or claimed" in the state court. The latter provision applies to the 3d clause only of said section, and in some rare cases not even to it.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

This Federal question was not only raised in this case, but also "specially set up" and "claimed" by plaintiff in error, on the trial in the state circuit court, by reading the patent (which contains an express reference to the act of Congress under which it was issued, stating its title and date of approval) in evidence, against the objections made to its introduction, and by asking instructions, which were given, declaring her to be a riparian proprietor and owner of any alluvion formed by accretions to her land.

Ross v. Doe ex dem. Barland, 1 Pet. 655, 7 L. ed. 302; *Kissell v. St. Louis Public Schools*, 18 How. 19, 15 L. ed. 324; *Berthold v. McDonald*, 22 How. 334, 16 L. ed. 318.

It appears from the opinion in this case that a Federal question was raised by the claim of title to the premises sued for under the patent from the United States to Louis Labeaume or his legal representatives, and the decision against the validity of said patent in regard to said claim.

Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 624; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; *Kreiger v. Shelby R. Co.* 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *United States v. Taylor*, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479.

If the patent was defective, and failed to convey the confirmation, or any part thereof, to Labeaume or his legal representatives, then the act of Congress of June 6, 1874, conveyed the same.

Campbell v. Laclede Gaslight Co. 119 U. S. 445, 30 L. ed. 459, 7 Sup. Ct. Rep. 278. And see also *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807.

A Federal question was necessarily raised, and was decided adversely to plaintiff in error, as the record showed that said act of Congress was applicable to the case if said patent did not convey the premises sued for.

Miller v. Nicholls, 4 Wheat. 311, 4 L. ed. 578.

Said patent states all of the facts required to make a perfect legal title in said Lebeaume, under said act of Congress, to said confirmation; and said statements are legal evidence.

Wright v. Roscherry, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; *Langdeau v. Hanes*, 21 Wall. 521, 22 L. ed. 606.

There were Federal questions properly raised in the case, and the judgment of the court was on them regardless of other questions, and denied to plaintiff in error her title claimed thereunder. This confers ju-

risdiction on this court, even if there were other questions in the case.

Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

All of the other questions in the case were matters of fact, and the verdict on these questions is in favor of plaintiff in error, amply sustained by the evidence, and is conclusive in her favor, as the supreme court of Missouri does not review such a verdict, and the case was therefore necessarily decided on the Federal questions presented.

Gibson v. Chouteau, 8 Wall. 314, 19 L. ed. 317.

This court has jurisdiction, under writs of error to state courts, to construe contested questions under such grants, and determine whether they vested such incidents in the grantees, and carried title, under state laws, to high or low water mark, or the center of the stream.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Knight v. United Land Assn.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

Mr. Charles Claflin Allen argued the cause, and, with **Mr. B. Schnurmacher**, filed a brief for defendant in error:

The question of riparian rights is not a Federal question, but is determinable by the state courts, according to the general rules of law.

St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *St. Louis v. Myers*, 113 U. S. 596, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 868, 838; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

Nor does the fact that title to land is derived from the United States, the validity of the grant not being disputed, present a Federal question.

Arvey v. Popper, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 575, 44 L. ed. 279, 20 Sup. Ct. Rep. 222; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 525, 44 L. ed. 873, 20 Sup. Ct. Rep. 715.

Even if this case involved a right or authority which could properly be said to be exercised under the United States, the jurisdiction of this court cannot be invoked because the right was not "specially set up or claimed."

Speed v. McCarthy, 181 U. S. 269, 45 L. 185 U. S.

ed. 855, 21 Sup. Ct. Rep. 613; *F. G. Oxley Starc Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

The claim of a Federal question comes too late when first made in a petition or motion for rehearing.

Eastern Bldg. & L. Assn. v. Welling, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Texas & P. R. Co. v. Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10.

Or in a petition for a writ of error.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

And cannot be introduced in the assignment of errors.

Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822; *Ansbros v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Fowler v. Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112.

The judgment of the supreme court of Missouri was against plaintiff, not only on the ground that she was not a riparian proprietor, and therefore not entitled to the accretions, but on other independent grounds, as appears from the opinion of the court. Under such circumstances this court will dismiss or affirm, even though the question of riparian rights raises a Federal question, and was erroneously adjudicated.

Speed v. McCarthy, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613; *Louvy v. Silver City Gold & S. Min. Co.* 179 U. S. 196, 45 L. ed. 151, 21 Sup. Ct. Rep. 104; 2 Foster, Fed. Pr. 2d ed. pp. 1004, 1005.

Messrs. Charles W. Bates, Charles Claflin Allen, and B. Schnurmacher filed an additional brief for defendant in error.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court:

A motion was made in this case to dismiss the writ of error for lack of jurisdiction, and a decision of the motion was reserved *until [41] after an argument of the case upon the merits. The whole case having been argued it becomes necessary to dispose of the motion to dismiss.

The motion is based upon the averment that there is no Federal question involved, and that, even if there were one, it was not properly raised in the court below. We think that, for the reasons now to be stated, the motion to dismiss must be granted.

In our judgment there is no Federal question arising by reason of plaintiff's claim under the patent put in evidence by her as

the source of her title to the land in question. With reference to the 1st clause of § 709 of the Revised Statutes, it appears plainly that the validity of the patent has never been questioned. Nor has the validity of any treaty or statute of or authority exercised under the United States been drawn in question. It is a pure question of the construction of the language used in the patent, whether the land granted therein reached the waters of the Mississippi river on the east, or whether, according to the courses and distances contained in the patent, the eastern limit of the land conveyed was some hundreds of feet west of the river. It was really a question of fact as to how far east the measurements of the courses and distances carried the boundary. There was no contention made as to the authority of the government to convey the land to the bank of the river where the water was actually flowing, if it chose so to do. The decision did not touch the question as to how far a grant by the government, of land bounded by the waters of a navigable stream, would carry the title, whether to high water or low water, or out to the middle of the stream. If the grant from the United States had been bounded by the waters of a navigable river, and the right to make the grant to the extent claimed by the grantee had been denied by a grantee under a state, the denial of the validity of the authority exercised in making such grant might bring the question of construction within the principle decided in *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210, and *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548. In *Packer v. Bird* it was a question how far a grant carried the title to land bounded by the margin of the Sacramento river, or, as stated by Mr. Justice Field, who delivered the opinion [42] of the court in that case, "The question presented is whether the patent of the United States, describing the eastern boundary of the land as commencing at a point on the river, which was on the right and west bank, and running southerly on its margin, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption." The opinion then proceeds with an examination of the question of what was the common law upon the subject, and whether that law had been adopted in the state of California where the land was. It was stated that it was "undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide ex-

tends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark. The title to land below that mark in such cases is vested, in England, in the Crown, and, in this country, in the state within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce."

It was said there was much conflict of opinion in the Western states as to what the true doctrine was; whether it was the common law, which decided the question by the ebb and flow of the tides, or the law of actual navigability of the river; and in the case then before the court it accepted the view of the supreme court of California in its opinion as expressing the law of that state, "that the Sacramento river being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream." It was in a case involving such facts that the remark was made, in the course of the opinion, that the courts *of the [43] United States would construe the grants of the general government without reference to the rules of construction adopted by the states for their grants, but that whatever incidents or rights attached to the ownership of property conveyed by the government would be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. It was a necessary case for the court to adopt one or the other of these two conflicting rules for the construction of the grants of the general government, and in making its decision as to the proper construction in such cases the court held that the question of construction became one of a Federal nature.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, was much the same case, the controversy being as to the extent of the grant of the United States government of land bounded by the Columbia river in the state of Oregon. The question was as to how far such a grant extended (the actual limitations of the boundaries, by the language used, not being disputed), whether in legal effect it granted lands under the water of the river, and the question was held to be a Federal one. In both cases it was decided that a grant by the Federal government of land within a state, bounded by a navigable river, did not extend so far as to convey land below ordinary high water, and beyond that point the right of a grantee was governed by the law of the state, and the decisions of those courts were therefore in each instance affirmed.

In this case no such question arises. It is not the case of granting lands bounded by the waters of a navigable river, and a claim made to an island in the river in one case and to the lands under water in the other, where the validity of the authority exercised, to the extent claimed, was drawn in

question, and the right to convey the land denied. Here no question is made as to the authority of the government to convey the land to the water's edge if it chose to do so. The validity of its conveyance under the authority of the acts of Congress referred to in the patent was not in any way controverted or drawn in question by defendant, but it was simply maintained that making correct measurements and construing the language of the grant *in the usual and ordinary way applicable to such instruments (not at all a Federal question), the courses and distances set forth in the patent and its general description of the land conveyed did not, as matter of fact, bring the eastern boundary to the waters of the river. The issue thus made was not one of "validity," but one of fact as to where by the language of the grant was its eastern boundary line. Where such a question alone is involved there is not drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and there is in fact no question of a Federal nature decided. As was remarked in *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 653, 34 L. ed. 1110, 1116, 11 Sup. Ct. Rep. 435, 440: "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed. The validity of the authority here was not primarily denied, and the denial made the subject of direct inquiry. *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503."

In the first of these two cases cited, it was held that to enable this court to entertain jurisdiction under a writ of error upon the ground that the validity of an authority exercised under the United States was drawn in question, the validity of such authority must have been denied directly, and not incidentally. In the case before us, there was no denial of the validity of the grant, directly or incidentally. In the *Hopkins Case*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503, it was held that the validity of a statute is drawn in question when the power to enact it is fairly open to denial and is denied, but not otherwise.

In *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, Mr. Justice Shiras, in delivering the opinion of the court dismissing a writ of error, refers to several cases which we think are relevant here. In *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34, it was held that the matter in controversy, being money received by one of the parties as an award under a treaty of the United States with a foreign power, providing for the submission of claims against that power to arbitration, did not in any way draw in question the validity or construction of the treaty. *Here there is no question made of the validity of the author-

ity exercised, but only a question of how far in fact it was exercised.

In *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131, the dispute arose concerning the ownership of a mining claim. In the course of the opinion in the *Blackburn Case*, referring to the *Gillis Case*, it was said: "It is true that this court put its judgment on the ground that the judgment of the state supreme court was based upon an estoppel, deemed by that court to operate against the plaintiff in error upon general principles of law, irrespective of any Federal question. Still the case is authority for the proposition that controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the state courts, and that to enable this court to review the judgment in such a case it must appear, not only that the application of a Federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties."

Here there was no construction put upon any statute, nor upon any authority exercised, but only a construction upon the language used in the patent, admitting the validity of all statutes, and also the validity of any authority actually exercised, and the only and simple question decided was that the language used in the patent, assuming its validity, bounded the land conveyed under it, not by the river on the east, but by a line which was separated from the waters of the river by a sand beach several hundred feet in width.

The *Blackburn Case* was followed by *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726, which reaffirmed the doctrine.

We conclude that no Federal question arises upon the construction of the language of the patent given it by the state court, under the 1st clause of § 709 of the Revised Statutes.

Nor was any Federal question raised under the 3d clause of that section. Under that clause no title, etc., or authority exercised under the United States, was specially set up and claimed by the plaintiff, and there was no decision against any title, etc., specially set up or claimed by the plaintiff. There was no decision of any Federal question whatever. We do not *hold it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court. *F. G. Orley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Dewey v. Des Moines*, 173 U. S. 193, 199, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379. And the decision that the grant did not ex-

tend to the river bank was not a denial of any authority claimed, but was only a decision that the grant did not in fact extend to the river, or, in other words, that the authority was not exercised. It was mere interpretation of the authority really exercised, and not any denial of authority.

The plaintiff also claims that she obtained title to the land in question, if not under the patent, then by virtue of the provisions of the act of Congress, approved June 6, 1874 (18 Stat. at L. 62, chap. 223), the 1st section of which is set forth in the margin.†

[47] It does not appear in the record that any such claim was made in the trial court or upon appeal in the supreme court of the state. There was no denial of the validity of that act by the decision in question, and when the plaintiff introduced the patent in evidence there certainly was no claim thereby specially set up under the act of Congress. This claim does not seem ever to have been thought of until the case reached this court. At any rate, the record does not show that it was pleaded, proved, referred to, mentioned, or in any manner set up or claimed. The act does not in any event touch the point, as it refers to those cases in which no patents had been given, and does not cover the case where one had been issued and received in entire fulfillment of the obligations of the government. As in our opinion the case involves no Federal question, the motion to dismiss will be granted on the ground of lack of jurisdiction.

Dismissed.

FRENCH-GLENN LIVE STOCK COMPANY,
Plff. in Err.,
v.
ALVA SPRINGER.

(See S. C. Reporter's ed. 47-54.)

Public lands -- conclusiveness of call for meander line--error to state court--Federal question.

1. Whether a lake ever existed in front of or bordering on land patented to the state of Oregon under the swamp-land grant, the recession of whose waters would leave the bed of the lake thus laid bare to accrue to the owner of such land, is a question of fact

NOTE.—On public lands, surveys, meander lines—see note to *Stoner v. Rice* (Ind.) 6 L. R. A. 387.

On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S.

†Chap. 223. An Act Obviating the Necessity of Issuing Patents for Certain Private Land Claims in the State of Missouri, and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the right, title, and interest of the United States in and to all of the lands in the state of Missouri which have at any time heretofore been confirmed to any person or persons by any act of

which is not concluded by a mere call in the official survey, plats, and maps for a meander line along the side of a lake as a boundary of such land.

2. A Federal question is presented by a contention in the state courts and in the Supreme Court of the United States, in an action to recover possession of a tract of land patented to the state of Oregon under the swamp-land grant, that a proper construction of the survey and patents gives riparian rights covering the land in dispute, and that it is not competent to overcome such rights by evidence affecting the legal import of the plats and patents.

[No. 124.]

Argued January 20, 21, 1902. Decided April 7, 1902.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment affirming a judgment of the Circuit Court of Harney County in favor of defendant in an action to recover land held under the homestead laws of the United States. *Affirmed.*

See same case below, 35 Or. 312, 58 Pac. 102.

Statement by Mr. Justice Shiras:

This was an action brought, in 1896, in the circuit court of Harney county, state of Oregon, by the French-GleNN Live Stock Company, a corporation of the state of California, against Alva Springer, to recover possession of a certain tract of land situated in said county. The action was tried in May, 1897, and resulted in a verdict and judgment in favor of the defendant. The cause was subsequently taken to the supreme court of Oregon, and by that court, on August 11, 1899, the judgment of the circuit court was affirmed; and thereupon a writ of error was allowed by the chief justice of that court, and the cause was brought to this court.

The facts of the case, as developed at the trial, were thus stated by the supreme court:

*The plaintiff, to support its contention [48] of ownership of the fee, offered in evidence (1) the official plat of the United States government survey of fractional township 26 south, range 31 east, of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur lake, which plat appears to have been approved

267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

Congress, or by any officer or officers, or board or boards of commissioners, acting under and by authority of any act of Congress, shall be, and the same are hereby, granted, released, and relinquished by the United States, in fee simple, to the respective owners of the equitable titles thereto, and to their respective heirs and assigns forever, as fully and as completely, in every respect whatever, as could be done by patents issued therefor according to law.

by the Land Department of the government and filed in the local office on September 17, 1877; the plat showing said lots bounded on the north by the meander line of Malheur lake; (2) the field notes of the survey of the exterior boundaries of said township and its subdivisions, and the meander line of Malheur lake, under the title heading, 'Meanders of the south shore of Malheur lake, through fractional township 26,' etc., and indicating that it was run 'with the meander of the lake;' (3) a list of selections of land, made by the agent of the state of Oregon, claimed as swamp and overflowed, with the approval of the Secretary of the Interior, bearing date September 19, 1889; (4) two patents from the United States, for said lots 3 and 4, section 34, and 1 and 2, section 35, 'according to the official plats of the survey of the said lands returned to the General Land Office by the surveyor general,' such patents bearing date March 10, 1890, and October 8, 1891, respectively, and the lots containing in the aggregate 158.53 acres; (5) two conveyances from the state, comprising the above-described lots, bearing date October 7, 1889, and April 30, 1890, respectively, and other mesne conveyances to the plaintiff; and (6) oral evidence, tending to prove that in 1877, and for some years thereafter, Malheur lake was a continuous body of water up to the meander line of that year; that there was a narrow ridge or reef across the west end thereof, some 12 or 15 miles west of the lands in dispute, which separated its waters from those of Harney lake; that its waters were from 8 to 12 feet higher than those of Harney lake; that, in 1881, the waters of Malheur lake, overflowing the ridge, cut a channel through, which was enlarged from year to year for some time; that, as a result, its surface was lowered, the water receding from the flat, shelving shore, leaving the disputed land bare, except in the spring time, from and after 1884.

[49] This constituted the *plaintiff's case. On behalf of the defendant, evidence was introduced tending to show that there never was a lake in front of the said lots; that Malheur lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of said lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at any time extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake, and a consequent reliction of land in front of the said lots." [35 Or. 312, 58 Pac. 102.]

Mr. Charles A. Keigwin argued the cause and filed a brief for plaintiff in error:

The jurisdiction of this court is abundantly established by the following cases:

Cousin v. Labatut, 19 How. 202, 15 L. ed. 601; *Magwire v. Tyler*, 1 Black, 195, 17 L. 185 U. S.

ed. 137; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *Knight v. United Land Assn.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Glasgow v. Baker*, 128 U. S. 571, 32 L. ed. 517, 9 Sup. Ct. Rep. 154.

Every presumption is to be indulged in favor of the public records.

Greenl. Ev. § 483; *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. ed. 552; *Galt v. Galloway*, 4 Pet. 332, 7 L. ed. 876; *Gonzales v. Ross*, 120 U. S. 605, 30 L. ed. 801, 7 Sup. Ct. Rep. 705.

It is the essence of a presumption that it dispenses with further inquiry.

Greenl. Ev. § 14.

The patenting of a tract as swamp land is conclusive as to its character.

Chandler v. Calumet & H. Min. Co. 149 U. S. 79, 37 L. ed. 657, 13 Sup. Ct. Rep. 798; *French v. Fyan*, 93 U. S. 169, 23 L. ed. 812; *Ehrhardt v. Hogaboom*, 115 U. S. 67, 29 L. ed. 346, 5 Sup. Ct. Rep. 1157.

Patents cannot be collaterally attacked. Nor can a plat be corrected in this way upon suggestion of fraud or error when a title is passed by it.

Noble v. Union River Logging Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Tubbs v. Wilhoit*, 138 U. S. 134, 34 L. ed. 887, 11 Sup. Ct. Rep. 279.

Mr. C. E. S. Wood argued the cause, and, with Messrs. Lionel R. Webster and Thomas D. Rambaut, filed a brief for defendant in error:

A decision that there was not at the time of a Federal grant or survey a lake forming part of a boundary line as shown by the plat does not draw in question the validity of any Federal Constitution, statute, or act.

Lanfear v. Hunley, 4 Wall. 204, 18 L. ed. 325; *Moreland v. Page*, 20 How. 522, 15 L. ed. 1009; *Barbarie v. Mobile*, 9 How. 451, 13 L. ed. 212; *Almonester v. Kenton*, 9 How. 1, 13 L. ed. 21.

The decision here complained of was made in accordance with the rules of general jurisprudence.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

The maps and plats introduced in evidence are not conclusive as to the existence or nonexistence of a lake in front of plaintiff's lot.

Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Koehnke & H. Bridge Co. v. Illinois*, 175 U. S. 633, 44 L. ed. 302, 20 Sup. Ct. Rep. 205; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141.

[49] *Mr. Justice Shiras delivered the opinion of the court:

The parties to this contest both claim under titles derived from the United States,—the plaintiff in error under patents granted to the state of Oregon under the swamp-land grant; the defendant in error under the homestead laws.

To support its contention the plaintiff in error put in evidence, at the trial, an official plat of the government survey of township 26 south, range 31 east, of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur lake, which plat appears to have been approved by the Land Department and filed in the local land office on September 17, 1877. The plat shows lots 3 and 4, section 34, and lots 1 and 2, section 35, as bounded on the north by the meander line of Malheur lake; also, a list of selections of land, made by the agent of the state of Oregon, claimed as swamp and overflowed, with the approval of the Secretary of the Interior, bearing [50] date September 19, 1889; *also two patents from the United States for said lots, dated, respectively, March 10, 1890, and October 8, 1891,—said lots containing in the aggregate 158.53 acres; also, two conveyances from the state of Oregon, comprising the said lots, bearing date October 7, 1889, and April 30, 1890, respectively, and certain mesne conveyances of said lots, vesting title in the plaintiff in error in 1894; also, oral evidence, tending to prove that in 1877, and for some years thereafter, Malheur lake was a continuous body of water up to the meander line of that year; that there was a narrow ridge or reef across the west end thereof, some 12 or 15 miles west of the lands in dispute, which separated its waters from those of Harney lake; that its waters were from 8 to 12 feet higher than those of Harney lake; that in 1881 the waters of Malheur lake, overflowing the ridge between the lakes, cut a channel through, which was enlarged from year to year for some time; that, as a result, the surface of Malheur lake was lowered, the waters receding from the flat, shelving shore, leaving the disputed land bare, except in the spring time, from and after 1884.

On the part of the defendant, whose possession began in July, 1888, evidence was put in tending to show that there never was a lake in front of the said lots; that Malheur lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of the lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at any time extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake, and a consequent reliction of land in front of the said lots.

The question of fact raised by this con-

tradictory evidence was submitted to the jury, whose verdict decided the issue in favor of the defendant in error.

The land in dispute, in the possession of the defendant in error, was not included within the lines of the original survey, nor in the description of the lots contained in the patents and *in the deeds of conveyance [51] under which the plaintiff in error holds, and to add the land in controversy to the lots so described would more than double the area of the land claimed by the plaintiff in error; but the contention of the plaintiff in error was in the courts below, and now is in this court, that, as the plaintiff in error bought in reliance upon the plats and patents which showed the meander line of the lake, such plats and patents must be deemed to conclusively establish that the lake was the northern boundary of the land, so far as the rights of riparian grantees are concerned.

Respecting this contention, the defendant in error advances two propositions: First, that the grantee of swamps and overflowed lands takes only such lands as are of that special character, and that this land under the water, forming the bed of the lake, not being of that character, could not pass, even under the facts as claimed to exist under the evidence of the plaintiff in error; and, second, that there never existed a lake in front of or bordering on the plaintiff in error's lots; that if such was the fact, the rule as respects accretion by reason of the alleged recession of the water would not apply; and that, as this question was submitted to the jury and found against the plaintiff in error, such finding conclusively determines the controversy.

While it may be conceded that the descriptions of the lots contained in the survey, plats, and patents are conclusive as against the government and holders of homesteads, so far as the lands actually described and granted are concerned, such conclusive presumption cannot be held to extend to lands not included within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, whose recession has left bare land accruing to the owners of the abutting lots. We agree with the supreme court of Oregon in thinking that the question whether the northern boundary of the lots of the plaintiff in error was an existing lake, the recession of whose waters would leave the bed of the lake, thus laid bare, to accrue to the owner of the lots, was a question of fact which was not concluded by a mere call for a meander line. If, indeed, there had been a lake in front of these lots at the time of the survey, which lake had *subsequently receded from the platted [52] meander line, the claim of the owner of the lots to the increment thus occasioned might be conceded to be good, if such were the law of the state in which the lands were situated. But if there never was such a lake—no water forming an actual and visible boundary—on the north end of the lots, it would seem unreasonable, either to prolong

the side lines of the survey indefinitely until a lake should be found, or to change the situs of the lots laterally in order to adapt it to a neighboring lake. The jury having found that the facts under this issue were as claimed by the defendant in error, the conclusion must be that the rights of the plaintiff in error must be regarded as existing within the actual lines and distances laid down in the survey and to the extent of the acreage called for in the patents, and that the meander line was intended to be the boundary line of the fractional section.

In *Niles v. Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124, a somewhat similar state of facts existed, and it was claimed that the mere call for a meander line gave riparian rights beyond that line. But this court said:

"It is urged that the fact that a meandered line was run amounts to a determination by the Land Department that the surveyed fractional sections bordered on a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation."

See, likewise, *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988, where a similar ruling was made.

Whether, even if the meander line of the survey really ran along and adjacent to Malheur lake, the doctrine of *Hardin v. Jordan*, 140 U. S. 384, 35 L. ed. 434, 11 Sup. Ct. Rep. 808, 838, and cognate cases, is applicable, is discussed at some length in the briefs. According to that rule, the extent of the title of a government grantee of lands [53] bounded *on streams and waters, without any reservation or restriction of terms, is to be construed, as to its effect, according to the law of the state in which the lands lie; and the cases cited show that, in some of the states, it is held that the title of a riparian proprietor extends to the middle thread of the stream, while in others it is held to extend only to the water's edge; and in Massachusetts, and perhaps other states, a distinction is recognized between lands bordering on lakes and ponds, and those bounded by running streams.

But we are not called upon to enter into that discussion in the present case, for the supreme court of Oregon reached its conclusion apart from any such question, and expressed itself as follows:

"If there never was a lake in front of plaintiff's lots, or if one did not exist there at the time of the survey, then there was no 185 U. S.

natural object or monument marking the north boundary of said lots; hence resort must be had to the secondary evidence, *viz.*, the courses and distances which are ascertainable from the plats and surveys, and they must prevail. The result is natural, and the land conveyed would be just what a mathematical calculation would produce from the field notes of the survey of the fractional sections and the supposed meander line. . . . The plaintiff sought to sustain the fact of the actual existence of the lake in front of its lots and upon which they abutted at the time of the survey, and then to show a gradual subsidence of the water of the lake, due to the cutting of the channel from natural causes, through a narrow reef or ridge extending across between Malheur and Harney lakes, by which the water of the former was drawn off into the latter, and a consequent reliction of the land bordering said lots, which constitute the land in dispute, and to which plaintiff claims title. The defendant controverted this position, and sought and introduced evidence tending to show the nonexistence of such a lake at the time of the survey, and at all times since; in short, there was support for the whole of his contention. The fact of the existence of Malheur lake, a non-navigable body of water, was admitted, but there was evidence to show that it lies to the northeast of the lots of plaintiff, and that no part of it now, or at the *time of the survey, ex-[54] tended westward, in front or to the north of them. . . . The issues of fact were clear and distinct, and having been submitted to the jury, there is no reason why their verdict should not preclude the plaintiff, as in other cases when a jury has passed upon a submitted question of fact."

As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of Federal law is left open for our revision. However, as the plaintiff in error contended, in the courts below and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a Federal question is thus presented.

For the reasons already given, we think that, while the plats are conclusive as to the meander line, and while if there was a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, and all accretions, it was competent for the defendant to show that there was not, at the time of the survey nor since, any such lake, and to contend that, in such a state of facts, there could be no intervening land and no accretion by reliction.

The judgment of the Supreme Court of Oregon is affirmed.

FRENCH-GLENN LIVE STOCK COMPA-
NY, *Plff. in Err.*,
v.
JAMES COLWELL.

(See S. C. Reporter's ed. 54, 55.)

*Public lands — conclusiveness of call for
meander lines—error to state court—Fed-
eral question.*

This case is governed by the decision in *French-
Glenn Live Stock Company v. Springer*, ante,
800.

[No. 125.]

Decided April 7, 1902.

IN ERROR to the Supreme Court of the
State of Oregon to review a judgment af-
firming a judgment of the Circuit Court of
Harney County in favor of defendant in an
action to recover land held under the home-
stead laws of the United States.

See same case below, 36 Or. 600, 58 Pac.
1119.

[55] *Mr. Justice Shiras delivered the opin-
ion of the court:

The French-Glenn Live Stock Company, a
corporation of the state of California,
brought an action in the circuit court of
Harney county, state of Oregon, against
James Colwell, to recover lands in possession
of the latter, under the homestead laws of
the United States. There was a verdict and
judgment in favor of the defendant, and that
judgment was affirmed by the supreme court
of Oregon. A writ of error was sued out to
this court.

The questions of fact and law in this case
are similar to those in the case of *French-
Glenn Live Stock Co. v. Springer*, just de-
cided, 184 U. S. 47, ante, 800, 22 Sup. Ct.
Rep. 563, and, for the reasons expressed in
the opinion in that case, *the judgment of the
Supreme Court of Oregon is affirmed.*

Mr. Justice Harlan took no part in this
decision.

JEANNIE M. WILSON, Administratrix of
the Estate of Alexander Osbourne, De-
ceased, *Plff. in Err.*,
v.

ADAM ISEMINGER and Elmer H. Rogers.

(See S. C. Reporter's ed. 54-65.)

*Contracts — impairing obligation — extin-
guishment of ground rent by retroactive
statute—reservation of existing rights.*

No unconstitutional impairment of the obliga-
tion of a contract is made by the provision
of Pa. act April 27, 1855, § 7, conclusively

presuming a release and extinguishment of
any irredeemable ground rent on which no
payment or demand for payment has been
made for twenty-one years, and of whose
existence no acknowledgment has been made
during that period, even though such pro-
vision is applicable to a ground rent reserved
before the passage of the act, as the further
provision that "this section shall not go into
effect until three years from the passage of
this act" gave a reasonable time to the own-
ers of such ground rents for preserving their
rights.

[No. 193.]

Argued March 19, 1902. Decided April 7,
1902.

IN ERROR to the Supreme Court of the
State of Pennsylvania to review a judg-
ment which affirmed a judgment of the
Court of Common Pleas, No. 1, of Philadel-
phia County, in favor of defendants in an ac-
tion to recover arrears of ground rent. Af-
firmed.

See same case below, 190 Pa. 580.

Statement by Mr. Justice Shiras:

*This was an action of assumpsit brought [56]
December, 1896, in the court of common
pleas, No. 1, of Philadelphia county, by
Harvey G. Clay, administrator of the es-
tate of Alexander Osbourne, deceased,
against Adam Iseminger, for recovery of ar-
rears of ground rent due on a ground-rent
deed between Alexander Osbourne and Jen-
nie M., his wife, and the said Adam Isem-
inger, dated January 4, 1854. The statement
of particulars claimed arrears of ground
rent due, under the stipulations of said
deed, for the years 1887 to 1896, both in-
clusive, with interest on each arrear.

On January 27, 1897, one Elmer H. Rog-
ers, having been permitted, as terre-tenant
and owner in fee of the lot of ground de-
scribed in the ground-rent deed, to intervene
and defend *pro interesse suo*, filed, under the
rules of the court, an affidavit of defense to
the whole of the plaintiff's claim, averring
that no payment, claim, or demand had been
made by anyone on account of or for any
ground rent on the premises described in the
said deed, or from any owner of said prem-
ises, or any part thereof, for more than
twenty-one years prior to the bringing of
the suit; that no declaration or acknowledg-
ment of the existence thereof, or of the
right to collect said ground rent thereon,
had been made within that period by or for
any owner of said premises, or any part
thereof, and that neither he nor they or any
of them within that period ever executed
any declaration of no set-off in reference to
said ground rent, or recognized its existence
in any way, manner, shape, or form.

NOTE.—As to what laws are void as impair-
ing obligation of contracts—see notes to Frank-
lin County Grammar School v. Bailey (Vt.) 10
L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S.
162; McCanna & F. Co. v. Citizens' Trust &
Surety Co. 24 C. C. A. 20, and Montana Ore-
804

Purchasing Co. v. Boston & M. Consol. Copper
& S. Min. Co. 35 C. C. A. 12.

On retrospective statutes—see notes to Otoe
County v. Baldwin, 28 L. ed. U. S. 331; Bar-
nitz v. Beverly, 41 L. ed. U. S. 94; *Ex parte*
Medley, 33 L. ed. U. S. 835, and People v.
O'Brien (N. Y.) 2 L. R. A. 255.

This defense was based on the 7th section [57] of an act of the *commonwealth of Pennsylvania of April 27, 1855, in terms as follows:

"That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable: *Provided*, That the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county the duplicate of any receipt therefor, proved by oath or affirmation, to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by the deponent, which recorded duplicate or the exemplification of the record thereof, shall be evidence until disproved, and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity, or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which records and judgments shall be duly indexed: *Provided*, That this section shall not go into effect until three years from the passage of this act."

Thereupon the plaintiff took out a rule on the defendant to show cause why judgment should not be entered against him for want of a sufficient affidavit of defense, assigning as a reason why such rule should be made absolute that the said 7th section of the act of April 27, 1855, was unconstitutional within the 10th section of article 1 of the Constitution of the United States, forbidding any state from passing any law impairing the obligation of contracts.

After a hearing the court discharged the said rule for judgment; a bill of exceptions was signed and sealed, and the cause was then taken to the supreme court of Pennsylvania, where the judgment of the court of common pleas was affirmed. 187 Pa. 108, 41 Atl. 38.

Thereafter the case came on for trial before the court and a *jury. The plaintiff offered evidence tending to show that the ground rent in question had never been paid off and extinguished. This offer was objected to as immaterial and irrelevant. The objection was sustained, and an exception was taken by the plaintiff. The court was asked to instruct the jury that the 7th section of the act of April 27, 1855, was unconstitutional, because it impairs the contract reserving the rent, and was inhibited by the 10th section of article 1 of the Constitution of the United States, which forbids the states from passing any law impairing the obligation of contracts. The request so to charge was refused by the trial judge. The defendants asked the court to charge that the verdict should be for the defendants. 185 U. S.

This request was granted. A bill of exceptions to the action of the court in rejecting the plaintiff's offer of evidence, in declining to charge as requested by the plaintiff, and in charging as requested by the defendant, was signed and sealed by the trial court. A verdict and judgment in favor of the defendants was then entered. The cause was then taken a second time to the supreme court of Pennsylvania, where on April 3, 1899, the judgment of the court of common pleas was affirmed.

Mr. George Henderson argued the cause and filed a brief for plaintiff in error:

This act exceeds the legitimate scope of a limitative act, in denying a remedy as to instalments before they have matured, and in divesting title to the estate without some fault or neglect of the owner.

Jackson ex dem. Hart v. Lamphire, 3 Pet. 280, 7 L. ed. 679; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Heckerman v. Hummel*, 19 Pa. 64; *Kirk v. Smith*, 9 Wheat. 241, 6 L. ed. 81; *Moore v. State*, 43 N. J. L. 210, 39 Am. Rep. 558; *St. Mary's Church v. Miles*, 1 Whart. 233; *McQuesney v. Hiestler*, 33 Pa. 439, 75 Am. Dec. 612; *Lindeman v. Lindsey*, 69 Pa. 100, 8 Am. Rep. 219.

The obligation of the rent is impaired by depriving the owner of all remedy as to arrears before a right of action has accrued.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; *Von Hoffman v. Quincy*, 4 Wall. 535, *sub nom. United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; *Cooley*, Const. Lim. pp. 348, 354, 358; *Hare*, Const. Law, p. 687; *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143. See also *McGehey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997.

New rules of property can have no retroactive application.

Cooley, Const. Lim. p. 112; *Norman v. Heist*, 5 Watts & S. 173, 40 Am. Dec. 493; *Cornell v. Hickens*, 11 Wis. 355; *Olcott v. Pond du Lac County*, 16 Wall. 690, 21 L. ed. 387.

Because some of the instalments of a contract are barred, can it be conclusively presumed that there has been a release before a day of maturity? Can a bar of the plaintiff's right be predicated upon the default of the defendant? The covenant in the deed excuses demand.

Ingersoll v. Sergeant, 1 Whart. 337; *St. Mary's Church v. Miles*, 1 Whart. 229.

Mr. Ira Jewell Williams argued the cause, and, with Mr. Alexander Simpson, Jr., filed a brief for defendants in error:

The validity of the retrospective application of this statute of limitations is not involved, because the full bar of twenty-one years' nondemand took place after the act.

Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886.

A statute of limitations may be constitutionally applied to prior contracts where,

as here, a reasonable time is given after the passage of the statute before the bar takes effect.

Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; *Koshkonong v. Burton*, 104 U. S. 675, 26 L. ed. 889; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; *Saranac Land & Timber Co. v. Roberts*, 177 U. S. 324, 44 L. ed. 789, 20 Sup. Ct. Rep. 642.

Three years is a reasonable time.

Ibid.

A statute of limitations barring the right of action after twenty-one years, non-demand of interest is constitutional, although the principal itself was not demandable.

St. Mary's Church v. Miles, 1 Whart. 229; *Lindeman v. Lindsey*, 69 Pa. 100, 8 Am. Rep. 219.

The legislature, in order to protect titles to property and prevent the assertion of stale claims, can, in the exercise of its discretion, say to the owner of the ground-rent, that he must, within twenty-one years, make demand of interest, or it will be conclusively presumed that he had no right to interest, because of the payment of the principal.

Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; *Korn v. Browne*, 64 Pa. 57; *Biddle v. Hooven*, 120 Pa. 221, 13 Atl. 927; *Wallace v. Fourth U. P. Church*, 152 Pa. 258, 25 Atl. 520; *Clay v. Iseminger*, 187 Pa. 108, 41 Atl. 38, 190 Pa. 580, 42 Atl. 1039.

[58] *Mr. Justice Shiras delivered the opinion of the court.

The question for determination in this case is whether the 7th section of the act of assembly of the commonwealth of Pennsylvania of April 27, 1855, the terms of which appear in the foregoing statement, is an act or law impairing the obligation of contracts within the meaning of the Constitution of the United States.

The peculiar character, under the laws of [59] the state of Pennsylvania, *of irredeemable ground rents, must first receive our notice.

It is defined to be a rent reserved to himself and his heirs by the grantor of land, out of the land itself. It is not granted like an annuity or rent charge, but is reserved out of a conveyance of the land in fee. It is a separate estate from the ownership of the ground, and is held to be real estate, with the usual characteristics of an estate in fee simple, descendible, devisable, alienable. *Bosler v. Kuhn*, 8 Watts & S. 185; *Wallace v. Harmstad*, 44 Pa. 495; *McQuigg v. Morton*, 39 Pa. 31.

It may be well to quote the language of the deed reserving the ground rent in question, which is that usually employed in the creation of such estates. The *tenendum* clause is in the usual form: "To have and to hold the said described lot or piece of ground, hereditaments, and premises hereby granted with the appurtenances unto the said Adam Iseminger, his heirs and assigns, to the only proper use and behoof of the said Adam Iseminger, his heirs and assigns for-

ever." Then comes the reservation, as follows:

"Yielding and paying therefor and thereout to unto the said Alexander Osbourne, his heirs and assigns, the yearly rent or sum of seventy-two dollars, lawful money of the United States, in half-yearly payments on the 1st day of April and October every year hereafter forever, without any deduction, defalcation, or abatement for any taxes, charges, or assessments whatsoever to be assessed as well on the said hereby-granted premises as on the said yearly rent hereby and thereout reserved. The first half-yearly payment thereof to be made on the 1st day of October, 1854, and, on default of paying the said yearly rent on the days and time and in manner aforesaid, it shall and may be lawful for the said Alexander Osbourne, his heirs and assigns, to enter into and upon the said hereby-granted premises or any part thereof, and into the buildings thereon to be erected, and to distrain for the said yearly rent so in arrears and unpaid, without any exemption whatsoever, any law to the contrary thereof in anywise notwithstanding, and to proceed with and sell such distrained goods *and effects, according to the usual course of distresses, for rent charges. But if sufficient distress cannot be found upon the said hereby-granted premises to satisfy the said yearly rent in arrear and the charges of levying the same, then and in such case it shall and may be lawful for the said Alexander Osbourne, his heirs and assigns, into and upon the said hereby-granted lot and improvements wholly to re-enter, and the same to have again, repossess, and enjoy as in his and their first and former estate and title in the same and as though this indenture had never been made," etc.

It appears in the Pennsylvania cases hereinafore and hereafter cited, that this form of estate was, in the early history of the commonwealth, a favorite form of investment; but that eventually great inconveniences arose from the existence of ancient ground rents, which the owners and occupants of the land never heard of, but of whose extinguishment the records of title made no mention. Indeed, the records disclosed the reservation of such ground rents unpaid and unextinguished, going back more than a century. In *Korn v. Browne*, 64 Pa. 55. there is a quotation in the opinion from a tract by Mr. Eli K. Price, a distinguished real-estate lawyer of Philadelphia, as follows:

"Those only who are accustomed to make or read briefs of title in Philadelphia, going back to the times of the first settlement, know how frequently occur ancient rent charges and ground rents, which the owners of the present day never heard of, and which generally have no doubt been honestly extinguished; while making this note the writer has such a single brief before him for an opinion, in which no less than three such charges occur as blemishes, grants, or reservations more than a century ago, which no person living has any knowledge of."

These evils led to the passage of the act

of the 27th of April, 1855, entitled "An Act to Amend Certain Defects of the Law for the More Just and Safe Transmission, and Secure Enjoyment of Real and Personal Estate."

[61] The theory of this remedial act is that upon which all statutes of limitation are based,—a presumption that, after a long lapse of time, without assertion, a claim, whether for money or for an interest in land, is presumed to have been paid or released. This is a rule of convenience and policy, the result of a necessary regard to the peace and security of society.

Bonds, even when secured by mortgages upon land, mortgages themselves, merchants' accounts, legacies, judgments, promissory notes, and all evidences of debt, have universally been treated as lawfully within the reach of legislative power exercised by the passage of statutes of limitation. Such statutes, like those forbidding perpetuities and the statute of frauds, do not, in one sense, destroy the obligation of contracts as between the parties thereto, but they remove the remedies which otherwise would be furnished by the courts. Are not the powers of government adequate for this?

"Laws for the preservation and promotion of peace, good order, health, wealth, education, and even general convenience, are supported under the police power of the state. Under these laws, personal rights, rights of property, and freedom of action, may be directly affected, and men may be fined, imprisoned, and restrained, and property taken, converted, and sold away from its owner. The principle of such laws is most easily perceived and recognized when men are held liable for nuisances, acts, and negligences affecting the health and safety of society, when the marriage contract is dissolved, and when property is subjected to charges and sales for matters affecting the public interest and welfare. Beyond this is a wide domain of general convenience where the power is likewise exercised. Thus, estates held in joint tenancy and common may be divided among the tenants, even by conversion and sale; life estates and remainders may be separated from each other; qualified inheritances expanded into absolute fees, and contingent and executory interests extinguished. What greater reason has the owner of an irredeemable ground rent, coming down from a former generation, to complain [than] . . . the owner of a remainder or reversion, or of some contingent or executory interest?" Ch. J., Agnew in *Palairer's Appeal*, 67 Pa. 497.

[62] "Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the *right to assert the same in the courts by his own negligence or laches. If one who is possessed be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect, . . . and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. Statutes of limitation

are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose. Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time." *Cooley, Const. Lim.* 5th ed. 448; *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *Leffingwell v. Warren*, 2 Black, 606, 17 L. ed. 263.

We are unable to perceive any sound distinction between claims arising out of ground-rent deeds and other kinds of debts and claims, which would exempt the former from the same legislative control that is conceded to lawfully extend to the latter.

But, assuming that there is nothing peculiar in ground rents that withdraw them from the reach of statutes of limitation, it is further contended, in the present case, that the act of April 27, 1855, can have no valid application to a ground rent reserved before the passage of that statute. It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though *what shall be considered [63] a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. *Cooley, Const. Lim.* 451.

Thus, in *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365, it was said per Chief Justice Waite:

"This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins v. Barney*, 5 Pet. 457, 8 L. ed. 190; *Sohn v. Waterson*, 17 Wall. 596, 27 L. ed. 737.

"It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms

of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.

"In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge, and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts." *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; *Saranac Land & Timber Co. v. Roberts*, 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642.

In *Korn v. Browne*, 64 Pa. 57, this question was considered, and it was said, per Read, J.:

[64] "The 7th section did not go into effect for three years, and gave ample time to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute. This prospective commencement makes the retrospective bar not only reasonable but strictly constitutional." Citing *Smith v. Morrison*, 22 Pick. 430, and *Ross v. Duval*, 13 Pet. 64, 10 L. ed. 60.

In *Biddle v. Hooven*, 120 Pa. 225, 13 Atl. 927, it was said, referring to *Korn v. Browne*, 64 Pa. 57: "An examination of it shows that the only question there argued was whether the section of the act referred to has a retrospective, as well as a prospective, operation with regard to ground rents. This appears in the first sentence of the opinion of Justice Read. He very properly held that, as the 7th section did not go into effect for three years, and gave ample time to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute, that this prospective commencement made the retrospective bar, not only reasonable, but constitutional. In other words, the act gave ample time to preserve all existing rights. . . . The only ground upon which this kind of legislation can be justified is that after the lapse of the statutory period the mortgage or other security is presumed to have been paid, or the ground rent extinguished. The payment of a mortgage and the extinguishment of a ground rent mean substantially the same thing. The act was not intended to destroy the ground landlord's ownership in the rent; it does not impair his title thereto; nor can it be said to impair the contract by which the rent was reserved, but from well-grounded reasons of public policy it declares that when the owner of such rent makes no claim or demand therefor for twenty-one years it presumes it has been extinguished, which means nothing more than that it has been paid. The language cited, as before observed, affects only the remedy; if it meant more it would be void for the excess."

The same conclusion was reached by the supreme court of Pennsylvania in *Wallace v. Fourth U. P. Church*, 152 Pa. 258, 25 Atl. 520, where it was said that "the purpose of the act of 1855 was to relieve titles and facilitate the sale of real estate. It *fixes [65] upon an arbitrary period of twenty-one years as that over which the search of a purchaser or other person must extend, and beyond which it shall not be necessary for him to look. If for twenty-one years no payment upon or acknowledgment of the ground rent can be shown, and no demand for payment has been made, the act conclusively presumes a release and extinguishment of the encumbrance by the act of the parties, and declares that the rent shall thereafter be irrecoverable." In that case the ground rent had been reserved long before the passage of the act of April 27, 1855, and it was held that as twenty-one years and ten months had elapsed without the payment of rent, or demand for the same, the right to demand it was extinguished.

So, in the present case, where no payment or demand was shown to have been made for more than twenty-one years, it was held that, in view of the numerous and repeated decisions, the question must be considered at rest. *Clay v. Iseminger*, 187 Pa. 108, 41 Atl. 38.

We are therefore of opinion that the Supreme Court of Pennsylvania did not err in holding that the 7th section of the act of April 27, 1855, was constitutionally applicable, and its judgment is affirmed.

VICKSBURG WATERWORKS COMPANY,
Appt.,
v.

MAYOR AND ALDERMEN OF THE CITY
OF VICKSBURG.

(See S. C. Reporter's ed. 65-83.)

Courts—jurisdiction of circuit court—case arising under Constitution and laws of the United States—equitable relief against threatened injury.

1. A case presented by a bill in equity which alleges that a contract right of a waterworks company with whose predecessors a municipality, with legislative sanction, contracted for a municipal water supply, is impaired by an ordinance directing that the waterworks company be notified that the city denies any liability on any contract for the use of hydrants, and by the subsequent action of the city in holding an election to authorize an issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the contract,—is one so arising under the laws and Constitution of the

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7, and *Bailey v. Mosher*, 11 C. C. A. 308.

As to injunction to restrain a threatened wrong—see note to *Gardner v. Stroever* (Cal.) 6 L. R. A. 90.

United States as to give a circuit court of the United States jurisdiction.

2. Apprehension that such illegal action may be taken by a municipality as will impair the franchise and contract rights of a waterworks company with whose predecessor the city has contracted for a municipal water supply entitles the company to maintain a suit for equitable relief in advance of any actual proceedings on the part of the city to impair the company's rights under the contract.

[No. 392.]

Submitted December 4, 1901. Decided April 7, 1902.

A PPEAL from the Circuit Court of the United States for the Southern District of Mississippi to review a judgment dismissing a suit for want of jurisdiction. *Reversed.*

Statement by Mr. Justice **Shiras**:

- [66] *The Vicksburg Waterworks Company, a corporation of the state of Mississippi, filed, in February, 1901, in the circuit court of the United States for the southern district of Mississippi, a bill of complaint against the mayor and aldermen of the city of Vicksburg, a municipal corporation of Mississippi. To this bill the city filed a demurrer and certain special pleas, and subsequently moved the court for leave to withdraw the demurrer and pleas, and for leave to file an answer alleging that said answer embodied all the matters of defense which were set forth in said pleas and demurrer, and also a motion to dissolve a temporary injunction which had been theretofore granted.

On July 1, 1901, the court entered the following order:

"Coming on to be heard the motion to dissolve the injunction herein, and the defendant now having moved the court for leave to file the answer herewith presented and marked by the clerk as filed June 21, 1901, and to withdraw the pleas and demurrers filed April 30, 1901, it is ordered that leave be granted to file said answer and withdraw said pleas and demurrers, but that the question of the jurisdiction of this court to hear the matter in controversy, raised by said answer, shall be first presented and argued."

On July 3, 1901, the complainant moved the court to "require defendant to elect on which plea it will stand, whether on demurrer to the whole bill or on the answer." This motion was overruled, and on July 3, 1901, the court entered the following order and decree:

- [67] "This cause coming on to be heard upon the motion to dissolve the injunction heretofore issued in this cause, and the court now being advised in the premises, and it appearing that there is no Federal question involved in the controversy presented *by the pleading, it is therefore ordered, adjudged, and decreed that said injunction be, and the same is hereby, dissolved, and that the bill of the complainant be, and the same is hereby, dismissed, and that execution issue therefor for the cost in the case."

185 U. S. U. S., Book 46.

Thereupon the complainant moved the court to "continue the restraining order in force as granted until the appeal in this cause is heard by the Supreme Court of the United States, or until the further order is granted by said court."

The following order was then entered by the court:

"Upon the appeal being allowed herein it is ordered that the temporary restraining order herein be continued until the 1st day of January, 1902, or if before then, until the decision of the appeal herein by the supreme court, upon condition, however, that the complainant diligently prosecute its appeal and file a motion at or before the next term of the supreme court to advance the appeal in this cause upon the docket of the Supreme Court of the United States, and upon the further condition that the injunction bond heretofore given in this case shall stand and continue in force for any additional liability which may be incurred by reason of this order, the principal and sureties upon said bond, now in open court consenting thereto. Ordered, adjudged, and decreed this 3d July, 1901."

On the same day an appeal was allowed to this court, and on July 4, 1901, the following certificate was signed by the trial judge and filed:

"The final decree having been entered herein on the 3d day of July, 1901, dismissing this suit and the bill, and amended and supplemental bill therein, now, therefore, this court, in pursuance of the 2d paragraph of the 5th section of the act of Congress, approved March 3, 1891, and entitled 'An Act to Establish Circuit Courts of Appeal, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes,' hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this cause, whether this cause presents a controversy which involves a Federal question under the laws or Constitution of the United States.

"The only question which I considered and decided in dismissing *this suit and the bills [68] of complaint is whether a Federal question was involved upon the pleadings."

Mr. James A. Carr submitted the cause for appellant. *Messrs. S. S. Hudson and A. N. Edwards* were with him on the brief:

Whether the obligation of a contract has or has not been impaired is a Federal question, if the pleading presents a substantial controversy.

Southern P. R. Co. v. California, 118 U. S. 109, 30 L. ed. 103, 6 Sup. Ct. Rep. 993.

By entering into the thirty years' contract the city was precluded from constructing waterworks of its own during the thirty years, or to own or acquire waterworks of its own, except as therein provided.

Grant v. Denver, Fed. Feb. 1901; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 10, 43 L. ed. 345, 19 Sup. Ct. Rep. 77.

Without a reservation of the right to regulate the time and rates, it cannot be done

without changing the contract, and when attempted to be done, as in this case, it brings the case within the United States constitutional inhibition.

Freeport Water Co. v. Freeport City, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

A bill to restrain the enforcement of a city ordinance, fixing the rates to be charged by the waterworks, on the ground that such rates are so unreasonably low as to amount to the taking of the property of the water company without just compensation, presents a Federal question.

Capital City Gas Co. v. Des Moines, 72 Fed. 818; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. 245; *Consolidated Water Co. v. San Diego*, 84 Fed. 369.

A fair and substantial controversy as to a Federal question is presented by the allegation of the bill.

Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 10, 43 L. ed. 345, 19 Sup. Ct. Rep. 77.

Where there is no law against such an act, the city could bind itself legally not to build waterworks in competition with the contracting party during the life of the contract, and this exclusive privilege is binding as to the city, if not as to others.

Bellevue Water Co. v. Bellevue (Idaho) 35 Pac. 693.

Mr. L. W. Magruder submitted the cause for appellees. *Mr. W. J. Voller* and *Messrs. Magruder, Bryson, & Dabney* were with him on the brief:

Where one claims under a grant from a state and the source of his right be a state law, and if, by such law, no such right exists, it cannot be impaired. The contention for such a construction does not involve a Federal question. It is not such a controversy that the court will take jurisdiction of to determine its validity. Its validity will be decided to determine the question of jurisdiction.

Osborn v. Bank of United States, 9 Wheat. 825, 6 L. ed. 224; *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; *New Orleans v. Benjamin*, 153 U. S. 431, 38 L. ed. 771, 14 Sup. Ct. Rep. 905; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 660, 42 L. ed. 315, 17 Sup. Ct. Rep. 925.

Where parties assert rights which are wholly determined by the state laws, no Federal question is raised.

Romic v. Casanova, 91 U. S. 380, 23 L. ed. 374; *McStay v. Friedman*, 92 U. S. 723, 23 L. ed. 767; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656.

Jurisdiction will always be denied if "by legal certainty" it appears that ground of jurisdiction does not exist.

Wetmore v. Rymer, 169 U. S. 122, 42 L. ed. 684, 18 Sup. Ct. Rep. 293.

A municipality has no power to grant a monopoly or an exclusive privilege, unless such right is expressly conferred upon it as one of its charter powers.

Freeport Water Co. v. Freeport City, 180 U. S. 598, 45 L. ed. 688, 21 Sup. Ct. Rep. 493; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 14, 43 L. ed. 347, 19 Sup. Ct. Rep. 77.

Mere apprehension that illegal action would be taken by the city cannot be the basis of enjoining such action. The municipality cannot be enjoined from passing any resolution or passing any ordinance looking to the doing of anything. They can only be enjoined from carrying into effect the purpose of such official action.

New Orleans Waterworks Co. v. New Orleans, 164 U. S. 478, 41 L. ed. 522, 17 Sup. Ct. Rep. 161; *Chicago v. Evans*, 24 Ill. 52; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; 1 Dill. Mun. Corp. § 308; 2 High, Inj. § 1246.

*Mr. Justice **Shiras** delivered the opinion of the court: [68]

The sole question for our consideration is whether the bill, as originally filed and as amended, presented a Federal question. As the party plaintiff and the party defendant were both corporations and citizens of the same state, the circuit court of the United States could not take jurisdiction of the controversy between them unless the complainant laid grounds for that jurisdiction by asserting rights arising under the Constitution or laws of the United States, and such assertion must appear in the complainant's statement of its own claim. *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

It is true that the learned judge, in his certificate to this court, inquires "whether a Federal question was involved upon the pleadings." And it is also true that the counsel for the respective parties have gone, in their briefs, into a discussion of questions of fact and law, as if the case were here on appeal from a final decree on the merits.

But our function, in the case before us on this certificate, is restricted to the inquiry whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a Federal question is disclosed so as to give the circuit court jurisdiction in a suit between citizens of the same state. If we conclude, after an inspection of the bill, that a Federal question is thereby presented, we must reverse the decree of the circuit court below dismissing the bill, and direct that court to proceed in the orderly exercise of its jurisdiction to determine the controversy; *if we fail to find such a question, the decree of the circuit court must be affirmed. [69]

Addressing ourselves, then, to a considera-

tion of the contents of the bill, original and supplemental, we encounter a very long and somewhat confusing narrative of the facts of the case. We do not think it necessary to state those facts in full in this opinion, but shall confine our attention to the allegations in which questions arising under the laws or Constitution of the United States are claimed to arise.

By an act of the legislature of the state of Mississippi, approved on the 18th day of March, 1886, the city of Vicksburg was authorized "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks."

The city received competitive bids for the construction and maintenance of said waterworks, and on November 18, 1886, at a special meeting of the board of mayor and aldermen, a committee reported that the bid made by Samuel R. Bullock & Company, of New York, was the best bid, and submitted the draft of an ordinance, entitled "An Ordinance to Provide for a Supply of Water to the City of Vicksburg, in Warren County, Mississippi, and to Its Inhabitants, Contracting with Samuel R. Bullock & Company, Their Associates, Successors, and Assigns, for a Supply of Water for Public Use, and Giving the City of Vicksburg an Option to Purchase Said Works." This ordinance was then adopted, in terms as follows:

"Sec. 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors, and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares, and all other public places within the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be extended, and [70] within such *other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains, and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good, wholesome water to the city of Vicksburg, Mississippi, and to its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

"The said Samuel R. Bullock & Company, their associates, successors, and assigns, shall exercise the greatest care and diligence in the use of the said streets, alleys, public squares, and other public places, and shall cause no unnecessary obstruction of, or interruption to, the public travel over or upon the same, or any injury to or interference with any pipes, mains, sewers, which
185 U. S.

may now be lawfully located beneath the surface thereof.

"The said Samuel R. Bullock & Company, their associates, successors, and assigns, shall take every precaution to provide against danger to property, life, and limb by reason of the exercise of the rights and privileges hereby granted, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purposes for which the said streets, alleys, public squares, and other public places may be used, they shall be restored to their former condition as near as may be without unnecessary delay, and they shall at their own cost and expense relay their mains and pipes when made necessary by a change of grade in any street ordered by the board of mayor and aldermen of said city if there was no established grade for such street at the time said mains and pipes were laid. On failure to restore said streets, alleys, public squares, and other public places as aforesaid, the mayor and aldermen of the city of Vicksburg may, on reasonable notice to them by any city officer, cause the same to be restored and recover the costs and expenses thereof from the said Samuel R. Bullock & Co., their associates, successors, and assigns, in any court having jurisdiction of the amount.

"The said Samuel R. Bullock & Company, their associates, successors, and assigns, hereby agree to hold the mayor and aldermen of the city of Vicksburg harmless from any liability *which may result to it by rea- [71] son of any violation of this section.

"Sec. 2. The general plan of the said system of waterworks shall be as follows:

"Mains.—The pipe system shall consist of not less than twelve (12) miles of mains of sizes varying from sixteen inches (16) to six (6) inches in diameter. The pipe used shall be of the best quality of cast-iron pipe and each pipe shall be tested at its place of manufacture to a pressure of three hundred (300) pounds to the square inch. All pipe shall be coated with Dr. Angus Smith's preservative varnish, and shall be laid and jointed by competent mechanics and in the best possible manner.

"The streets along which and at what points said mains shall be laid shall be first designated by the board of mayor and aldermen of the city of Vicksburg.

"Hydrants.—The hydrants shall be double-nozzle fire hydrants with nozzles fitted to connect with the hose couplings now in use by the fire department of said city of Vicksburg.

"The board of mayor and aldermen of the city of Vicksburg shall within thirty (30) days from the date of the final passage of this ordinance designate the points on the line of distributing mains at which the hydrants shall be erected.

"Gates and valves.—All the necessary gates and valves shall be provided and located at such points on the lines of mains as will enable certain districts to be cut off and isolated when repairs are needed with-

out depriving other districts of their full supply.

"Pumps.—The pumping plant shall consist of two pumping engines each capable of pumping two millions (2,000,000) of gallons of water per day of twenty-four (24) hours against the pressure needed to supply all parts of the pipe system with an abundant supply of water. They shall be so arranged as to be operated separately or together.

"Boilers.—The boilers shall be of ample capacity to operate the pumping engines and shall be so arranged as to be operated separately or together as may be required.

[72] "Stand-pipe.—There shall be a stand-pipe or a reservoir of *sufficient capacity and height or elevation to furnish an ample supply of water for consumption at the highest points along the line of the mains.

"Pump-house.—The pumps and boilers house shall be a substantial stone or brick building of ample size for the pumps and batteries of boilers. The smokestack will be of brick of the size needed to operate the boilers.

"Source of supply.—The water shall be taken from such point as may be free from all sewerage contamination, and shall be good, wholesome water fit for all purposes of domestic or manufacturing consumption.

"Sec. 3. In consideration of the public benefit and the protection to property resulting from the construction of the said system of waterworks the mayor and aldermen of the city of Vicksburg hereby rent to the said Samuel R. Bullock & Company, their associates, successors, and assigns, not less than eighty (80) double-nozzle frost-proof fire hydrants for the aforesaid period of thirty (30) years at the annual rate of sixty-five (\$65) dollars for each hydrant, to be payable semiannually on the 15th days of January and July. After the first year of the operation of said waterworks the said city hereby rents not less than ten (10) hydrants in addition to said eighty (80) for the unexpired period of said thirty years; the first one hundred (100) hydrants shall be located on the original twelve (12) miles of mains at said annual rental of sixty-five (\$65) dollars, payable as aforesaid and for the remainder of said period of thirty years unexpired at the time of placing each of said hydrants.

"The rental of all hydrants in excess of said one hundred hydrants hereafter erected on the line of distributing mains or on the extensions thereof as hereinafter provided at the request of the said mayor and aldermen of the city of Vicksburg shall be at the annual rate of fifty (50) dollars for each hydrant, payable as aforesaid, during the unexpired period of the said original term of thirty (30) years. Water shall be used from the said hydrants for the extinguishment of fires and necessary fire practice and for flushing sewers and gutters only, provided that for fire practice and flushing sewers no more than two hydrants shall be opened at one time, and not more than once in each week.

*"Sec. 4. Water shall be furnished free of [73] charge to the public schools, and all other public buildings used exclusively for city purposes, and for filling public cisterns, and the city hospital shall also be supplied with water free by a supply pipe whenever the mains shall be laid within seven hundred and fifty (750) feet of said hospital. And water shall also be supplied free for six (6) drinking fountains with openings for man and beast and one public fountain to be erected by the said Samuel R. Bullock & Co., in such place on the line of mains as the board of mayor and aldermen of the city of Vicksburg may direct.

"Sec. 5. That said Samuel R. Bullock & Company, their associates, successors, or assigns, may procure the organization of a waterworks corporation under the laws of any state, and may assign to it all the rights and privileges acquired hereunder. Provided, that such assignment shall not invalidate or affect the bond required by section (7) seven hereof, and no assignment thereof shall be valid unless such assignee shall in writing to said board of mayor and aldermen accept this ordinance and become bound by its terms and obligations. And the said board of mayor and aldermen shall pass and enact such further and other ordinance, and do and perform such other acts, including the repassage of this ordinance, in favor of the said corporation, as may be necessary to vest in the said corporation the rights and privileges hereby granted.

"Sec. 6. Upon the completion of the construction of the said system of waterworks the said Samuel R. Bullock & Company, their associates, successors, and assigns, shall notify the mayor and aldermen of the city of Vicksburg to that effect in writing, and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw four (4) fire streams through 100 feet of 2½ inch hose and 1 inch nozzle from four (4) different hydrants a stream not less than fifty (50) feet high at the highest location on which any of such hydrants are located. On the satisfactory performance of this test the said board of mayor and aldermen shall formally accept said system if constructed in accordance with the terms of this ordinance.

*"Sec. 7. Within fifteen days after the day [74] that this ordinance takes effect the said Samuel R. Bullock & Company, their associates, successors, or assigns, shall file their written acceptance thereof, binding themselves to its terms and obligations, in the office of the city clerk accompanied by their bond in the penal sum of ten thousand (\$10,000) dollars with two or more sufficient sureties to be approved by said board of mayor and aldermen executed to the mayor and aldermen of the city of Vicksburg and conditioned for the faithful compliance with the terms of this section. On failure to file such bond within said time this ordinance shall become null and void. But if said board shall not approve a bond so filed, said board may, in its discretion, grant addition-

al reasonable time within which to file another bond.

"The construction of the said system shall be commenced within sixty days after this ordinance takes effect, and said system shall be completed within eighteen (18) months after the commencement of the construction thereof; provided, however, that the time during which the said Samuel R. Bullock & Company, their associates, successors, or assigns, are delayed by floods, act of God, or the public enemy, legal proceedings for the maintenance or defense of their legal rights or in the acquisition of property or right of way, or by reason of any other causes whatever beyond their control, shall form no part of the time limited in this ordinance for the performance of any act required by the terms hereof to be done by them, but they shall use all due diligence to remove any such obstructions or delays.

"Sec. 8. The said board of mayor and aldermen of the city of Vicksburg shall from time to time pass and enact ordinances under suitable penalties providing for the protection of said works from damage, fraud, or imposition.

"Sec. 9. At the expiration of each period of ten years after this ordinance takes effect, the mayor and aldermen of the city of Vicksburg shall have the right and privilege to purchase the said system of waterworks, provided they notify the said Samuel R. Bullock & Company, their associates, successors, or assigns, of their intention to do so, at least one year before the expiration of the said period of ten years.

[75] *The value of the said system shall be ascertained as follows: The said Samuel R. Bullock & Company, their successors, associates, and assigns, and the board of mayor and aldermen of the city of Vicksburg shall severally appoint one person, the two appointees shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of waterworks. None of the board shall be residents of the said Warren county. The said mayor and aldermen of the city of Vicksburg shall within sixty days after the said board have rendered its decision, pay the amount awarded in cash. A failure to so pay the award or to give notice of intention to purchase as above provided shall operate as a waiver of the right to purchase until the expiration of the next succeeding period of ten years.

"Sec. 10. The said Samuel R. Bullock & Company, their associates, successors, and assigns, shall make extensions to their line of mains whenever called upon so to do by the mayor and aldermen of the city of Vicksburg. Provided, however, that said extensions shall be not less than 500 feet in length and that one public hydrant shall be located on each 500 feet or major portion thereof; and further provided, that two thirds of the residents on the line of such extension shall agree to take water at the established rates for a period of at least two years, but the said Samuel R. Bullock

& Company, their associates, successors, and assigns, may voluntarily make such extensions from time to time as they may deem necessary.

"Sec. 11. After the works are put in operation, if at any time the pressure gauges located at the points hereinbefore named should indicate a pressure of less than twenty pounds (20) on the distributing mains at the highest point of elevation for the period of two weeks in succession then the rentals for the use and employment of the hydrants for the purposes aforesaid shall cease until the standard of pressure in this section provided shall be attained; provided, however, if the pressure indicated as aforesaid should be less than 20 pounds for two calendar months in succession then all the rights and privileges *of the said Samuel R. Bullock & Company, their associates, successors, and assigns, acquired by virtue of this ordinance, shall, at the option of said board of mayor and aldermen made in writing, cease, determine, and be null and void. But nothing herein contained shall be so construed as to prevent the said Samuel R. Bullock & Company, their associates or assigns, from temporarily shutting off the water from its said system or any portion thereof, for the purpose of making repairs or extensions to the same; and no liability shall attach to the said Samuel R. Bullock & Company, their associates, successors, and assigns, for the suspension of the supply of water; provided, the repairs or extensions are made and the water turned on again without unnecessary delay. But the city shall not be liable to pay the rental for any hydrant during such time as the proper supply of water cannot be procured therefrom.

"Sec. 12. Be it further ordained, That as part of the consideration for the performance of the duties and obligations hereby imposed on the said Bullock & Co., their associates, successors, and assigns, the said waterworks and the property and business pertaining thereto and employed in and about said system shall be exempt from all municipal taxation during the first five years of their operation, and all of the property and business pertaining to and employed in and about said system of waterworks shall thereafter during each year for the balance of the period of this contract be assessed for taxation by said city at a valuation not to exceed the sum of fifty thousand dollars (\$50,000).

"Sec. 13. The said Samuel R. Bullock & Company, their associates, successors, or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water, as they may determine; provided, that said rates and charges shall not exceed 50 cents for each 1,000 gallons of water.

"Sec. 14. Be it further ordained, That for the purpose of paying the obligations and liabilities of the said mayor and aldermen of the city of Vicksburg, which shall accrue to the *said Samuel R. Bullock & Company, [77]

their associates, successors, or assigns, by virtue of the terms and conditions of this ordinance, the said mayor and aldermen of the city of Vicksburg or other duly constituted municipal authorities shall annually levy and cause to be collected upon the taxable property of said city a special tax, to be known and designated as the waterworks tax, sufficient to meet and pay all of said obligations and liabilities during the continuance of this contract and until all of said obligations and liabilities shall be paid and discharged.

"Sec. 15. Be it further ordained, That this ordinance shall take effect from and after its approval by the mayor. Ordained this 18th day of November, 1886."

On March 1, 1887, Samuel R. Bullock & Company assigned and transferred, under and by virtue of the 5th section of the aforesaid ordinance, all their rights and privileges acquired under the ordinance to the Vicksburg Water Supply Company, incorporated under the laws of the state of Mississippi, and the said company accepted in writing the said ordinance.

The bill further alleges the construction of the said water plant, in accordance with the specifications contained in the ordinance, and the city accepted the same; that since the completion and acceptance of said waterworks, during a period of fourteen years up to about July, 1900, the said company fully complied with all the terms of the ordinance, and no complaint was made by the city with respect to the execution of the company's part of the contract, and the city, without question, paid to the water company the semiannual payments stipulated for in the ordinance; that on the 8th day of August, 1900, a mortgage that the said company had previously made, and which had fallen into default, was foreclosed, and all the franchises, ordinances, contracts, and property described and conveyed in said mortgage deed were sold to the Vicksburg Waterworks Company, a corporation under the laws of the state of Mississippi, doing business in the city of Vicksburg, and which became the owner of said waterworks property and entered into the operation of the same; that on October 18, 1900, the said the Vicksburg Water Supply Company executed a quitclaim deed to the said the Vicksburg Waterworks [78] Company, conveying *and assigning all rights, titles, and interest it might have or might thereafter acquire in said waterworks property, franchises, ordinances, and contracts; that the Vicksburg Waterworks Company gave the city notice in writing of the said purchase and assignment, with a written acceptance of the terms and provisions of the said ordinance; that since the completion and acceptance of the said waterworks the city continuously received and used the water furnished by said waterworks, during a period of about fourteen years; and said water has at all times been and now is good and wholesome for public and private use, and adequate in supply for the needs of the city and its inhabitants; that said water so furnished from the time

the city first received and accepted the same up to the present time is and has at all times been the same character and supply of water, and is and at all times has been in accordance with the said ordinance and contract entered into with said city by said S. R. Bullock & Company, the said Vicksburg Water Supply Company, and the said Vicksburg Waterworks Company, and that the pressure maintained has at all times been and is now greater than required by said ordinance and contract.

Upon these allegations, the appellants claim that a contract was entered into between the city and S. R. Bullock & Company and their assigns, the Vicksburg Water Supply Company and the Vicksburg Waterworks Company, which contract still exists and is within the protection of the Constitution of the United States.

The matters and things which are alleged by the appellants to impair the obligation of said contract and to destroy their property rights are mainly as follows:

On March 9, 1900, the legislature of Mississippi passed an act entitled "An Act to Authorize the Mayor and Aldermen of the City of Vicksburg to Issue Bonds to the Amount of \$375,000, to Purchase or Construct, Equip and Maintain, a Waterworks System; Construct and Establish a Sewerage System; to Purchase Grounds for, Erect and Equip a City Hall; Construct the Necessary Buildings for a Medical College, and for Other Purposes;" by which act, the bill alleges, the legislature assumed to annul and abrogate the aforesaid ordinance and contract the *city entered into [79] with said Bullock & Company and their assigns in this, that, by reason of said ordinance and contract, said city has no right within the said period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock & Company or their assigns, notwithstanding which said act authorizes and permits said city to construct and maintain waterworks for said purpose, if unable to buy the waterworks of said Vicksburg Water Company at the arbitrary and inadequate price fixed by the said legislative act. The bill further alleges that, in pursuance of said act, and as required by its terms and conditions, an election was held in said city on the 3d day of July, 1900, at which it was voted, by a majority of the votes cast, that said city should issue its bonds in the sum of \$150,000 to buy or construct waterworks for said city; that, on the 7th day of November, 1900, the city passed a resolution and ordinance as follows: "Resolved, that the mayor be and is hereby instructed to notify the Vicksburg Waterworks Company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; that the city attorney take such action as shall be necessary to determine the rights of the city in the premises." The bill further alleges that on December 7, 1900, the city filed a bill in

the chancery court of the county of Warren, state of Mississippi, against the Vicksburg Water Supply Company and the Vicksburg Waterworks Company, averring, among other things, that the contract entered into with Samuel R. Bullock & Company was null and void, and the attempt by said mayor and aldermen was a gross abuse of their rights and powers; that the said mayor and aldermen had no right to make a contract for so long a period as thirty years and beyond their official terms to bind the constituted authorities to pay rents for the said hydrants as therein stipulated; that the rates prescribed in said contract for the use of said hydrants and the rates charged by said company against domestic consumers are exorbitant and illegal, and said board exceeded its power and authority in making [80] a contract stipulating during the *period aforesaid for said rates; that the said mayor and aldermen, at a meeting held on the 5th day of November, 1900, resolved and declared that "the said board no longer recognized any liability, under said contract, to said company, by reason whereof said complainants say that said contract no longer exists; that they are entitled, as against the Vicksburg Water Supply Company, to have said contract canceled and annulled, and as against the Vicksburg Waterworks Company to a decree that said company have never acquired any rights in or to said contract, or if mistaken in this, by reason of the matters and things stated, they are entitled to have the same annulled and canceled; praying that the said city may have said relief and such other and further relief as may appear just and proper."

The present bill further alleges that said suit in the chancery court was brought on petition to the circuit court as involving a Federal question, and that the same is now pending in that court upon a motion to remand.

The bill prays for an injunction to restrain the defendant from assuming to abrogate and take away the franchises and contract rights of the complainant, and from attempting to coerce the company to sell its works to the defendant for an inadequate price, and that said act of the legislature of Mississippi, adopted on March 9, 1900, and said resolution and ordinance adopted and passed by said city on the 7th day of November, 1900, be declared to impair the obligations of said contract between said city and said Bullock & Company and their assigns, and to cast a cloud upon the title, franchises, and rights of complainant, and said act, ordinance, and resolution, and each of them, are alleged to be in contravention of the Constitution of the United States in this, that they impair the obligations of said contract between said city and said Bullock & Company and their assigns.

It cannot be seriously contended that, under the act of March 18, 1886, authorizing the city to provide for the erection and maintenance of a system of waterworks, and to contract with a party or parties to build and operate waterworks, and under the or-

dinance of the city of November 18, 1896, providing for a supply of water to the city and its inhabitants by contracting *with [81] Samuel R. Bullock & Company, their associates, successors, and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years.

After the lapse of that long period and the continuous acquiescence of the city in the contract as a valid and subsisting one, the city, according to the allegations of the bill, now insists that the said contract was invalid because in excess of its powers to contract, and is proposing to borrow money to erect and maintain waterworks of its own, and become a competitor with the complainant for the custom of the consumers of water. And the question for our consideration is whether the subsequent legislation, state and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States.

As respects the act of March 9, 1900, it is contended by the complainant that it is unconstitutional for several reasons, chiefly because it places an arbitrary valuation on the property of the complainant, and because it purports to authorize the city to build and operate waterworks of its own in derogation of the contract rights of the complainant.

Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the waterworks company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, *do not pre- [82] sent the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and

within the jurisdiction of the circuit court as presenting a Federal question.

The objections urged in the brief of the appellee to the validity of the contract, because it undertakes to bind the city for a period of thirty years, because an attempt to barter away the legislative power of the city authorities, and because creating an indebtedness in excess of the charter limits, are those that were considered at length in the similar cases of *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, and *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736, and were in those cases held to be untenable. However, we do not wish to be understood as now determining such questions in the present case, for we are only considering whether or not the circuit court had jurisdiction to consider them.

It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.

[83] *It may be said that the action of the circuit court in dismissing the bill may have been based on the fact that the city had proceeded by a bill filed in the chancery court of Mississippi against the waterworks company before the present suit was instituted. But the learned judge does not, in his certificate, suggest such a question, and the bill avers that the record in the city's suit is still pending in the circuit court on a motion to remand. Whether the city's complaint in the state court disclosed a Federal question, and what, if properly removed to the circuit court for that reason, the course of the circuit court ought to be in respect to the formal disposition of the cases, are matters not before us for determination.

Nor can we consider allegations made in behalf of the city in its answer as to misconduct of the waterworks company, in respect to which no issue was found nor proofs taken in the court below. They must be determined by the proper tribunals, which will pass upon the merits of the case.

We think this cause presents a controversy so arising under the laws and Constitution of the United States as to give the Circuit Court jurisdiction, and therefore *the judg-*

ment of the Circuit Court is reversed, and the cause remanded to that court to take proceedings therein according to law.

FREDERICK RODGERS, *Appt.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 83-93.)

Army and Navy—pay of rear admiral—statutes—general and special provisions—deduction while on shore duty.

1. The rear admirals embraced in the nine lower numbers of that grade, who were advanced to that rank by act of March 3, 1899, § 7 (30 Stat. at L. 1004, chap. 413), which in effect abolished the rank of commodore and lifted those in that rank to that of rear admiral, with a special provision that each of such nine officers should have their pay increased to that allowed brigadier generals in the Army, are not entitled to the pay and allowances of major generals in the Army by the provision of § 13, that after June 30, 1899, commissioned officers of the line of the Navy shall receive the same pay and allowances as officers of corresponding rank in the Army, as this general rule for salaries of naval officers cannot be understood as repealing the special provision in § 7 for the pay of the nine lower numbers of the grade of rear admiral thereby created.
2. Additional words of qualification needed to harmonize a general and a prior special provision in the same statute should be added to the general provision, rather than to the special one.
3. The pay of the rear admirals embraced in the nine lower numbers of that grade, which by act of March 3, 1899, § 7 (30 Stat. at L. 1004, chap. 413), was fixed at the same amount as that allowed brigadier generals in the Army, is subject to the long-established rule in respect to naval service, of a difference between the pay of naval officers on shore duty and those at sea, which rule is expressly recognized and continued in § 13 of that act.

[No. 317.]

Argued February 26, 1902. Decided April 7, 1902.

APPEAL from the Court of Claims to review a judgment in favor of the United States in a suit to recover a balance claimed to be due the claimant on account of his pay as rear admiral in the United States Navy. *Affirmed.*

See same case below, 36 Ct. Cl. 266.

Statement by Mr. Justice **Brewer**:

*This is an appeal from the court of claims. [84] The claimant, Frederick Rodgers, a rear admiral of the line of the Navy, brought suit to recover the sum of \$3,358.13, which he claims as the balance due him on account

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey* (N. C.) 4 L. R. A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136, and *United States v. 356 Caddies of Tobacco*, 20 L. ed. U. S. 235.

of pay and allowances for the period between March 3, 1899, and March 2, 1901. The claim is founded upon the law of Congress known as the "navy personnel act," which was approved on March 3, 1899, and entitled "An Act to Reorganize and Increase the Efficiency of the Personnel of the Navy and Marine Corps of the United States," 30 Stat. at L. 1004, chap. 413.

The applicable sections are 7 and 13, which, omitting irrelevant portions, read:

"Sec. 7. That the active list of the line of the Navy, as constituted by § 1 of this act, shall be composed of eighteen rear admirals, seventy captains, one hundred and twelve commanders, one hundred and seventy lieutenant commanders, three hundred lieutenants, and not more than a total of three hundred and fifty lieutenants (junior grade) and ensigns: *Provided*, That each rear admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier general in the Army. Officers, after performing three years' service in the grade of ensign, shall, after passing the examinations now required by law, be eligible to promotion to the grade of lieutenant (junior grade): *Provided*, That when the office of chief of bureau is filled by an officer below the rank of rear admiral, said officers shall, while holding said office, have the rank of rear admiral and receive the same pay and allowance as are now allowed a brigadier general in the Army: *And provided* further, That nothing *contained in this section shall be construed to prevent the retirement of officers who now have the rank or relative rank of commodore with the rank and pay of that grade. . . .

"Sec. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: *Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under § 12 of this act: *Provided*, further, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places. . . . *And provided*, further, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law: *And provided*, further, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy."

By § 1466 of the Revised Statutes of the United States it was, among other things, provided:

"Sec. 1466. The relative rank between of 185 U. S.

officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered:

"Rear admirals with major generals.

"Commodores with brigadier generals.

"Captains with colonels."

The findings show that the claimant was appointed and commissioned a rear admiral on March 3, 1899. From that date until March 2, 1901, he was one of the rear admirals "embraced in the nine lower numbers of that grade." He served on shore from March 3, 1899, to February 13, 1901, and for the rest of the time at sea. While at sea he received the same pay as was "allowed a *brigadier general in the Army," and while[86] on shore he received pay at the same rate less 15 per cent, together with commutation in lieu of allowance of quarters. Judgment was rendered in favor of the United States (36 Ct. Cl. 266), from which judgment the claimant took this appeal.

Mr. James H. Hayden argued the cause, and, with Mr. Joseph K. McCammon, filed a brief for appellant:

Section 13 of the act of March 3, 1899, has no retroactive effect and cannot be considered for the purpose of computing the pay of officers before July 1, 1899.

Royce v. United States, 36 Ct. Cl. 328.

The language of a statute cannot be disregarded in favor of any supposed policy of Congress, such as that of giving officers on shore duty less pay than when at sea.

United States v. Dickson, 15 Pet. 141, 10 L. ed. 689; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *Yturvide v. United States*, 22 How. 290, 16 L. ed. 342.

While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the latter act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal.

King v. Cornell, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 312; *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153; *Red Rock v. Henry*, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; *District of Columbia v. Hutton*, 143 U. S. 18, 36 L. ed. 60, 12 Sup. Ct. Rep. 369. See also *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Tracy v. Tuftly*, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. Rep. 527; *Fisk v. Henric*, 142 U. S. 459, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207.

Assistant Attorney General Pradt argued the cause, and, with Mr. John Q. Thompson, filed a brief for appellee:

Subsequent legislation, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the particular and specific provisions of the earlier statute.

Black, Stat. Constr. & Interpretation of

Laws, p. 117; Sedgw. Stat. & Const. Law, pp. 97-99; *Crane v. Reeder*, 22 Mich. 334.

[86] *Mr. Justice **Brewer** delivered the opinion of the court:

This case involves a mere question of statutory construction. The matter of military and naval salaries is one exclusively within the control of Congress. The courts may neither increase nor decrease them, correct any supposed inequalities, nor in any manner set aside or modify the action of the legislative branch of the government in respect thereto. If there be inequality, injustice, it can be corrected alone by Congress, and the courts may not interfere.

The primary rule of statutory construction is, of course, to give effect to the intention of the legislature. Whenever that is apparent it dominates and interprets the language used. But when the intent is a debatable question, and there is nothing on the face of the statute which clearly indicates such intent, there are certain minor and subsidiary rules by which courts are guided in determining the true construction.

In the case at bar neither the words of the statute nor the circumstances and conditions of this legislation make perfectly clear the intent of Congress. If we look alone upon § 13, we may well conclude that Congress had one thought in its mind, while if we turn to § 7 another and somewhat different intent is apparent. Section 13 suggests a complete parallel in the matter of pay between all the officers of the Navy and those of the Army according to their several [87] ranks. Section 7, *on the other hand, points to a special exception in respect to one half the officers of a certain rank in the Navy. The ingenious and plausible arguments made by counsel on the respective sides clearly show that it is a debatable question whether Congress intended that after the 1st of July, 1899, there should be only one uniform rule controlling the pay of all the respective officers of the Army and the Navy, or whether as to one half of the rear admirals a different rule was contemplated. Under those circumstances of doubt we turn to other rules of statutory construction.

Before noticing them it is well to understand exactly the contentions of the parties. The claimant insists that the first proviso in § 7 establishes a complete but temporary rule for the payment of the nine lower members of the grade of rear admiral; that no provisions of other sections of this statute, or of any other statute, limit or qualify the right of the nine junior rear admirals to the full pay given by statute to a brigadier general. On the other hand, the government contends that the proviso is subject to the general rule which obtains in respect to all other naval officers, of a 15 per cent difference between the pay when on shore duty and that when at sea. Again, the claimant insists that by § 13, after the 30th day of June, 1899, all rear admirals became entitled to the pay and allowances of major generals in the army, and that the proviso in § 7, in respect to the nine junior rear ad-

818

mirals, was temporary in its nature, and expired on the 30th of June, 1899; while the government contends that the distinction between the nine senior and the nine junior rear admirals is a permanent provision, and did not cease to have force on the 30th of June, 1899.

It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general,—the terms of the general broad enough to include the matter provided for in the special,—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining *an exception to the general, and the general [88] will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. In *Ex parte Crow Dog*, 109 U. S. 556, 570, *sub nom. Re Kang-Gi-Shun-Ca*, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396, 405, this court said:

"The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *generalia specialibus non derogant*. 'The general principle to be applied,' said Bovill, Ch. J., in *Thorpe v. Adams*, L. R. 6 C. P. 135, 'to the construction of acts of Parliament, is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald v. Champenys*, 30 L. J. Ch. N. S. 782, 2 Johns. & H. 31-54, 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'"

In Black on Interpretation of Laws, 116, the proposition is thus stated:

"As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all."

So, in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and

he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly *contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

And in *Crane v. Reeder*, 22 Mich. 322, 334, Mr. Justice Christianey, speaking for the supreme court of that state, said:

"Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict."

Both the textbooks and the opinion just quoted cite many supporting authorities.

In the light of this canon, how should these two sections be construed? Section 7 in effect abolishes the rank of commodore, at least so far as respects the active list of the line of the Navy, and lifts those in that rank to that of rear admiral. The attention of Congress was thus directed to such change and the proper accompanying provisions in respect to salary and otherwise, and it declared that the lower nine rear admirals, they who were by the section lifted to that rank, should receive a particular salary. Clearly that was a special provision in respect to a matter to which the attention of Congress was at the time directed. If another statute had been passed at a subsequent or on the same day making general provision for the salaries of naval officers, clearly the canon to which we have referred would apply. *A fortiori*, when the subsequent general provision is in the same statute it should be held applicable. So, when in § 13 Congress prescribed a general rule for the salaries of naval officers, such general rule cannot, within the scope of this canon, be understood as repealing the special provision in the prior section, but the special provision must be taken as an exception to and limitation of the general rule.

[90] *But it is said that harmony between the two may be obtained by limiting the operation of the special provision to the period between the passage of the act and the 30th of June following. But that necessitates adding something to the words of the special provision, so that it shall read that from the date of the act until the 30th of June following such should be the rule in respect to the salaries of the recently promoted commodores. But the same harmony can be obtained by adding to the general provision a clause like this: Except in respect to the nine lower numbers of the grade of rear admiral. In either case the harmony is secured by adding some words of qualification,

185 U. S.

and the rule, as we have seen, is to the effect that the additional words of qualification are to be put to the general provision rather than to the special.

It is urged that the provision in § 7 was intended to merely fill out the present fiscal year, and that Congress meant by this legislation to start the new fiscal year, July 1, 1899, with one general rule of equality between the pay of officers of the Navy and that of officers of the Army. There might have been some force in this suggestion if the pay of the nine lower rear admirals had been continued through the balance of the year the same as it was at the date of the passage of the act. But all of them, whether commodores or captains, were by this special provision given an increase of pay. So Congress was not simply continuing salaries, but was making special provisions for the nine lower numbers of the grade of rear admirals, giving them an increase of pay over that which they had previously received.

Another matter worthy of notice is this: Prior to the act of March 3, 1899, the corresponding ranks of officers of the Navy and the Army were rear admiral and major general, commodore, and brigadier general, captain, and colonel. By that act the rank of commodore was abolished, although that of brigadier general was undisturbed. No change was made in the relative rank of captain and colonel, or of rear admiral and major general, but the legislation left one rank in the Army to which there was no corresponding rank in the Navy. The statute in effect lifted the rank in the Navy which was corresponding to that of brigadier general in the Army to that of rear admiral, and corresponding with that of major general in the Army. The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear admiral, as it had stood in the past) all the benefits of such position? Would it be unnatural for Congress to bear in mind those who by length of service or by personal distinction had already earned the position, and provide that in, at least, the matter of pay there should be some recognition of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the army, should not by a mere change of statute be given a benefit in salary which was not at the same time accorded to brigadier generals in the Army? May not this explain its action in so dividing the rear admirals into two classes,—one composed substantially of former rear admirals, equal both in rank and pay with major generals in the Army, and the other of those who in the past were only commodores, to whom was given the rank of rear

819

admirals, but the pay of brigadier generals in the Army?

Still another matter may be mentioned. The second proviso of § 7 reads:

"*Provided*, That when the office of chief of bureau is filled by an officer below the rank of rear admiral, said officer shall, while holding said office, have the rank of rear admiral and receive the same pay and allowance as are now allowed a brigadier general in the army."

There is no similar clause in § 13. Why should Congress in § 7 make provision for the rank and pay of certain officers who during the ensuing four months might be charged with certain duties, and omit any such provision in prescribing salaries generally and permanently? Is it not reasonable to believe that Congress intended this [92] as a special provision which should continue after the 30th of June, 1899, and as a permanent rule for the cases named?

These considerations certainly tend to support the conclusion which follows from enforcing the well-recognized canon of construction in respect to special and general statutes. We think the court of claims was correct when it said:

"Section 13 is in general terms, and the language there used does not indicate that it was the intention of the Congress to abrogate the special provision made in § 7 for the rear admirals 'embraced in the nine lower numbers of that grade;' and special provision having been made for them it cannot be held that a subsequent general statute, much less in the same act, was intended to alter or repeal the special provision so made."

The further question is whether the provision in § 7, that the rear admirals embraced in the nine lower numbers of that grade should receive such pay and allowances as were given to brigadier generals, was intended to be absolute and exclusive, practically ignoring the general rule in respect to naval service of a difference between the pay of officers doing shore duty and that of those at sea? When there has been a long-established rule of difference in the compensation for the two kinds of services; when that rule is expressly recognized and continued in this same statute, as it is in § 13; when it is not in terms excluded in § 7,—it would be going too far to hold it inapplicable to the salary provided for by § 7. In other words, it is not to be believed that Congress by that section carved out a salary which in all respects ignored the general rules pertaining to salaries of naval officers. It is rather to be believed that only the amount was fixed, and that otherwise it was to be in harmony with and subordinate to any and all general provisions. We are of opinion that the court of claims was right in its conclusions in this respect.

It may be conceded that the questions we have been considering are not free from doubt, and much may be said in favor of the view opposed to that we have taken. Inasmuch as Congress has full control over the matter of salaries it can at any time ap-

propriate to these officers such a sum as will make their *salaries that which they contend [93] was intended by the act of March 3, 1899. It is not a case in which the judicial decision must necessarily be a finality, but one in which there is full power on the part of Congress to correct any mistake which may have been made.

The judgment of the Court of Claims is affirmed.

Mr. Justice **Gray** took no part in the decision of this case.

CITY OF NEW YORK and Bird S. Coler, as
Comptroller Thereof, *Petitioners*,
v.

SAMUEL PINE and Frederick Müller.

(See S. C. Reporter's ed. 93-108.)

Equity—injunctive relief—laches as bar—damages in lieu of injunction.

An ascertainment and decree for the payment of damages, with injunction in the alternative, and not a permanent injunction to be entered on a specified date unless the parties shall sooner agree in respect to compensation, is the measure of relief in a suit by riparian owners to restrain the construction and maintenance by a municipal corporation of a dam in aid of its water supply, by which the waters of a river are unlawfully diverted from their natural flow through the lands of such riparian owners, who delayed their suit until the work of construction had proceeded for two years, with the consequent expenditure of a large sum of money, during which period negotiations between such owners and the municipality had been carried on with a view to compensation for the injuries such owners would sustain.

[No. 491.]

Argued February 25, 26, 1902. Decided April 7, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree affirming by a divided court a decree of the Circuit Court for the Southern District of New York by which the city of New York was permanently enjoined from diverting the water of a stream in aid of its water supply. *Reversed* and remanded with instructions to enter a decree providing for an ascertainment and payment of damages with injunction in the alternative.

See same case below, 112 Fed. 98.

NOTE.—*As to laches as a defense*—see notes to *Hammond v. Hopkins*, 36 L. ed. U. S. 135; *Felix v. Patrick*, 36 L. ed. U. S. 720; *Middletown v. Newport Hospital (R. I.)* 1 L. R. A. 191; *Calhoun v. Delhi & M. R. Co. (N. Y.)* 8 L. R. A. 248, and *Coffey v. Emigh (Colo.)* 10 L. R. A. 125.

As to damages in lieu of injunction—see note to *Sperb v. Metropolitan Elev. R. Co. (N. Y.)* 20 L. R. A. 752.

Statement by Mr. Justice Brewer:

This was a suit commenced in the circuit court of the United States for the southern district of New York by the appellees, as plaintiffs, for an injunction restraining the city of New York from maintaining a dam on the west branch of Byram river and diverting the waters thereof from their natural flow through the farms of plaintiffs.

The facts are these: Byram river is a non-navigable stream of fresh water flowing into Long Island sound. Traeing its source up stream from the sound, for a short distance it forms the boundary between New York and Connecticut, then deflects to the east, and for some 5 or 6 miles is within [94] the *state of Connecticut. It there divides into two branches, the east branch being entirely within the limits of that state. The west branch, which is the longer of the two, extends into the state of New York. A few hundred feet from the state line the city of New York, under legislative sanction, commenced the construction of a dam, with a view of appropriating part or all of the waters of this west branch and using the same for the supply of the city. The watershed of this west branch above the dam, the territory from which the water sought to be appropriated is all drawn, is wholly within the limits of the state of New York. The plaintiffs own farms situated on Byram river in Connecticut, below the junction of the two branches. In their bill they alleged, among other things:

"Fourth. Your orators further aver that the defendant began about two years ago the building of a dam across the said west branch of said Byram river, about 500 feet north of the Connecticut line, and is now building said dam and it is now near completion, and your orators are informed and believe that the said defendant intends to divert or cause to be diverted the water of said west branch or some of it from the natural channel thereof, and intends to divert or cause the same to be diverted from flowing through its natural channel into and through the state of Connecticut, and by, through, and over land owned by your orators.

"Fifth. Your orators further aver that they as riparian owners of land in the state of Connecticut, on said Byram river or on the west branch thereof, are each of them accustomed to use the water of said river, . . . and that the flow of said river would be materially lessened by the diversion of the water of the said west branch or any part thereof, and that they, your orators, and each of them, would be damaged in the sum of twenty-four hundred dollars (\$2,400) and more."

The answer of the city admitted the building of the dam, although averring that it was not near completion, and would not prevent the natural flow of the west branch for at least a year; admitted its intention to appropriate some or all of the water; alleged that such appropriation would cause little or no injury or damage to the plain- [95] tiffs, and denied on information *and belief that the premises of either would be dam-

aged in the sum of \$2,400; averred that the building of the dam was of great and permanent benefit to the citizens and residents of New York, and that it was and always had been able and willing to pay any damages that the complainants might suffer from being deprived of the natural flow of the water. Testimony was taken and the case submitted to the court upon pleadings and proofs. That the dam as completed, and it was completed when the testimony was taken, would work a diversion of a considerable portion of the water in its natural flow, and that the property of plaintiffs was damaged by such diversion, was shown by the testimony and found by the court, although whether such damage amounted to more than \$2,400 each was perhaps not established by the testimony, and certainly was not found by the court. The cost of the dam proper was about \$45,000, though the city had expended for land and damages several hundred thousand dollars. It also appeared that several thousand people in the city of New York were dependent upon this water supply. The circuit court, after finding the fact of damage, held that a court of equity had no power to ascertain and order the payment of damages, but that it might delay the issue of an injunction so as to give the parties an opportunity to agree in respect to the amount of compensation, and in an opinion, filed on June 27, 1900, ruled that a decree would be entered on November 1, 1900, if the parties had not come to an agreement. Thereafter, no agreement having been made, a decree was entered as follows:

"That the complainants in this suit and each of them are entitled to the injunction order of this court restraining the defendant, its successors and assigns, their and its officers, agents, and employees, each, all, and any of them, from diverting the water or any part of the water of the west branch of the Byram river or any part of the water of the Byram river, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at, and below the junction of the two branches of said river; and

"It is further ordered, adjudged, and decreed that the defendant, *its successors and [96] assigns, their and its officers, agents, and employees, each, any, and all of them, be and they and each of them are hereby perpetually enjoined from diverting the water or any part of the water of the west branch of the Byram river, or any part of the water of the Byram river, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at, and below the junction of the two branches of said river."

On appeal to the circuit court of appeals for the second circuit this decree was, on October 30, 1901, affirmed by a divided court. Thereupon the case was brought here by certiorari. 183 U. S. 700, *ante*, 396, 22 Sup. Ct. Rep. 946.

Mr. George L. Rives argued the cause, and, with *Mr. George L. Sterling*, filed a brief for petitioner:

The trial court should have refused a permanent injunction, but should have awarded damages and an injunction until the damages should be paid.

Pappenheim v. Metropolitan Elev. R. Co. 128 N. Y. 436, 13 L. R. A. 401, 28 N. E. 518; *Hughes v. Metropolitan Elev. R. Co.* 130 N. Y. 15, 28 N. E. 765; *Thompson v. Manhattan R. Co.* 130 N. Y. 360, 29 N. E. 264; *Mitchell v. Metropolitan Elev. R. Co.* 134 N. Y. 11, 31 N. E. 260; *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741.

One of the most striking and distinctive features of courts of equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest.

1 Story, Eq. Jur. 21.

The New York practice has been followed in New Jersey and Massachusetts, and probably in other states.

Crey ex rel. Simmons v. Paterson, 60 N. J. Eq. 385, 48 L. R. A. 717, 45 Atl. 995; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691.

This court had a very similar case to deal with in 1862, and refused to allow an injunction.

Parker v. Winnipiscogee Lake Cotton & Woollen Co. 2 Black, 545, 17 L. ed. 333. See also *Consolidated Canal Co. v. Mesa Canal Co.* 177 U. S. 296, 44 L. ed. 777, 20 Sup. Ct. Rep. 628.

Messrs. John Whalen and George L. Sterling filed a brief for petitioners on application for writ of certiorari.

Mr. Charles C. Marshall argued the cause, and, with *Mr. Stephen G. Williams* and *Messrs. Marshall, Moran, & Williams*, filed a brief for appellees:

The remedy in this suit is by injunction.

Legg v. Horn, 45 Conn. 409; *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 28; *Parker v. Griswold*, 17 Conn. 287, 42 Am. Dec. 739; *New London Water Comrs. v. Perry*, 69 Conn. 468, 37 Atl. 1059; *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786; *Carwood v. New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Gilzinger v. Saugerties Water Co.* 66 Hun, 173, 21 N. Y. Supp. 121, Aff'd 142 N. Y. 633, 37 N. E. 566; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 204; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757; *Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L. R. A. 687, 58 N. E. 142; *Holyoke Water Power Co. v. Connecticut River Co.* 22 Blatchf. 131, 20 Fed. 71; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Randolph*, Em. Dom. § 28, p. 27.

The remedy is by injunction, because damages would be inadequate.

Uline v. New York C. & H. R. R. Co. 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536; *Stowers v. Gilbert*, 156 N. Y. 600, 51 N. E. 433; *New London Water Comrs. v. Perry*, 69 Conn. 468, 37 Atl. 1059; *Stowers v. Gilbert*, 156 N. Y. 604, 51 N. E. 282.

822

Courts of equity have no power to withhold an injunction and to decree in lieu thereof the payment of a sum of money in the way of damages or compensation.

The right to the remedy of injunction is not dependent on the extent of appellees' injury or the amount of their damage, nor upon any hardship resulting to the appellants from the operation of the injunction.

Corning v. Troy Iron & Nail Factory, 40 N. Y. 204; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 280, 56 N. E. 757; *Strobel v. Kerr Salt Co.* 164 N. Y. 323, 51 L. R. A. 687, 58 N. E. 142; *Parker v. Griswold*, 17 Conn. 302, 42 Am. Dec. 739. See also *Branch v. Doane*, 18 Conn. 233; *New London Water Comrs. v. Perry*, 69 Conn. 461, 37 Atl. 1059; *Wilts & B. Canal Nav. Co. v. Swindon Waterworks Co.* L. R. 9 Ch. 451; *Bickett v. Morris*, L. R. 1 H. L. Sc. App. Cas. 47; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322.

***Mr. Justice Brewer** delivered the opinion of the court: [96]

Many interesting questions are involved in this case, but we think it unnecessary for the present at least to decide more than one. We assume, without deciding, that, as found by the circuit court, the plaintiffs will suffer substantial damage by the proposed diversion of the water of the west branch. Also, without deciding, we assume that, although the west branch above the dam and all the sources of supply of water to that branch are within the limits of the state of New York, it has no power to appropriate such water or prevent its natural flow through its accustomed channel into the state of Connecticut; that the plaintiffs have a legal right to the natural flow of the water through their farms in the state of Connecticut and cannot be deprived of that right by and for the benefit of the city of New York by any legal proceedings either in Connecticut or New York; and that a court of equity, at the instance of the plaintiffs, at the inception and before any action had been taken *by the city of New York, would have [97] restrained all interference with such natural flow of the water.

Notwithstanding these assumptions we are of opinion that the decree ought not to stand, and for these reasons: This is not a case between two individuals in which is involved simply the pecuniary interests of the respective parties. On the one side are two individuals claiming that their property rights are infringed,—rights which can be measured in money, and that not a large sum; on the other, a municipality undertaking a large work with a view of supplying many of its citizens with one of the necessities of life. According to the averments in the bill the city had been engaged in this work for two years, and had nearly completed the dam. While the near completion is denied in the answer there is no denial of the time during which the city had been engaged in the work, and it stands as an admitted fact that for two years prior to the commencement of this suit the work had been under way. It is true the testimony

185 U. S.

disloses that the plaintiffs and the city had been trying to agree upon the amount of compensation, but that shows that the plaintiffs were seeking compensation for the injuries they would sustain, and were not insisting upon their alleged right to an abandonment of the work. It is one thing to state a right and proffer a waiver thereof for compensation, and an entirely different thing to state the same right and demand that it should be respected. In the latter case the defendant acts at his peril. In the former he may well assume that payment of a just compensation will be accepted in lieu of the right. In the latter the plaintiff holds out the single question of the validity and extent of the right; in the former he presents the right as the foundation of a claim for compensation, and his threat to enforce the right if compensation is not made is simply a club to compel payment of the sum he deems the measure of his damages. Further, the testimony shows that the city was settling with other parties similarly situated, and paying out large sums of money for the damages such parties would sustain. So, it is not strange that the city acted on the assumption that the only matter to be determined was the amount of the compensation.

[98] *If the plaintiffs had intended to insist upon the strict legal rights (which for the purposes of this case we assume they possessed), they should have commenced at once, and before the city had gone to expense, to restrain any work by it. It would be inequitable to permit them to carry on negotiations with a view to compensation until the city had gone to such great expense, and then, failing to agree upon the compensation, fall back upon the alleged absolute right to prevent the work. If they had intended to rest upon such right, and had commenced proceedings at once, the city might have concluded to abandon the proposed undertaking and seek its water supplies in some other direction. If this injunction is permitted to stand the city must pay whatever the plaintiffs see fit to demand, however extortionate that demand may be, or else abandon the work and lose the money it has expended. While we do not mean to intimate that the plaintiffs would make an extortionate demand, we do hold that equity will not place them in a position where they can enforce one.

The time at which parties invoke the aid of a court of equity is often a significant factor in determining the extent of their rights. *Vigilantibus non dormientibus æquitas subvenit* is a maxim of equity. As said by Pomeroy, in his work on Equity Jurisprudence, vol. 1, § 418, the principle embodied in this maxim "operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of relief, than as being the source of any particular and distinctive doctrines of the jurisprudence. . . . The principle thus used as a practical rule controlling and restrict-

185 U. S.

ing the award of reliefs is designed to promote diligence on the part of suitors."

In *Smith v. Clay*, 3 Bro. Ch. 639, note, Lord Camden said: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and *reasonable diligence*."

*It was said by Circuit Judge Shipman, in [99] deciding this case:

"If a court of equity has power in any case by decree to ascertain and order the payment of damages by decree of injunction in the alternative, a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law and without pretense of right to take and retain the property."

However true that proposition may be generally when invoked at the inception and before any work has been done, we think it not applicable when the plaintiffs have waited until the work has been progressing for two years and the defendant has expended a large sum of money thereon. As declared by Lord Camden, in the quotation just made, a court of equity is never active in relief against public convenience.

It may be not amiss to notice some of the cases in which the effect of time upon a suit in equity has been the subject of discussion. In *Gallagher v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873, was considered the general subject of laches. Many authorities were cited and reviewed, and it was said (p. 373, L. ed. p. 740, Sup. Ct. Rep. p. 875):

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claims to be enforced—an inequity founded upon some change in the condition or relations of the property of the parties."

In *Roberts v. Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756, it appeared that Douglas county, Wisconsin, had agreed with the Northern Pacific Railroad Company to deed to it certain lands, held by the county under tax titles, in consideration of the construction by the company of its railroad through the county. The company constructed the road and the county made the deed. Thereafter the validity of such deed was questioned, and the county made a conveyance of the lands to *Roberts et al.*, whereupon the railroad company brought suit against them to quiet its title. The line of the road was constructed through some of these lands, and Mr. Justice Shiras, speaking for the court, observed (pp. 9, 10, 11, L. ed. pp. 876, 877, Sup. Ct. Rep. p. 758):

"So far as those portions of the lands, described in the bill *of complaint, consist of [100] parcels held and used by the railway company for the necessary and useful purposes of their road as a public highway, it is obvious that the title and possession thereof cannot

823

be successfully assailed by the appellants. The latter became purchasers long after the railroad company had entered into visible and notorious possession of these portions of the lands and had constructed the roads, wharves, and other improvements called for by their contract with the county.

"It is well settled that where a railroad company having the power of eminent domain has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burden of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession. . . . So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with the statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages." *Lexington & O. R. Co. v. Ormsby*, 7 Dana, 276; *Harlow v. Marquette, H. & O. R. Co.* 41 Mich. 336, 2 N. W. 48; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Pettibone v. La Crosse & M. R. Co.* 14 Wis. 443; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622."

Again, *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223, was a suit to perpetually restrain the city of Austin from completing a system of waterworks, and from levying on the property of the Austin Water, Light, & Power Company any taxes to pay therefor, and it was held that by reason of the delay in pressing their claim, the plaintiffs were not entitled to the relief, and many authorities were cited in the opinion in support thereof.

[101] *In *Northern P. R. Co. v. Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794, was presented a question similar to that in *Roberts v. Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756, and the same conclusion was reached. In the course of the opinion *Provolt v. Chicago, R. I. & P. R. Co.* 57 Mo. 256, 264, was cited. That was a case in which the conduct of a landowner in standing by while a railroad company constructed its road precluded him from recovering physical possession of the land covered thereby, and this quotation was made from the opinion of that court:

"If, from negotiation in regard to the price of the land, or for any other reason, there is just ground of inference that the works have been constructed with the express or implied assent of the landowner, it would seem wholly at variance with the expectations of the parties and the reason of the case, that the landowner should retain the right to enter upon the land, or to main-

tain ejectment. There are other effective and sufficient remedies. A court of equity would unquestionably interfere, if necessary, and place the road in the hands of a receiver until the damages were paid from the earnings. 2 Redf. Am. Railway Cas. 2d ed. 253. But the only question we are called upon to decide is whether under all the facts and circumstances of this case ejectment will lie, and we think it will not."

This question was also considered in *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972, and in the course of the opinion on page 15, S. E. p. 978, are these pertinent observations by Mr. Justice Cobb:

"When a railroad company, without warrant or authority, enters upon the land of another, it is as a general rule no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a necessary component part of its railroad that to surrender its possession would interfere seriously with the interests of the company, the landowner, although entitled to compensation for his property, might by his conduct in allowing the entry upon his land and permitting the company to so use it as that it could not be abandoned without great prejudice to its rights,*estop himself from asserting against [102]

the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law which govern in all transactions of the character above referred to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether the corporation be public or private. A railroad corporation, being one charged by the law with the performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line of railway, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to the possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight, and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the

same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject-matter of the controversy. That a railroad corporation has a right to deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land and constructs its road without lawful authority, and the landowner acquiesces in the wrongful act and the consequent appropriation of the property to a great *public use until the same has become a necessary component part of the property required by the railroad to perform its public duties, such landowner will be held to have waived his right to retake the property, and will be remitted to such other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated."

See also *Atlanta, K. & N. R. Co. v. Barker*, 105 Ga. 534, 31 S. E. 452; *Chicago, B. & Q. R. Co. v. Englehart*, 57 Neb. 444, 77 N. W. 1092.

From these authorities it is apparent that the time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. If one, aware of the situation, believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to enforce those rights, and, in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal.

These views do not justify the conclusion that a court of equity assumes a general right to ignore or supersede statutory provisions for the ascertainment of the amount of compensation in cases of condemnation. They simply mean that a failure to pursue statutory remedies is not always fatal to the rights of a party in possession, and that sometimes if full and adequate compensation is made to the plaintiff the possession of the defendant will not be disturbed.

It is true the cases cited were mainly those of actual physical possession by railroad companies of real estate belonging to other parties, but the same doctrine applies when there is only an invasion of some easement or other incorporeal right, and its preservation can alone be secured in a court of equity. The *action of the court does not depend upon the character of the property or right involved, but upon the conduct of the plaintiff in respect to his claim. *Pappenheim v. Metropolitan Elev. R. Co.* 128 N. Y. 436, 13 L. R. A. 401, 28 N. E. 518, was a suit brought by the owner of premises on Second

avenue, in New York city, to restrain the defendants from operating their elevated railway in front of plaintiff's premises. The trial court found the amount of the damage to the premises, and provided by its decree that an injunction should not issue in case the defendants paid the amount of the damage upon the execution by plaintiff of a deed conveying her interest in the easement taken. This decree was affirmed by the court of appeals, and in the opinion by Mr. Justice Peckham, then a member of that court, it was said, after referring to the rule controlling actions at law:

"But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues." 1. 444, L. R. A. p. 404, N. E. p. 519.

It is true in that case the plaintiff sought in her petition the very relief that was granted, and so the case is not authority on the question of the effect of delay in asserting one's legal rights, but it is authority for the proposition that a court of equity may take full possession and finally end the controversy by securing the payment of adequate compensation in lieu of a cessation of the trespass. See also *Jackson v. Stevenson*, 156 Mass. 496, 502, 31 N. E. 691.

It is, however, urged that in all the cases referred to the one party could have appropriated the property or right of the other by condemnation proceedings, and that as he could have done *so he should not be dis- [105] turbed for lack of those proceedings, but either given time to carry them through, or else in the pending equitable suit have the compensation or damages estimated, and then, upon payment, be protected in his possession. In other words, as he could have obtained the rightful possession by legal proceedings and payment, equity will do what the law could have done, and on payment of the ascertained compensation or damages affirm the possession. Whatever may be true of those cases, we start in this with the assumption that there was no power in the city of New York, by any proceedings in the states of New York or Connecticut, to acquire the right of appropriating this water and thus depriving the plaintiffs of its continued flow. It was suggested in the *Pappenheim Case*, 128 N. Y. 436, 13 L. R. A. 401, 28 N. E. 518, that "in cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be in-

serted, and an injunction would issue upon the right of the owner being determined. *Henderson v. New York C. R. Co.* 78 N. Y. 423."

But the ruling of this court has been to the contrary, at least in cases where there has been delay on the part of the plaintiff in commencing suit. In *D. M. Osborne & Co. v. Missouri P. R. Co.* 147 U. S. 248, 37 L. ed. 155, 13 Sup. Ct. Rep. 299, the plaintiff, owning lots on Gratiot street, in St. Louis, filed a bill in the United States circuit court for the eastern district of Missouri, to restrain the defendants from constructing a steam railroad along such street. The fee of the street was in the public, but it was alleged that the construction and operation of the railroad would work a damage to the property of the plaintiff, and the facts tending to show such damage were set forth. It appeared that the road had been constructed before the bill was filed. Section 21 of article 2 of the Missouri Constitution of 1875 reads "that private property shall not be taken, or damaged, for public use without just compensation." The statutes of Missouri provided means for condemning a right of way and assessing the value of property taken, but contained no provision for assessing the damages to property not taken, so that neither the railroad company nor the plaintiff could at the time have taken any legal proceedings for ascertaining the [106] amount of the damage *to plaintiff's property by the construction of the railroad. The circuit court, finding that the plaintiff's property was damaged, and assuming that the damages came within the protecting clause of the Constitution, held that nevertheless the plaintiff was not entitled to an injunction, saying (35 Fed. 84, 85):

"The question at issue is whether a complainant who claims damages resulting incidentally to his property from the laying of a railroad track in a public street under a legislative and municipal license can wait until the work is done, and then enjoin its operation, although none of his property is actually taken, or whether he should in such case be left to his remedy at law for the damage inflicted. Unless the wrongdoer is insolvent, or unless some other cause exists to render the legal remedy of no avail, it appears to me that on general principles he should be left to his legal remedy, and it was so held in the cases first above cited. The rule does not deprive the complainant of the protection intended to be afforded by the Constitution, nor does it work any hardship. It simply requires the complainant to be diligent in applying for such relief as equity may afford."

That decision was affirmed by this court, and in the opinion it was said (p. 259, L. ed. p. 161, Sup. Ct. Rep. p. 303):

"But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate be-

fore restraint will be laid upon the progress of a public work."

Reference was made in the opinion to *McElroy v. Kansas City*, 21 Fed. 257, a case in the circuit court of the United States for the western district of Missouri, in which the same constitutional provision was in question, and an application made to restrain the grading of a street in front of the complainant's lot, and in which, as stated, "it was ruled that, if the injury which the complainant would sustain from the act sought to be enjoined could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer *large inconvenience if the contemplated [107] act were restrained, the injunction should be refused, and the complainant remitted to his action for damages. If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainant the substantial benefit of the condition while not restraining defendant from the exercise of its ultimate rights."

These propositions do not, as counsel for appellees suggest, necessitate some legislation like the act of Parliament known as Lord Cairn's act (21 and 22 Victoria, chap. 27), by which it was provided that "in all cases in which the court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct."

Nor do they justify the conclusion that under their application one man is at liberty to wrong another upon payment of damages. There is no thought of creating a new rule or of substituting a judicial opinion for an act of Congress. All that can be fairly said in reference to them is that they are an application of the ancient maxim that he who seeks equity must do equity. Limiting them, as we have limited them in the present case, to conditions which exist after defendant has proceeded in the completion of its proposed work and has expended a large sum of money therein, they can never be considered as inviting a party to do a wrong with the expectation of escaping every penalty save a pecuniary one.

On that ground alone, and without deciding whether plaintiffs *have a legal right to [108] recover damages, the decrees of the Circuit Court of Appeals and the Circuit Court will be reversed and the case remanded to the

latter court, with instructions to set aside its decree and to enter one providing for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam and the appropriation of the water, and for which the defendant is legally responsible, a proposition upon which we express no opinion, and fixing a time within which the defendant will be required to pay such sum, and that upon the failure to make such payment an injunction will issue as prayed for; and, on the other hand, that upon payment a decree will be entered in favor of the defendant. If the plaintiffs shall prefer to have their damages assessed by a jury, leave may be given to dismiss the bill without prejudice to an action at law.

Mr. Justice **Gray** did not hear the argument and took no part in the decision of this case.

Mr. Justice **White** took no part in the decision of this case.

HIPPOLITE FILHIOL *et al.*, *Plffs. in Err.*,
v.

CHARLES E. MAURICE, Charles G. Convers, and William G. Mauricee.

(See S. C. Reporter's ed. 108-111.)

Jurisdiction of circuit court—case arising under Constitution or treaty of the United States.

A complaint in ejectment against private individuals, which alleges that plaintiff was ousted in violation of U. S. Const. 5th Amend. and of the provision of the treaty with France of October 21, 1803, for the protection of the inhabitants of the territory ceded in the enjoyment of their property, does not show a cause arising under the Constitution or a treaty of the United States, of which the circuit court of the United States has jurisdiction, where no right, title, privilege, or immunity is asserted as derived from the Constitution or treaty, as against the defendants, and it is not charged that they took possession by direction of the United States government.

[No. 50.]

Argued March 5, 6, 1902. Decided April 7, 1902.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment sustaining a demurrer to a complaint in an action of ejectment. *Reversed* and remanded, with a direction to dismiss the complaint for want of jurisdiction.

Statement by Mr. Chief Justice **Fuller**:
This was an action of ejectment brought

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7, and *Bailey v. Mosher*, 11 C. C. A. 308.

185 U. S.

by Hippolite Filhiol and others in the circuit court of the United States for the eastern district of Arkansas, against Charles E. Maurice, Charles G. Convers, and William G. Maurice, for the recovery of a parcel of land in the city of Hot Springs, Garland county, Arkansas, on the permanent reservation at Hot Springs described *as Bath[109] house site No. 8, and for rent thereof as damages. Plaintiffs deraigned title as heirs at law of Don Juan Filhiol, to whom it was alleged the lands were granted February 22, 1788, by the then Spanish governor of the province of Louisiana, by virtue of which grant said Filhiol became the owner of a tract of "about three miles square, embracing all the hot springs in the city of Hot Springs, Garland county, Arkansas," and including the parcel of land for which plaintiffs brought suit. The complaint did not aver the citizenship of plaintiffs or defendants, although the caption described plaintiffs as residents of several states other than Arkansas; but it was averred as follows: "And for cause of action say that by the 5th Amendment of the Constitution of the United States and the 3d article of the treaty of the United States of America and the Republic of France, which was ratified on the 21st day of October, 1803, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the land in controversy and their full enjoyment of the same, but, in violation of the provisions of said treaty, and without due process of law, and in violation of the 5th Amendment of the Constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the 2d day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land in controversy, and for more than two years last past have held possession, and they now hold possession, of the land in controversy, wrongfully and without right, and they refuse to surrender possession of the same to plaintiffs." Defendants demurred to the complaint, on the ground that its allegations did not "constitute a cause of action."

The circuit court sustained the demurrer, and, plaintiffs electing to stand on their complaint and declining to amend, the complaint was dismissed with costs. A writ of error directly from this court was then allowed.

Messrs. **William F. Vilas** and **Clifford S. Walton** argued the cause, and, with *Mr. J. H. McGowan*, filed a brief for plaintiffs in error:

This court has jurisdiction over appeals from the circuit courts wherever the plaintiff claims some title, right, privilege, or immunity under the Constitution, or under a treaty, and that such claim is put in controversy in the suit; and the right of appeal does not depend upon the validity of the claim, it being sufficient if it involves a real and substantial dispute or controversy, and such appellate jurisdiction is not af-

827

fectured by the disclosure in the complaint of diverse citizenship.

Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Ansburo v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Southern P. R. Co. v. California*, 118 U. S. 109, 30 L. ed. 103, 6 Sup. Ct. Rep. 993; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Colorado Cent. Consol. Min. Co. v. Turek*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

The construction and application of the treaty are involved here because we claim a perfect title under the laws of Spain which prevailed in Louisiana at the time our grant was made.

United States v. Turner, 11 How. 663, 13 L. ed. 857.

The circuit court, in sustaining the demurrer, was compelled to consider the grant and its effect under the laws of Spain, the powers of the Spanish governor, the surveyor general, and other officers, and the authorized regulations concerning the disposal of the Spanish public domain. This, in legal intendment, is equivalent to discussing and passing upon a grant made by the United States.

Ibid.

Mr. Branch K. Miller also filed a brief for plaintiffs in error.

Assistant Attorney General Pradt argued the cause, and, with Mr. George H. Gorman, filed a brief for defendants in error:

A case can only be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is granted under that instrument in such wise as that a definite issue in respect to the possession of the right can be distinctly deducible from the record.

Muse v. Arlington Hotel Co. 168 U. S. 435, 42 L. ed. 533, 18 Sup. Ct. Rep. 109; *Cornell v. Green*, 163 U. S. 78, 41 L. ed. 77, 16 Sup. Ct. Rep. 969.

The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege, or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted.

Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 40 L. ed. 531, 18 Sup. Ct. Rep. 109.

In order to give the circuit court jurisdiction of any cause arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, the cause of action must appear from the plaintiff's own statement of his claim.

Muse v. Arlington Hotel Co. 168 U. S. 436, 42 L. ed. 533, 18 Sup. Ct. Rep. 109.

The action cannot be so framed as to nominally present a case against private

persons only, yet really to result in passing upon the property rights of the United States.

Stanley v. Schicalby, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418.

*Mr. Chief Justice Fuller delivered the [110] opinion of the court:

Writs of error may be sued out directly from this court to the circuit courts in cases in which the construction or application of the Constitution of the United States is involved, or in which the validity or construction of any treaty made under the authority of the United States is drawn in question. Act of March 3, 1891, chap. 517, § 5, 26 Stat. at L. 826.

And we repeat, as has often been said before, that a case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument; but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege, or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of the validity or construction in disposing of the right asserted. *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109, and cases cited.

The jurisdiction of the circuit court was not invoked in this case on the ground of diverse citizenship, but on the ground that the case arose "under the Constitution or laws of the United States or treaties made, or which shall be made, under their authority." And it is settled that, in order to give the circuit court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim.

As the circuit court took jurisdiction, which could only have been on the latter ground, and decided the case upon the merits, the writ of error was properly taken directly to this court, the jurisdiction of which is exclusive in such cases. *Huguley Mfg. Co. v. Galtton Cotton Mills*, 184 U. S. 290, ante, 546, 22 Sup. Ct. Rep. 452; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

We are met, however, on the threshold, with the question whether the jurisdiction of the circuit court could be maintained on *that ground. It does not appear that [111] this question was raised below, and, on the contrary, the circuit court disposed of the case on the merits; that is, assuming jurisdiction, the circuit court decided that the complaint failed to set up a cause of action.

Did it appear from plaintiffs' own statement that the case arose under the Consti-

tution or a treaty of the United States? We do not think it did.

The 5th Amendment prohibits the exercise of Federal power to deprive any person of property without due process of law, or to take private property for public use without just compensation; and the treaty of October 21, 1803, provided for the protection of the inhabitants of the territory ceded in the enjoyment of their property. Public Treaties, 200.

But no right, title, privilege, or immunity was here asserted as derived from the Constitution or the treaty, as against these private individuals who were impleaded as defendants, either specifically or through averments that plaintiffs were ousted in violation of the treaty and of the 5th Amendment, the provisions of which it was the duty of the Federal government to observe.

The gravamen of the complaint was that plaintiffs' ancestor had a perfect title, to which they had succeeded, and the appropriate remedy for illegal invasion of the right of possession was sought; but it was not made to appear that the circuit court had jurisdiction, for the action was not against the United States, nor could it have been, as the United States had not consented to be so sued, and so far as defendants were concerned, it was not charged that they took possession by direction of the government, and plaintiffs set up no more than a wrongful ouster by merely private persons, remediable in the ordinary course and in the proper tribunals. And see *Arkansas v. Texas & T. Coal Co.* 183 U. S. 185, ante, p. 144, 22 Sup. Ct. Rep. 47; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

The particular grounds of the decision of the circuit court on the merits do not appear, nor is it material, as that court manifestly had no jurisdiction.

Judgment reversed and cause remanded, with a direction to dismiss the complaint for want of jurisdiction, with costs.

[112]*MICHIGAN SUGAR COMPANY, Plff. in Err.,
v.

ROSCOE D. DIX, Auditor General of the State of Michigan.†

(See S. C. Reporter's ed. 112-114.)

Error to state court — Federal question — when sufficiently alleged.

The jurisdiction of the Supreme Court of the United States to re-examine the final judg-

†This case appears in the Official Report under the title of *Michigan Sugar Co. v. Michigan*.

NOTE.—On *Federal jurisdiction over state courts; necessity of Federal question*—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to *what is Federal question; when considered*—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

185 U. S.

ment of a state court under U. S. Rev. Stat. § 709, div. 3, cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the cause up from such court intended to assert a Federal right.

[No. 199.]

Argued March 20, 21, 1902. Decided April 7, 1902.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment denying an application for a writ of mandamus to compel the auditor general to issue warrants in favor of petitioner for beet sugar bounties. *Dismissed.*

See same case below, 124 Mich. 674, 83 N. W. 625.

The facts are stated in the opinion.

Mr. Thomas A. E. Weadock argued the cause, and, with Mr. John C. Weadock, filed a brief for plaintiff in error:

Messrs. Horace M. Oren and Charles D. Joslyn argued the cause and filed a brief for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a petition for mandamus filed in the supreme court of the state of Michigan by the Michigan Sugar Company against the auditor general of that state, praying that he might be commanded to draw his warrant or warrants on the treasury of the state in favor of petitioner, for certain amounts alleged to be due to it for bounty earned for beet sugar manufactured from sugar beets raised in the year 1898, in accordance with the provisions of an act of the legislature of Michigan of 1897. Reliance was also placed on an act of 1899 asserted to have made appropriations to pay such bounties. The auditor general, in response to a rule to show cause, insisted that the act of 1897 was in contravention of the state Constitution, and also that no appropriations had been made out of which the alleged bounties could be paid.

The supreme court of Michigan held that the act of 1897 was *unconstitutional, and [113] that it could not be and was not helped out by the act of 1899, which made no specific appropriations "by which the sugar bounties could be paid," and denied the application. 124 Mich. 674, 83 N. W. 625. Thereupon this writ of error was allowed, and errors were assigned to the effect that the judgment of the supreme court was in conflict with the prohibitions of the Constitution of the United States in respect of "impairing the obligation of contracts," deprivation of property without due process of law, and denial of the equal protection of the laws.

The petition for mandamus nowhere set up that the state of Michigan had passed any law impairing the obligation of a contract with relator, and nowhere invoked the protection of any provision of the Federal Constitution, nor was any issue in relation thereto raised upon the record.

It is clear that the case did not fall with-

in either the first or second of the classes of cases in which the judgment of a state court may be re-examined under § 709 of the Revised Statutes. The validity of no treaty or statute of, or authority exercised under, the United States, was drawn in question; nor was the validity of a statute of, or an authority exercised under, the state drawn in question on the ground of repugnancy to the Constitution, treaties, or laws of the United States, and its validity sustained. And as to the third class, no right, title, privilege, or immunity was specially set up or claimed as belonging to relator under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and denied.

The supreme court of the state did not refer to the Federal Constitution, or consider and decide any Federal question. For aught that appears, the court proceeded in its determination of the cause without any thought that it was disposing of such a question.

The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the 3d division of § 709, cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question *that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission, or authority, of the United States. Applying this rule to the case before us, the writ of error cannot be maintained.

Writ of error dismissed.

Mr. Justice **Brown** took no part in the decision.

EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, NEW YORK, *Plff. in Err.*,

v.

DAVID W. EBAUGH.

(See S. C. Reporter's ed. 114-122.)

Error to state court—question of fact—construction of law of other state.

1. Whatever was a question of fact in the state court is a question of fact on writ of error from the Supreme Court of the United States to that court.
2. A finding of fact by a state trial court as to the law of another state and its application under the decisions of the courts of that

NOTE.—On *Federal jurisdiction over state courts; necessity of Federal question*—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to *what is Federal question; when considered*—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

state is binding upon the Supreme Court of the United States on error to the supreme court of the former state, which decided that such finding of the trial court was conclusive upon it.

[No. 177.]

Argued March 3, 1902. Decided April 7, 1902.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment affirming a judgment of the Court of Common Pleas of Greenville County in favor of plaintiff in an action to recover the par value of stock in a foreign building and loan association. *Affirmed.*

See same case below, 58 S. C. 83, 36 S. E. 535.

Statement by Mr. Justice **McKenna**:

The plaintiff in error is a building and loan association incorporated under the laws of the state of New York, and has its principal place of business in the city of Syracuse in that state. The defendant in error is a shareholder in said corporation, and brought this action in the court of common pleas of the county of Greenville, state of South Carolina, for the par value of his stock,—to wit, the sum of \$1,000,—or, failing in that, for the sum of \$580, the money paid in by him.

By agreement of counsel all issues of law and fact were referred to a referee. The referee took testimony, and reported *to the court "that the plaintiff is entitled to recover judgment against the defendant for the sum of \$1,000, with interest from October 15, 1898, at the rate of 7 per cent per annum, and for the costs of this action."

The report of the referee was confirmed, and judgment was entered for the plaintiff (defendant in error) in accordance with the report. The judgment was affirmed by the supreme court of the state, and the case was then brought here.

The facts as recited in the opinion of the court of common pleas are as follows:

"The defendant is a corporation organized under the laws of New York, with its principal place of business in the city of Syracuse. In the early part of the year 1892 it began business in the state of South Carolina, and organized in the city of Greenville a local branch of said association. The plaintiff is a resident of the city of Greenville, in said state. The defendant's agent approached the plaintiff for the purpose of inducing him to become a stockholder in the defendant company. The agent exhibited to the plaintiff a form of the certificate of stock, which contained, among other things, this promise:

"Eastern Building and Loan Association of Syracuse, New York, agrees to pay said shareholder, or his heirs, executors, administrators, or assigns, the sum of \$100 for each of said shares, at the end of seventy-eight months."

"At the same time the agent exhibited to him certain printed circulars, or litera-

ture, of the defendant company. One of these circulars was entitled "The definite contract plan." This circular stated:

"Q. What amount is deposited monthly?

A. Seventy-five cents per share. . . .

"Q. When will the shares reach their par value? A. Shares mature in exactly six and one half years.

"Q. How much will a member have to pay in altogether? A. On a basis of ten shares (\$1,000 maturity value) he will have paid in five hundred and ninety-five dollars (\$595) and receives \$1,000." . . .

[116] "All shares on which payments are made are regularly matured *at the expiration of seventy-eight months (six and one half years) from date of certificate. . . .

"Illustration.

"Showing cost and profits to the investor of ten shares of \$1,000 six and a half years, at time of maturity.

He pays a membership fee of \$1.00
per share..... \$10 00

He pays monthly instalments of
\$7.50 per month for 78 months

\$7.50 x 78..... 585 00

Total amount invested.... \$595 00

He receives in cash at maturity.. 1,000 00

" . . . "The only association making a contract definite in every particular. . . . Stock matures in seventy-eight months."

"On reading the circulars and after listening to the persuasive talk of the agent, the plaintiff was induced to become a subscriber for ten shares of stock. Thereupon the certificate sued upon was issued to him. This certificate is dated on April 1, 1892. It certifies that 'D. W. Ebaugh, of Greenville, county of Greenville, and state of South Carolina, is hereby constituted a stockholder of the Eastern Building & Loan Association of Syracuse, New York, incorporated under the laws of New York, and holds ten shares therein of \$100 each, and in consideration of the membership fee, together with agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions, and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract; and the said Eastern Building & Loan Association of Syracuse, New York, agree to pay to said shareholder, or his heirs, executors, administrators, or assigns, the sum of \$100 for each of said shares at the end of seventy-eight months from the date hereof.'

"Ebaugh paid the entrance fees, and continued to pay the monthly instalments until seventy-eight months had elapsed. The last payment was made on October 1, 1898. In subscribing to this stock and in making these

[117] payments, Ebaugh trusted to the *statements contained in the circular and to the promise made in the certificate. About one month before the last payment was made, the association wrote to Ebaugh stating that they could not carry out the contract, and stating that they could not pay him \$100 upon the end of seventy-eight months, but that he

185 U. S.

would have to continue making payments. In reply to this, Ebaugh wrote that he had made a definite contract with the association, and expected them to comply with its terms. A short time after making the last remittance he signed a blank receipt upon the back of the certificate, and sent the same to the association, with the request that they forward him a check for the money due him. The association refused to make payment, and on January 17, 1899, this action was commenced to recover from the association the sum of \$1,000, with interest thereon from October 1, 1898. Certain property of the defendant company in this state was attached in said action.

"The defendant made answer, alleging that there was no contract to mature the stock at a definite period, but that it was only estimated that the stock would be matured in seventy-eight months. It also claims that any promise to mature the stock within a definite time would be contrary to their by-laws and charter, and contrary to the laws of New York.

"By agreement of counsel, all issues of law and fact were referred to Osear Hodges, a member of the bar at Greenville, as special referee. Mr. Hodges took testimony, and heard argument, and filed his report, wherein he concludes 'that the plaintiff is entitled to recover judgment against the defendant for the sum of \$1,000, with interest from October 15, 1898, at the rate of 7 per cent per annum, and for the costs of this action.'

"To this report the defendant filed certain exceptions. After hearing argument, I am satisfied that the report of the referee is correct in every particular, and the exceptions are hereby overruled. The defendant certainly made definite assurances in those circulars, and a definite promise as to the maturity of stock; that if the plaintiff would pay the entrance fees, and his monthly dues for seventy-eight months, that at the end of that *time it would pay to him \$100 for [118] each share of stock taken by him. These assurances and this promise were made for the purpose of procuring the plaintiff as a stockholder. This promise was definite. The plaintiff relied upon it, and made the payment of his entrance fees, and his monthly dues. The association knew that the plaintiff was relying upon its promise, and allowed him to make all these payments and to incur the liability of a stockholder. It received the full benefit of this transaction, and it cannot now be heard to say that the contract was contrary to its by-laws or its charter. Even if this contract were in excess of its charter powers, the association would, nevertheless, be bound by it, inasmuch as it received the full benefit thereof." [58 S. C. 83, 36 S. E. 535.]

Mr. William Hepburn Russell argued the cause, and, with Mr. William Beverly Winslow, filed a brief for plaintiff in error:

The test of compliance with the rule of constitutional obligation, that full faith and credit shall be given in each state to the laws of every other state, is that the same

effect shall be given to them that would be given to them by the courts of such other state.

Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398.

If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused.

Chapman v. Goodnow, 123 U. S. 540, *sub nom. Chapman v. Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Dowey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205.

And where the Federal question was necessarily raised and must have been decided adversely to the claim of plaintiff in error this court will not dismiss the writ of error.

Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct. 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599.

It is for this court to say, and it is its duty under the Constitution to determine, whether in this decision the supreme court of South Carolina gave to the laws of New York and the contract made under those laws the same effect that such laws and contract have in the courts of New York.

Green v. Van Buskirk, 5 Wall. 307, 18 L. ed. 599; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Mills v. Duryce*, 7 Cranch, 481, 3 L. ed. 411; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Dupasscur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

After proof of a foreign law and its interpretation was made, the English courts held themselves bound by it, and it was not a question of fact for a jury, but of law for the court, as to the meaning and effect of the foreign law in the place of contract and of its enactment.

Copin v. Adamson, L. R. 9 Exch. 345, 31 L. T. N. S. 242, 43 L. J. Exch. N. S. 161, 22 Week. Rep. 658.

If this court protects a contract against state legislation under the contract clause of the Federal Constitution will it not protect a contract against the decision of a state court which refuses full faith and credit to the laws of a sister state and abrogates a contract upon the pretense of

construing it? Repudiation and confiscation are not "construction" and "interpretation."

Western Massachusetts Mut. F. Ins. Co. v. Hilton, 42 App. Div. 52, 58 N. Y. Supp. 996; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617, 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398.

It is settled law that when statutes and judicial decisions of another state are given in evidence, the question of their effect and meaning is one of law, not of fact.

Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137; *Kline v. Baker*, 99 Mass. 255.

Mr. **H. J. Haynsworth** argued the cause and, with Messrs. *W. H. Lyles*, *L. W. Parker*, and *L. O. Patterson*, filed a brief for defendant in error:

Erroneous construction of the statute of another state is not a denial of full faith and credit to that statute.

Glenn v. Garth, 146 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.

Mr. Justice **McKenna** delivered the opinion of the court:

Plaintiff in error invokes against the judgment, to quote from the brief of counsel, "those provisions of the Constitution of the United States which declare that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;'" that no state shall "pass . . . any law impairing the obligation of contracts," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The protection of those constitutional provisions is claimed because it is asserted the courts of South Carolina disregarded the law of New York as expounded by the courts of that state.

Certain decisions of New York were introduced in evidence *by plaintiff in error, [119] and from them it is deduced that the law of the state was and is that the contract between the association and its stockholders is constituted, not only of the certificate of stock and its indorsement, but as well of the articles of association and the by-laws of the corporation, and therefore the period of maturity was an estimate, not an assurance. And, further, that it was established as the law of New York, in *O'Malley v. People's Bldg. L. & Sav. Asso.* 92 Hun, 572, 36 N. Y. Supp. 1016, that "the authority to issue a certificate with a fixed period of maturity is not expressly given either by the statute or by articles of association, or by-laws of the association." And that the association "did not possess the power or authority to

issue a certificate specifying a fixed maturity period, and that the clause in the certificate should be construed as an estimated period of maturity."

To the first proposition the courts of South Carolina answer with a finding of fact that the plaintiff in error had given the defendant in error a definite promise that his stock would mature in seventy-eight months,—not a promise only by the certificate, but assurances in circulars and positive representations by an agent.

The supreme court of South Carolina did not find it necessary to concur with or dissent from the second proposition advanced by plaintiff in error. The court said:

"The appellant contends that the contract must be construed with reference to the laws of New York, and attempts to differentiate this case from those just mentioned [prior cases were cited] on the ground that the answer alleges, and the testimony establishes the fact, that under the laws of that state, the by-laws of the association, and not its express agreement, must prevail in the interpretation of the contract between the parties.

"Both the master and circuit judge found, as a matter of fact, that the laws of New York did not forbid the defendant from entering into an agreement by which the shares of stock would mature in a definite time.

[120] *—"In his report the master says:

"The question as to whether this promise was in excess of the charter powers was not expressly decided by the supreme court, but that court did decide that even though it were in excess of its charter powers (in the language of *Bedford Bell R. Co. v. McDonald*, 17 Ind. App. 492, 46 N. E. 1022): "The general rule is that where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of *ultra vires*."

"This proposition is fully sustained by the decisions of New York. The plaintiff introduced in evidence the following decisions of that court: *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *De Groff v. American Linen Thread Co.* 21 N. Y. 124; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

"This constituted the only evidence before me as to what was the law of New York touching this point. I find, as a matter of fact, that the law of New York is that where a corporation enters into a contract that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as contained in the contract, if it suffers the other party to perform his agreement, and receives the benefits and retains them.

"This being the law of New York, it is conclusive of the case at issue."

"The report of the master was confirmed in all respects by the circuit judge.

"As this is an action at law, the foregoing findings of fact are not subject to review, but are conclusive on this court.

185 U. S.

"As the laws of New York are not in conflict with the construction which this court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts causing us to differentiate this case from those heretofore mentioned."

It will be observed, therefore, that the case was presented to the supreme court of South Carolina with the facts found by the trial court as follows: (1) That the plaintiff in error had made a positive promise that the stock of defendant in error would mature in seventy-eight months; (2) under the assurance *of that promise the defendant had subscribed for the stock and had performed in good faith all obligations on his part; (3) under such circumstances it was the law of New York that plaintiff in error could not be heard to say that its promise was *ultra vires*. And the court decided that such findings of fact were conclusive upon it.

The case is presented here under like conditions. This is a writ of error to the state court, and whatever was a question of fact there is a question of fact here. This court said, speaking by Chief Justice Waite, in *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398, where, as in the case at bar, was invoked that provision of the Constitution of the United States which requires the courts of one state to give full faith and credit to the public acts of another:

"Whenever it becomes necessary under this requirement of the Constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242, in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another."

We are not called upon, therefore, to review or reply to the very able argument of counsel for plaintiff in error, advanced to show that the situs of the contract between the parties was New York, and that the words "public acts," in article 4, § 1, of the Constitution of the United States, mean the public statutes of the state.

*A necessary element in both propositions [122] (if they may be regarded as independent) is

the law of New York; and in the latter is involved, not only what the statutory law is, but what its application is under the decisions of the courts of that state. Both, as we have seen, were facts to be proved, and the finding upon which is binding upon us.
Judgment affirmed.

Mr. Justice **Gray** did not hear the argument, and took no part in the decision.

SARAH J. MCINTOSH, *Plff. in Err.*,
v.

R. L. AUBREY.

Levy and seizure—exemptions—real estate purchased with pension money.

(See S. C. Reporter's ed. 122-125.)

Real estate purchased by a pensioner of the United States government with pension money is not exempted from seizure and sale

NOTE.—*Exemption from attachment, levy, or seizure of property purchased with pension money, or of pension money after payment to pensioner.*

In harmony with the decision in *MCINTOSH v. AUBREY* the exemption conferred by U. S. Rev. Stat. § 4747, has often been held not to extend to property purchased with pension money. *Re Stout*, 109 Fed. 794; *Bauk of Kingwood v. Murdock*, 48 W. Va. 301, 37 S. E. 548.

And land bought with the proceeds of pension checks, nothing appearing to show how long the pension money had been held or what use had been made of it, prior to the purchase, is not exempt from the lien of a judgment. *McFarlaud v. Fish*, 34 W. Va. 548, 12 S. E. 548.

So in Indiana and Kentucky the exemption under the act of Congress, as to proceeds of investments made with pension money, has been refused; the case of *Faurote v. Carr*, 108 Ind. 123, 9 N. E. 350, holding that property bought with pension money is not exempt.

And the exemption of pension money under the act of Congress does not extend to property bought with the same. So held in a suit to set aside a fraudulent conveyance and subject the land to a judgment for alimony, where the holder of title made the defense that his vendor had bought the land with pension money. *Cavanaugh v. Smith*, 84 Ind. 380.

A house and lot purchased with the proceeds of a pension check are not exempt, but may be subjected in proceedings in aid of execution. *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878.

So land bought with pension money is not exempt, and a conveyance of same to wife of debtor without consideration will be set aside at the instance of creditors thereby defrauded. *Johnson v. Elkius*, 90 Ky. 163, 8 L. R. A. 552, 13 S. W. 448.

And pension money, when invested in land, loses its exempt character under the act of Congress. *Coakley v. Underwood*, 13 Ky. L. Rep. 654, 17 S. W. 7.

But in Iowa it has been held, overruling *Webb v. Holt*, 57 Iowa, 712, 11 N. W. 658; *Triplett v. Graham*, 58 Iowa, 135, 12 N. W. 143; *Baugh v. Barrett*, 69 Iowa, 495, 29 N. W. 425; *Farmer v. Turner*, 64 Iowa, 690, 21 N. W. 140; *Foster v. Byrne*, 76 Iowa, 295, 35 N. W. 513, 41 N. W. 22, that the exemption of pension money under the act of Congress, U. S. Rev. Stat. § 4747, attaches to property bought with the same.

on execution, by U. S. Rev. Stat. § 4747, declaring that no money due or to become due to any pensioner shall be liable to attachment, levy, or seizure, whether the same remains with the Pension Office or any officer or agent thereof, but shall inure wholly to the benefit of such pensioner, since the exemption provided by that section protects the fund only while in the course of transmission to the pensioner.

[No. 107.]

Submitted January 16, 1902. Decided April 7, 1902.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment refusing to allow an appeal from a judgment of the Superior Court which affirmed a judgment of the Court of Common Pleas of Fayette County in favor of plaintiff in an action of ejectment. *Affirmed.*

See same case in the court of common pleas, 10 Pa. Super. Ct. 275.

Crow v. Brown, 81 Iowa, 344, 11 L. R. A. 110, 46 N. W. 993; *Dean v. Clark*, 81 Iowa, 753, 46 N. W. 995.

And this is so notwithstanding the judgment was rendered before the debtor received the pension money, and before Iowa Acts, 20th Gen. Assem. chap. 23, took effect. *Crow v. Brown*, 86 Iowa, 741, 53 N. W. 131.

But a crop raised on land purchased with pension money is not exempt from seizure under execution by Iowa Acts, 20th Gen. Assem. chap. 23, as property in which pension money is invested, unless such land is the homestead of the pensioner, the proceeds and accumulations of which, when bought with pension money, are by that act expressly exempted. *Haefner v. Mullison*, 90 Iowa, 372, 57 N. W. 893.

And the proceeds of a sale of real property are not exempt from garnishment against the grantor, although the property was purchased by him with pension money, where the grantee agreed to pay the judgments, to satisfy which the garnishment issued, out of the purchase money. *Lee v. Grimm*, 106 Iowa, 37, 75 N. W. 655.

And the fact that the owner of real property intended to mature with pension money certain building and loan association stock, pledged as collateral security, in addition to a mortgage on the property, for the payment of a loan with which he purchased the property, does not exempt the proceeds of a sale of the property by him, where the purchaser agreed to repay the loan as part of the purchase price. *Ibid.*

The title to foals of two mares, where the mares and the services of the sire had been paid for with pension money, is such a property interest that the owner may maintain replevin against an attaching creditor. And a judgment therein, directed for the defendant, on the ground that plaintiff had no exempt interest in the colts, under Iowa Acts, 20th Gen. Assem. chap. 23, is erroneous. *Diamond v. Palmer*, 79 Iowa, 578, 44 N. W. 819.

A horse obtained by exchanging one bought with pension money is also exempt under Iowa Code Laws, 20th Gen. Assem. chap. 23, providing that pension money invested by the pensioner is exempt. *Smith v. Hill*, 84 Iowa, 684, 49 N. W. 1043.

Pension money goes to the administrator, and not to the widow, as she only takes such

Statement by Mr. Justice **McKenna**:

This action presents the question of the liability of real estate purchased with pension money, to be taken on execution to satisfy a claim of a creditor. The action is ejectment based on a title derived from a sale under such an execution, and was brought in the court of common pleas of Fayette county, state of Pennsylvania. The case was submitted upon the following statement of facts:

[123] "It is agreed that title to the premises in dispute was in Samuel B. G. Jobes on the 5th day of September, A. D. 1882. That on that date the said Jobes conveyed the same to the defendant, Sarah J. McIntosh, by deed duly executed and delivered, *under which deed she now claims the said property. That Sarah J. McIntosh's husband,—McIntosh, was a soldier in the volunteer service of the United States, and that after his death the government granted a pension to the said Sarah J. McIntosh, widow as aforesaid, and transmitted to her the money, which she herself received and retained in

her own possession for several months, after which the said pension money was paid to said Jobes as the purchase money for the said property by the said Sarah J. McIntosh, defendant. The said property was sold to the plaintiff at sheriff's sale, under regular process of execution, on the 28th day of August, 1897, and a sheriff's deed for the same was acknowledged and delivered to the plaintiff by Fred S. Chalfant, Esq., high sheriff of Fayette county, Pa., on September 8, 1897.

"That this process was issued on the following judgments, viz.: L. T. Claybaugh, for use of R. L. Aubrey, surviving partner of Aubrey & Son, vs. the said Sarah J. McIntosh, at No. 427 March term of 1892; judgment of R. L. Aubrey, surviving partner of Aubrey & Son, vs. J. B. Swogger and Mrs. Sarah J. McIntosh aforesaid, at No. 118 June term, 1896; and judgment of R. L. Aubrey, surviving partner of Aubrey & Son, vs. Sarah Jane McIntosh aforesaid, at No. 278 December term, 1892, of the common pleas court of Fayette county aforesaid.

property as is exempt to the head of the family. And pension money is exempted without regard to a family, under Iowa Stat., chap. 23, Laws 20th Gen. Assem. Perkins v. Hinckley, 71 Iowa, 499, 32 N. W. 469.

Me. Stat. 1862, chap. 106, § 2, exempting personal property amounting to \$1,000 to a volunteer soldier "during his term of service" does not apply to land after his term expires, even though bought with bounty money during service. Knapp v. Beattie, 70 Me. 410.

A house bought with pension money is not liable in New York to execution on a judgment against the pensioner. The N. Y. Code, § 1393, providing that a pension shall be exempt in any legal process, must be liberally construed. Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 7 L. R. A. 557, 23 N. E. 1108.

But property purchased with proceeds of property that was bought with "pay and bounty" money is not exempt, under N. Y. Laws 1864, chap. 578, exempting pay and bounty of soldier, it being impossible to tell whether the property in question represents the profits or original capital. Wygant v. Smith, 2 Lans. 185.

The exemption of a house and lot purchased and partly paid for with pension money, granted by N. Y. Code Civ. Proc. § 1393, is limited to the amount of pension money put in the property, and the balance above such amount is subject to claims against the owner. Countryman v. Countryman, 23 N. Y. Civ. Proc. Rep. 161, 28 N. Y. Supp. 258.

A judgment obtained by a pensioner to rescind an investment made with the pension money on the ground of fraud is exempt. The money in this case never was in the hands of the pensioner. Payne v. Gibson, 5 Lea, 173.

Land bought by the wife of a pensioner, with a pension-money check handed her by her husband, where she takes the title in her name, is not liable for his debts. U. S. Rev. Stat., § 4747, provides that pension money "shall inure wholly to the benefit of the pensioner." Holmes v. Tallada, 125 Pa. 133, 3 L. R. A. 219, 17 Atl. 238.

So land bought by a wife with the proceeds of a pension check, where the husband gave her the check, is not liable for his debts, the check being exempt. Farmer v. Turner, 64 Iowa, 690, 21 N. W. 140.

And land bought with pension checks where

the deed is made to the wife of the pensioner is exempt from proceedings in aid of execution, on a judgment existing at the time of the purchase. The transfer of exempt property is not a fraud on creditors. Hissem v. Johnson, 27 W. Va. 644, 55 Am. Rep. 327.

So property bought with bounty money given by a soldier to his wife is exempt from seizure by his creditors, under N. Y. Laws 1864, exempting pay or bounty, even if the title is placed in her name. Whiting v. Barrett, 7 Lans. 106.

Following the rule in Crow v. Brown, 81 Iowa, 344, 11 L. R. A. 110, 46 N. W. 993, the same court in Marquardt v. Mason, 87 Iowa, 136, 54 N. W. 72, held that land purchased by the wife of a pensioner, with the proceeds of a pension certificate given to her by her husband, could not be subjected to a judgment for his debts, since, if the gift was not valid, the money remained the property of the husband and was exempt from the payment of his debts.

The Iowa supreme court had previously held that a homestead bought by a wife with pension money of her husband is liable to be subjected to judgments outstanding against him. The money was received by the husband and then given to the wife in this case. Triplett v. Graham, 58 Iowa, 135, 12 N. W. 143.

And in Goble v. Stephenson, 68 Iowa, 270, 26 N. W. 433, the same court had held that real estate bought by a wife with pension money given to her by her husband may be subjected to his debts, where the gift was made prior to Iowa Laws 1884, chap. 23, which exempted pension money.

Real property purchased by a pensioner with pension money, taking the title in the name of the wife, is not exempted from liability to seizure and sale for the husband's debts by U. S. Rev. Stat. § 4747. Burtch v. Burtch, 14 Pa. Co. Ct. 482.

And land bought by the sons of a pensioner with his pension money is not exempt from seizure for his debts. Sims v. Waisham, 9 Ky. L. Rep. 912, 7 S. W. 557.

Real property purchased by a soldier's widow with pension money, and held by her until her death intestate, is exempt from execution after her decease to satisfy a judgment rendered against her prior to such purchase, under N. Y. Code Civ. Proc. § 1393, exempting a pension from levy and sale by virtue of an execution.

"That this action of ejectment is brought by the plaintiff to recover the said property from the defendants, under the said deed of the said sheriff to him.

"That the first knowledge of the plaintiff that the said property was purchased with pension money was after the said executions were in the hands of the said sheriff, and had been duly levied upon the said real estate.

"That the said R. L. Aubrey, surviving partner of the said Aubrey & Son, plaintiff in the said judgments and executions, is the plaintiff in this action.

"If, under the facts as hereinbefore stated, the court shall be of opinion that the said property was not liable to the said executions and sale, by reason of the same having been bought with pension money, judgment shall be entered upon this case stated in favor of the defendants.

[124] "But if the court shall be of opinion that the said property was not so exempt, then judgment shall be entered for the plaintiff, with leave to both parties to take exceptions and appeals."

Judgment passed for the plaintiff in the action, defendant in error here, and was af-

firmed by the superior court of the state. From the judgment of the latter court the supreme court refused to allow an appeal. This writ of error was then sued out.

Mr. Edward Campbell submitted the cause for plaintiff in error:

If the soldier is not protected in the act of exchanging his pension for the necessities of life, its only effect will be to enable his creditors to take it in satisfaction of their claims. No benefit is conferred if the protection is not extended beyond the possession of the money itself; for its only value consists in its purchasing power, and if the soldier is deprived of that, the pension might as well, so far as he is concerned, have remained ungranted.

Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 7 L. R. A. 557, 23 N. E. 1108.

An exemption of specific articles from levy and sale upon execution extends, not only to the protection of such articles while in use or possession, but also to any claim arising out of their conversion by a wrongdoer, or their destruction by fire, or otherwise, when insured.

Freeman, Executions, § 235.

Tyler v. Ballard, 31 Misc. 540, 65 N. Y. Supp. 557. The court distinguished *Re Winans*, 5 Dem. 139, *infra*, as merely holding that pension moneys of a deceased pensioner are liable for the debts of real estate to be paid in due course of administration, and said that this indicated that the remedy of the judgment creditor, if any, was by means of proceedings in the surrogate court.

In *Re Liddle*, 35 Misc. 173, 71 N. Y. Supp. 474, the court ordered the real estate of a deceased pensioner, purchased with pension money, to be sold to pay his debts, on the ground that the exemption given by N. Y. Code Civ. Proc. § 1393, did not extend beyond the pensioner's life. In this case the testator had expressly directed in his will the payment of all his debts.

Premises purchased with pension money and transferred by the pensioner to his wife, under an oral agreement to reconvey, are not exempt after a reconveyance by the wife as to a liability which she was permitted to incur in reliance upon her apparent ownership. *Fritz v. Worden*, 20 App. Div. 241, 46 N. Y. Supp. 1040. The court inclined to the view that a pensioner by conveying to his wife premises purchased with pension money loses his right of exemption in the property conveyed as against future creditors, but expressly refrained from deciding the point.

A Union soldier does not, by handing pension money to his wife and allowing her to deposit it in a bank in her own name and afterwards to purchase real estate with a part thereof, taking the title in her own name and paying out the balance on a cash payment for a building thereon, make a gift of the same to his wife so as to destroy its exemption as pension money, under N. Y. Code Civ. Proc. § 1393, where no gift was in fact intended. *Countryman v. Countryman*, 23 N. Y. Civ. Proc. Rep. 161, 28 N. Y. Supp. 258.

The exemption of pension money after payment to the pensioner has been differently construed in different states. Several states have local laws extending the provisions of the exemption after the money comes to the hands of the pensioner.

Pension money is only protected from credit-

ors by U. S. Rev. Stat. § 4747, while it remains in the pension office or is being transmitted to the pensioner. *Beecher v. Barber*, 6 Dem. 129.

Pension money is not exempt from liability for the pensioner's debts, under U. S. Rev. Stat. § 4747, after it has come into his hands. *Fuller v. Infield*, 6 Ohio C. C. 36.

Pension money is said, in *Price v. Society for Savings*, 64 Conn. 362, 30 Atl. 139, to be protected from attachment by U. S. Rev. Stat. § 4747, only so long as it remains due to the pensioner, and not after it has been actually paid over and has come into his possession.

So in Maine it is held that the proceeds of a pension check in the hands of a pensioner loses its exemption. *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739; *Crane v. Linneus*, 77 Me. 61.

And prior to *Crow v. Brown*, 81 Iowa, 344, 11 L. R. A. 110, 46 N. W. 993; 86 Iowa, 741, 53 N. W. 131, *supra*, the supreme court of Iowa had held that pension money after it had reached the pensioner was not exempt.

Thus a note for loaned pension money, which note was assigned as a gift by the payee to her daughter before the Iowa act of 1884 took effect, was held liable for the debt of the payee. *Baugh v. Barrett*, 69 Iowa, 495, 29 N. W. 425.

And pension money deposited in bank was held not exempt from garnishment for debts. *Webb v. Holt*, 57 Iowa, 712, 11 N. W. 658.

So in Kansas it has been held that money in bank, the proceeds of discounting pension checks, loses its exempt character and is then liable to garnishment. *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408.

In New Jersey, also, the proceeds of a pension money draft on deposit in bank are liable to be subjected in proceedings in aid of execution. *State, Jardain, Prosecutor, v. Fairton Sav. Fund & Bldg. Asso.* 44 N. J. L. 376.

In Pennsylvania pension money on deposit as such is regarded as having lost its exempt character. As soon as it reaches the pensioner's hands the exemption is gone. *Rozelle v. Rhodes*, 116 Pa. 129, 9 Atl. 160.

But the proceeds of a pension check which was deposited by the pensioner with a bank for collection are exempted from attachment by U. S. Rev. Stat. § 4747, while they remain in the

If force and effect are to be given to that clause of the act of Congress which provides that pension money "shall inure wholly to the benefit of the pensioner," to the exclusion of his creditors, there appears to be no escape from the conclusion that the property purchased with pension money is exempt.

Crow v. Brown, 81 Iowa, 344, 11 L. R. A. 110, 46 N. W. 993.

Messrs. A. F. Cooper and J. Q. Van Swearingen submitted the cause for defendant in error:

When money received as a pension has come into the actual possession and control of the pensioner, then it has "inured wholly" to his benefit, and is no longer exempt.

Roselle v. Rhodes, 116 Pa. 129, 9 Atl. 160; *Holmes v. Talladé*, 125 Pa. 133, 3 L. R. A. 219, 17 Atl. 238; 18 Am. & Eng. Enc. Law, p. 294; *Spelman v. Aldrich*, 126 Mass. 113; *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739; *Crane v. Linneus*, 77 Me. 59; *State, Jardin, Prosecutor v. Fairton Sav. Fund & Bldg. Assn.* 44 N. J. L. 376; *Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. 649; *Sims v. Walsham*, 9 Ky. L. Rep. 912, 7 S. W. 557; *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep.

bank to the credit of the pensioner, as under these circumstances the pension money, as cash, has not yet come into the pensioner's hands. *Reiff v. Mack*, 160 Pa. 265, 28 Atl. 699.

In Wisconsin, it has been held that pension money received by pensioner cannot be subjected to his debts, in proceedings in aid of execution. The debtor in this case answered that the money held by him was the money paid him as pensioner, which money is exempted by the United States act. *Folschow v. Werner*, 51 Wis. 85, 7 N. W. 911.

So, in Kentucky, it was held that the proceeds of a check of a pension agent given to a pensioner, which check was indorsed by her and cashed by a bank, is not liable for her debts under the act of Congress. *Eckert v. McKee*, 9 Bush. 355. But see *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878, *supra*.

The proceeds of a pension money check cashed at bank are exempt under N. Y. Code Civ. Proc. § 1393. *Wildrick v. DeVinney*, 18 N. Y. Week. Dig. 335.

And pension money in bank is exempt from proceedings in aid of execution under N. Y. Code, § 1393. *Stockwell v. National Bank*, 36 Hun, 583.

And proceeds of pension money in bank are not liable to be subjected in proceedings in aid of execution. N. Y. Code, § 1393, exempts pay and bounty of soldiers from any legal proceeding. *Burgett v. Fancher*, 35 Hun, 647.

So the proceeds of a pension check deposited in a savings bank to the credit of the pensioner are exempt from attachment under Conn. Gen. Stat. § 1164, which exempts from attachment or execution "any pension moneys received from the United States while in the hands of the pensioner." *Price v. Society for Savings*, 64 Conn. 362, 30 Atl. 139.

Pension money in the hands of another was, in Vermont, held liable to the debts of the pensioner by trustee process, and Vt. Rev. Laws, § 1076, which exempts debts due from the sale and delivery of exempt property, was held not to apply. *Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. 649.

And a purchaser of a soldier's claim for bounty is liable to be trustee, though the
185 U. S.

578; *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408.

Mr. Justice **McKenna** delivered the opinion of the court:

The plaintiff in error claims that the property having been purchased with pension money it was exempt from seizure and sale on execution under § 4747 of the Revised Statutes of the United States. The section is as follows:

"No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure, by or under any legal or equitable process whatever, whether the same remains with the Pension Office or any officer or agent thereof, . . . but shall inure wholly to the benefit of such pensioner."

The language of the section of itself seems to present no difficulty, and if doubt arises at all it is only on account of the decisions of courts whose opinions are always entitled to respect. *Crow v. Brown*, 81 Iowa, 344, 11 L. R. A. 110, 46 N. W. 993; *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 7 L. R. A. 557, 23 N. E. 1108. But, notwithstanding, we think the purpose of Congress

bounty is exempt by statute. *Yates v. Hurst*, 41 Vt. 556.

But a pension draft is exempt: and where the pensioner gave his pension check to his wife, who gave it to a third party, receiving a note therefor, it was not liable to trustee process. *Hayward v. Clark*, 50 Vt. 612.

So, a pensioner may under U. S. Rev. Stat. § 4747, make a valid gift of a pension check to his wife, and the proceeds thereof in the hands of a trustee from whom she received a note therefor are not attachable for the husband's debts. *Bullard v. Goodno*, 73 Vt. 88, 50 Atl. 544.

But pension money paid into bank by pensioner's attorney, and deposited in name of the wife of the pensioner, is liable for his debts, under Mass. Gen. Stat. chap. 108, § 10, which does not permit a married woman to hold a gift from her husband as against his creditors. *Spelman v. Aldrich*, 16 Mass. 113.

Pension money in the hands of an administrator is exempt from the payment of the debts of a deceased pensioner, even though the pension is paid during the life of the pensioner. *Hodge v. Leaning*, 2 Dem. 553.

But the exemption created by N. Y. Code Civ. Proc. § 1393, has no application after the pensioner's death so as to protect pension money from the claims of his creditors in the settlement of his estate. *Beecher v. Barber*, 6 Dem. 129.

And pension moneys given to a woman by the United States on account of the military services of her son are not exempt after her death in favor of her descendants who did not compose the family for whom she provided, either under U. S. Rev. Stat. § 4747, or N. Y. Code Civ. Proc. § 1393, from liability as a part of real estate to satisfy a judgment recovered against her administrator. *Re Winans*, 5 Dem. 138. See also, *Tyler v. Ballard*, 31 Misc. 540, 65 N. Y. Supp. 557; *Re Liddle*, 35 Misc. 173, 71 N. Y. Supp. 474, *supra*.

The U. S. act of 1866 exempting pension money did not apply to money paid before the passage of the act. *Kellogg v. Walte*, 12 Allen, 529.

is clearly expressed. It is not that pension money shall be exempt from attachment in all of its situations and transmutations. It is only to be exempt in one situation, to wit, when "due or to become due." From that situation the pension money of plaintiff in error had departed.

[125] The simplicity and directness of the statute are impaired by *attempts to explain it by the use of other terms than its own. That money received is not money due, and that real estate is not money at all would seem, if real distinctions be regarded, as obvious enough, without explanation. Nor are legal fictions applicable. Undoubtedly the law often regards money as land and land as money, and, through all the forms in which property may be put, will, if possible, trace and establish the original ownership; but these are special instances depending on special principles, and cannot be made a test of the purpose of Congress in enacting § 4747.

We concur, therefore, with the learned judge of the court of common pleas of Pennsylvania, that "the exemption provided by the act protects the fund only while in the course of transmission to the pensioner. When the money has been paid to him it has 'inured wholly to his benefit,' and it is liable to seizure as opportunity presents itself. The pensioner, however, may use the money in any manner, for his own benefit and to secure the comfort of his family, free from the attacks of creditors; and his action in so doing will not be a fraud upon them." [10 Pa. Super. Ct. 275.]

Judgment affirmed.

Mr. Justice Shiras, Mr. Justice White, and Mr. Justice Peckham dissented.

STATE OF KANSAS, Complainant,
v.
STATE OF COLORADO.

(See S. C. Reporter's ed. 125-147.)

Controversy between states — jurisdiction — diversion of water by one state to the injury of other state — admissions by demurrer — amendment to bill — decision postponed to await evidence.

1. A controversy between states, of which the Supreme Court of the United States has original jurisdiction, is presented by a bill filed by the state of Kansas against the state of Colorado, whose averments raise the question whether the latter state has the power wholly to deprive the state of Kansas of the benefit of water from the Arkansas river, which rises in Colorado and by nature flows into and through Kansas.
2. The general rule that the truth of material and relevant matters set forth with requisite precision is admitted by demurrer will not be applied in a controversy between

states, which involves the question whether one state may wholly deprive the other state and its inhabitants of all the water of a river accustomed to flow through that state, whereby injury is inflicted on such state as an individual owner, and on all the inhabitants of that state, and especially on the inhabitants of that part of the state lying in the river valley.

3. No amendment to a bill filed by one state against another state, whose averments are sufficient to present the question whether the latter state has the power wholly to deprive the former of the benefits of water from a river which rises in the former and by nature flows into and through the latter state, will be compelled on demurrer, whatever imperfections a close analysis of the bill may disclose; but any decision as to the sufficiency of the bill to warrant the relief prayed for will be postponed until the facts are before the court on the evidence.

[No. 10, Original.]

Argued February 24, 25, 1902. Decided April 7, 1902.

ORIGINAL BILL by the State of Kansas against the State of Colorado to enjoin the diversion by the latter state of the water of the Arkansas river. *Demurrer to bill overruled* without prejudice to any question, with leave to answer.

Statement by Mr. Chief Justice Fuller:

*The state of Kansas, by leave of court, [126] filed her bill of complaint against the state of Colorado on May 20, 1901, which, after stating that Kansas was admitted into the Union January 29, 1861, and Colorado August 1, 1876, averred:

That the Arkansas river rises in the Rocky mountains in the state of Colorado, and flows through certain counties of that state, and thence across the line into the state of Kansas; its tributaries in Colorado have their rise and entire flow in that state; the length of the river therein is approximately 280 miles, and the drainage area of the river and its tributaries approximately 22,000 square miles. All of the drainage area is east of the summit of the Rocky mountains and a large portion thereof in the mountains, where the accumulation of snow in the winter season is very great, the waters from the melting of which flow into the river directly and in great volume from early spring until August in each year. The river, after leaving the mountains of Colorado, proceeds in an easterly course for approximately 200 miles to the west line of Kansas, and "is a navigable stream under the laws and departmental rules and regulations of the United States." The volume of water in the bed of the river flowing from Colorado into Kansas formerly was and should now be, and would be, very large, but for the wrongful diversion of the same; said volume at its normal height in the river at the mean average flow for about ten months in the year being upwards of 2,000 cubic feet per second, while it is *much less for [127] about two months in the autumn in each year. The tributaries of the river in Kan-

NOTE.—On Federal jurisdiction of suits against a state—see notes to Tindall v. Wesley, 13 C. C. A. 165, and Hans v. Louisiana, 33 L. ed. U. S. 842.

sas are comparatively few in number, and cannot furnish water to cause a continuous stream to flow in the bed of the river, except near the south line of the state, where the river passes into the territory of Oklahoma. The river, after entering Kansas, proceeds through certain enumerated counties thereof, and then through the territory of Oklahoma, the Indian territory, and the state of Arkansas, and empties into the Mississippi river at the eastern boundary of that state. From Fort Gibson, in the Indian territory, to the mouth of the river, it is a large navigable stream, and is used for the purposes of trade and commerce by vessels plying thereon.

The length of the river in Kansas is about 310 miles; its course is through a broad valley, and along its entire length in Kansas are alluvial deposits of great depth, amounting in the aggregate to about 2,500,000 acres, the greater part of which acreage and the greater part of the course of the river lying in the western part of the state. The elevation of the bed of the river through the state of Kansas is from 3,350 feet above the level of the sea at the Colorado line to 1,000 feet above that level at the point where it enters Oklahoma. The rainfall in the drainage area in the western half of the state of Kansas is very light, and, by reason of the porous nature of the soil throughout that area, the greater portion of the water so falling sinks into the earth, and but a small portion thereof finds its way to the river, except in the event of severe and unusual storms. The ordinary and usual rainfall in the major portion of the valley of the river in Kansas is utterly inadequate to the growing and maturing of cultivated crops of any kind, because the precipitation is very scanty, and does not fall during the growing season of the year.

[128] The river in its entire course through the state of Kansas has a natural fall of about 7 3-10 feet per mile. Its valley is composed of sand covered with alluvial soil, and the river and the surface soil of the bottom lands in Kansas are all underlaid with sand and gravel, through which the waters of *the river have flowed from time immemorial, extending in width under the entire valley for its whole length throughout the state, the natural course and flow of the river being in and beneath the bed thereof and beneath the surface of the bottom lands of the entire valley of the river, that portion which flows beneath the surface being called the "underflow." The underflow is confined to and is coextensive with the valley, and varies in volume with the amount of water in discharge in the river. The water which flows in the river from Colorado into Kansas furnishes the principal and almost the entire supply of water for the underflow of the valley, and at its normal height the underflow is of great and lasting benefit to the bottom lands, both as to those which abut on the river and as to those which do not; and is of great benefit to the people owning and occupying such lands, "for that it furnishes moisture sufficient to grow ordinary farming crops in the absence of rainfall,

and furnishes water at a moderate depth below the surface for domestic use and for the watering of animals. The flow of the water in the river bed is also of great value to the people in the vicinity by reason of the fact that the evaporation therefrom tends to cool and moisten the surrounding atmosphere, thereby greatly promoting the growth of all vegetation, enhancing the value of the lands in that vicinity, and conducting directly and materially to the public health, and making the locality habitable. Owing to the dryness of the climate, the cloudlessness of the sky, the high elevation, and the prevailing winds, evaporation is rapid and great, being about 60 inches per annum at the east end of the river valley in Kansas, and 90 inches at the west line of the state. Outside of the valley in the western half of the state of Kansas are several million acres of arid upland and plateau, upon which grows a sparse but valuable grass upon which cattle may feed, and upon which they have, in times past, in vast numbers, been fed and fattened; but the cattle so fed must have watering places, and such watering places must be in the river valley; and the availability and use of said arid lands and the prosperity of the business of cattle feeding thereon depend entirely upon the water, its convenience, depth, and supply; and if the surface flow of water in *the bed of said river be wholly [129] cut off from the state of Kansas, then the underflow will gradually diminish and run out, and the valley of the Arkansas river will become as arid and uninhabitable as is the upland and plateau along its course, since without said underflow the valley land will be unfit for cultivation, and the arid lands unavailable for grazing."

The bottom lands in the valley of the Arkansas river in Kansas "are practically level, and rise from 6 to 15 feet above the water bed of the river," and are such as are ordinarily termed "bottom lands." Nearly all of the bottom lands, including those which are adjacent to the bed of the river, are fertile and productive, valuable for farming purposes, and well adapted to the growing of corn, wheat, alfalfa, rye, etc., and "all like crops, grains, and grasses usually grown in that latitude of the United States. In addition thereto, all of said lands are valuable for grazing purposes, and well adapted to the support of vast numbers of cattle, horses, sheep, and hogs."

More than three fourths of these Kansas bottom lands were and are occupied by persons owning or leasing them, and residing thereon with their families; and more than two fifths, including more than two fifths of those on the river bank, are and have been for years in actual cultivation, with an agricultural population of more than 50,000, raising all products "common to the latitude and climate," while numerous cities, towns, and villages are situated on the bank of the river, including ten county seats, with an aggregate population of over 50,000. The actual value of the Arkansas bottom lands averages not less than \$25 an acre, provided they receive the benefits arising

from the natural and normal flow of the water of the river, but that by reason of the wrongful acts of the state of Colorado the value of the lands "has shrunk many millions of dollars, which has been a direct loss to the citizens of the state of Kansas, and to the taxable wealth, and to the revenues of the state of Kansas, and to the school system of the state, as hereinafter set forth."

[130] The bill further averred that all of the bottom lands were originally part of the public domain of the United States, and that the state became entitled, on admission, for school purposes, to "sections 16 and 36 of each township, some of which sections were situated within the valley, and a number of them adjoined the bed of the stream; that under the act of Congress of March 3, 1863, there was granted to the state practically all of the odd-numbered sections of land in the valley lying north of a line 4 miles south of the north line of township 26, and the grant included all the territory of the Arkansas valley west of Wichita, being four fifths of the valley; that all the requirements of the act of Congress were complied with prior to 1874, by the state and by the Atchison, Topeka & Santa Fé Railroad Company, and the title in fee simple had been conveyed to the state, and by the state to the railroad company and others, being not less than 900,000 acres, a large portion of which abutted upon the river; that the even-numbered sections had been at all times subject to entry, and have been taken and occupied by settlers under the land laws.

Prior to the admission of Kansas there were many settlers and residents in the valley, occupying and holding lands there, more particularly along the line of the Santa Fé trail, which followed the river from the present site of the city of Hutchinson to the west line of the state; and during the years 1869, 1870, and 1871, the entire Arkansas valley, from the south line of the state to the city of Great Bend, was taken and occupied by actual settlers, who subsequently acquired title to the lands under the United States, the state, and the railroad company; while the other valley lands, from Great Bend to the west line of Kansas, were taken up between 1872 and 1884, and have been since occupied by settlers and purchasers from the state and company. All of the lands of the valley have been thus occupied, held, and owned by the original settlers and their grantees, who have continuously held and owned all riparian and other rights in any way appertaining or belonging to the lands.

[131] The bill further averred that under an act of Congress of March 2, 1889, certain lots were transferred to the state of Kansas, and had been since used for the maintenance of a soldiers' home thereon, in accordance with the provisions of the "act; that these lands consisted of 126 $\frac{56}{100}$ acres of bottom lands of the valley, adjoining and abutting on the bed of the river, and were fertile and well adapted to the raising of fruits, grains, and vegetables when supplied with moisture, but that the

value thereof depended entirely on the flow of water in the bed of the river and on the underflow beneath the land; that the state was, and had been during its entire ownership of the tract, using a large portion of the same for raising grains, fruits, vegetables, and grasses thereon for the needs of the institution, and, as the owner, was and had been since 1889 "entitled to the full, free, and natural flow of all waters which naturally would flow in said river and beneath said land; and the rights of the state thereto are prior and superior to any right or claim of the state of Colorado accruing, acquired, or established subsequent to said date."

It was also alleged that since 1885 the state of Kansas had been the owner of 640 acres situated in Reno county, on which it had erected a large institution for the purposes of an industrial reformatory, and that the greater portion of the lands was used for farming purposes in connection with the institution, and the production of grain, vegetables, etc., for its needs; that the lands are bottom lands in the valley of the Arkansas, furnished with moisture sufficient for the growing of crops thereon solely from the underflow of the river, the rainfall in ordinary seasons being entirely inadequate; and that the title of the state's grantors dated from 1873; and, "by reason of the foregoing, the state of Kansas is entitled to the full natural flow of the water of the Arkansas river in its accustomed place and at its normal height and in its natural volume underneath all of the said reformatory lands. The rights of the state thereto relate back to May 19, 1873, and are prior and superior to any right or claim of the state of Colorado accruing, acquired, or established subsequent to said date."

The bill further averred that the Constitution of the state of Colorado provided in §§ 5 and 6 of article 16 as follows:

"Sec. 5. The water of every natural stream not heretofore *appropriated within [132] the state of Colorado is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

"Sec. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

That the legislature of Colorado has from time to time passed numerous laws purporting to authorize the diversion of water from the Arkansas river and its tributaries, in that state, for uses and purposes other than domestic; "more particularly for the purpose of irrigating arid and waste lands

for agricultural purposes in said state;" that in and by its laws and through its officers and courts Colorado has assumed "to grant to divers persons, firms, and corporations the right and authority to divert the waters of the Arkansas river and its tributaries in Colorado from their natural channels, and to cause said waters to flow into and through canals and ditches constructed for the purpose, extending great distances away from the natural channels of said streams, and to store said waters and to empty the same upon high arid lands, not riparian to said streams, where large portions of such waters are lost from evaporation, and the remainder sinks into the earth, as a result of which all of said waters are forever lost to such streams, and are thus and thereby prevented from flowing into or through the state of Kansas."

That in pursuance of the constitutional provisions and the statutes of Colorado, many persons, firms, and corporations claim to have acquired rights to divert water from the river and its tributaries, for the purpose of irrigating arid, nonriparian lands in that state, each of them owning one or more ditches or canals, some being of great [133] capacity and many miles in length; "and many of these persons, firms, and corporations "have constructed great reservoirs within which to store, and in which are stored for use, vast quantities of the water of said streams before using it for the purpose of irrigation."

That these ditch owners and the state of Colorado are now diverting the waters flowing in the bed of the Arkansas river and its tributaries, and carrying them to great distances from their natural courses, and discharging them for agricultural purposes on "arid and nonriparian lands, where such waters are wholly lost to such streams and to the state of Kansas and its inhabitants; that such diversion is carried to such an extent that no water flows in the bed of said river from the state of Colorado into the state of Kansas during the annual growing season, and the underflow of said river in Kansas is diminishing and continuing to diminish, and if the said diversion continues to increase, the bottom lands of said valley will be injured to an enormous extent, and a large portion thereof will be utterly ruined, and will become deserted and be a part of an arid desert."

That the state of Colorado, through its laws, legislature, officers, and agents, assumes to authorize canal and ditch owners to take, carry away, and so use the waters of the streams, and to regulate and control the distribution thereof to landowners for irrigation purposes; that other canals and ditches for the irrigation of arid, nonriparian lands are contemplated, and the extension of branches and laterals; that this system is being continuously carried on in the drainage area of the Arkansas valley, and that unless restrained therefrom Colorado will grant additional rights for the construction of other canals and ditches sufficient to divert all the water in the river so that none will flow into Kansas.

That Colorado has since 1890 constructed and owns and manages a great canal for diverting water of the Arkansas river from its channel, and using it on arid, nonriparian lands, so that it will not return to or again flow in the river; and the state permits its agents to divert into said canal water to the amount of 756 28-100 *cubic feet [134] per second, which is approximately the natural flow of the river at the place of the diversion.

That the water so diverted is sold by the state of Colorado to persons owning lands in the vicinity, and is used by such owners in irrigating arid, nonriparian lands, when but for the diversion it would flow into Kansas and through said valley.

That the state of Colorado is threatening to build, and will build unless restrained other similar canals, with the intention of diverting other large quantities of water from the river, and irrigating other arid, nonriparian lands, and the legislature of that state has authorized their construction; and the state of Colorado also intends to, and will, unless restrained, extend its existing canal and build branches and laterals.

That Colorado has by legislation appropriated large sums of money for the construction of reservoirs for the storage of water from the streams tributary to the Arkansas river, and provided for the control thereof and the sale of the waters so stored for the irrigation of arid lands, nonriparian to the streams from which the waters are taken. That the state has constructed and is using four of such reservoirs holding vast quantities of water which would otherwise flow into the state of Kansas; and by reason of the use of those waters no portion thereof is permitted to return to its natural channel or flow in the river. That the state of Colorado is now preparing to construct, and intends to construct, and, unless restrained, will construct, at various points along the river and its tributaries, vast reservoirs in which to further store and hold the natural and flood waters of said stream; "and it is the intention and expectation of said state so to store and withhold and divert from the channel of said river all of the water thereof." That surveys for these reservoirs had been made and plans and specifications were being prepared for their construction, and the state is preparing to enter on the construction thereof. That if these reservoirs are so constructed by Colorado, vast and enormous quantities of water which would otherwise flow into the state of Kansas will be taken and held and sold and used for the irrigation of arid and nonriparian lands not now irrigated, and will be forever lost to the river and the state of Kansas, which will cause in *Kansas in said [135] valley a vast and ruinous decline in agriculture, and great diminution of the wealth and revenues of the state, and in its population and prosperity.

Complainant charged the facts to be "that it is the intention of the state of Colorado to divert absolutely all of the water that does, can, or might flow down the Arkansas river into the state of Kansas, so that all

of the water shall be used in the state of Colorado, and none whatever, either above or below the surface, that may by any possibility be utilized, shall cross the line into the state of Kansas, all to the great profit and advantage of the state of Colorado, and to the great damage and injury of the state of Kansas."

It was further stated that when the territory of Kansas was organized in 1854 it extended from its present eastern boundary to the summit of the Rocky mountains, and all of the present drainage area of the Arkansas river in Colorado was then included therein, and during all of the period from then to the organization of the state of Kansas the water of the river was wholly unappropriated, and the common law and the riparian rights herein claimed extended over the whole of the Arkansas valley and to the summits of the Rocky mountains, and had for many years prior thereto. That by reason of the prior settlement, occupation, and title of the inhabitants of Kansas upon and to the lands situated in the valley of said river, including those upon its banks, Kansas and the owners of land in the valley acquired and now have the right to the uninterrupted and unimpeded flow of all the waters of the river into and across the state of Kansas; which rights accrued prior to any of the diversions by or in Colorado, and prior to the accruing of any of the rights claimed by that state, or by persons, firms, or corporations therein now taking water from the river or its tributaries.

[136] The bill further averred that the state of Colorado and the various persons, firms, and corporations engaged in taking waters from the river and its tributaries under and in pursuance of authority granted by the state of Colorado, have by so doing wrongfully, illegally, and unlawfully diverted the water from the accustomed channel across the state of Kansas, and have *greatly damaged and irreparably injured the state of Kansas and its inhabitants. That by reason of such diversion the fertility of all the valley lands in Kansas, including those on the river banks, as well as others, has been greatly diminished, and the crops, trees, and vegetation have languished and declined, and in many places perished, and wells which should furnish water for domestic use and animals have become dry. That these damages are the proximate and necessary result of the diversion of the waters, and that such damage amounts to vast sums annually, which damages have increased year by year for the past ten years, substantially in proportion as the diversion of the waters in the state of Colorado has increased.

It was also stated that by reason of the diversion of the waters as described, during the summer season and the dry portion of the year, the bed of the river in Kansas, above the city of Wichita, becomes practically, and oftentimes wholly, dry; and because of the natural features of the territory through which the stream passes, which are set forth, the channel becomes filled up, and great damage is inflicted at

times of sudden and excessive rainfall in Kansas or sudden and excessive melting of snows in Colorado.

That the property of complainant, situated on the banks of the river, and used for the purposes of a soldiers' home, has been greatly damaged and specially injured by reason of the diversion of the water, which would otherwise flow by and underneath the said tract of land; and unless the natural and normal flow is restored the value of the property will be entirely destroyed; and that the same is true of complainant's property used for the purposes of a state industrial reformatory.

The bill further averred that a large number of irrigation canals and ditches, now wrongfully used in diverting the waters of the Arkansas river and its tributaries from their accustomed channels in Colorado, are owned and operated by domestic corporations organized for that purpose under the laws of Colorado, with limited periods of existence; and that if Colorado be not restrained from doing so, she will grant extensions of the charters now held, and also grant other and new charters to corporations organized for the purpose of unlawfully and wrongfully *diverting and using [137] said waters for irrigation purposes, all to the irreparable injury of the state of Kansas and its inhabitants.

The bill then prayed "that a decree may be entered prohibiting, enjoining, and restraining the state of Colorado from granting, issuing, or permitting to be granted or issued hereafter, any charter, license, permit, or authority to any person, firm, or corporation for the diversion of any of the waters of the Arkansas river or of any of its tributaries from their natural beds, courses, and channels within the state of Colorado, except for domestic use; and from granting to any person, firm, or corporation any right to extend or enlarge any of the canals or ditches now existing, or to construct and operate any other canals, ditches, branches, laterals, or reservoirs in addition to those heretofore constructed and now in use in said state."

"That the said state of Colorado may be prohibited, enjoined, and restrained, as a state, from itself constructing, owning, or operating, either directly or indirectly, any canal or ditch whereby the waters of said river, or any of its tributaries, shall be diverted from their natural courses and channels; and from constructing, owning, operating, or using any reservoir for the storage of the waters of said river, or any of its tributaries, for purposes of irrigation."

"That the said state of Colorado may be prohibited, enjoined, and restrained from granting to any person, firm, or corporation any extension of any charter, license, permit, or authority, of any kind or nature whatsoever, for the diversion of any of said waters from said river or its tributaries for irrigation purposes, or for the continuance of such diversion thereof after the charter, license, permit, or authority theretofore granted for that purpose shall have expired."

And for general relief.

Thereupon, October 15, 1901, the state of Colorado, by leave, filed its demurrer to the bill of complaint, assigning the following causes:

[138] "First. That this court has no jurisdiction of either the parties to or the subject-matter of this suit, because it appears on the face of said bill of complaint that the matters set forth therein do not constitute, within the meaning of the Constitution of the United States, any controversy between the state of Kansas and the state of Colorado.

"Second. Because the allegations of said bill show that the issues presented by said bill arise, if at all, between the state of Kansas and certain private corporations and certain persons in the state of Colorado who are not made parties herein, and which matters so stated, if true, do not concern the state of Colorado as a corporate body or state.

"Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals who reside in the said state of Kansas on the banks of the Arkansas river, and that although the said suit is attempted to be prosecuted for and in the name of the state of Kansas, said state is in fact loaning its name to said individuals, and is only a nominal party to said suit, and that the real parties in interest are the said private parties and persons residing in said state.

"Fourth. Because it appears from the face of said bill that the state of Kansas in her right of sovereignty is seeking to maintain this suit for the redress of the supposed wrongs of certain private citizens of said state, while under the Constitution of the United States and the laws enacted thereunder said state possesses no such sovereignty as empowers it to bring an original suit in this court for such purposes.

"Fifth. Because it appears upon the face of said bill of complaint that no property rights of the state of Kansas are in any manner affected by the matters alleged in said bill of complaint; nor is there any such property right involved in this suit as would give this court original jurisdiction of this cause.

"Sixth. Because it appears from the face of said bill of complaint that the acts complained of are not done by the state of Colorado or under its authority, but by certain private corporations and individuals against whom relief is sought, and who are not made parties herein.

[139] "Seventh. The bill is multifarious in this, to wit: that thereby the state of Kansas seeks to determine the claims of the state of Kansas as a riparian owner against the claims of the state of Colorado as an appropriator of water; the claims of the state of Kansas as a riparian owner against the separate and severable claims of numerous undisclosed Colorado appropriators of water; the separate and severable claims of various disclosed and undisclosed riparian claimants in Kansas against the claims of the state of Colorado as an appropriator of water; and
185 U. S.

the separate and severable claims of various disclosed and undisclosed riparian claimants in Kansas against the separate and severable claims of numerous undisclosed Colorado appropriators; and otherwise, as is apparent from the bill.

"Eighth. Because the acts and injuries complained of consist of the exercise of rights and the appropriation of water upon the national domain in conformity with and by virtue of divers acts of Congress in relation thereto.

"Ninth. Because the Constitution of the state of Colorado declaring public property in the waters of its natural streams, and sanctioning the right of appropriation, was enacted pursuant to national authority, and ratified thereby at the time of admission of the state into the Union.

"Tenth. Said bill of complaint is in other respects uncertain, informal, and insufficient, and does not state facts sufficient to entitle the state of Kansas to the equitable relief prayed for."

The demurrer was set down for argument, and duly argued February 24 and 25, 1902.

Mr. A. A. Godard argued the cause, and, with **Mr. J. S. West** filed a brief for complainant:

The bill alleges and shows that the state of Kansas has a direct and vital interest in the subject-matter of the proposed suit.

This suit is sought to be instituted, therefore, to protect the property of the state of Kansas, within the rule and authority of *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249, and wherein the jurisdiction of the court over an original suit in equity, such as is here proposed, is expressly and definitely affirmed.

The proposed suit may be maintained by the state of Kansas in behalf, and for the protection, of its citizens, who are riparian owners in the valley of the Arkansas river.

Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *New Jersey v. New York*, 5 Pet. 285, 8 L. ed. 127; *Cohen v. Virginia*, 6 Wheat. 364, 5 L. ed. 257.

Mr. Eugene F. Ware also argued the cause, and, with **Messrs. A. A. Godard** and **S. S. Ashbaugh**, filed a brief for complainant.

Messrs. Luther M. Goddard, Platt Rogers, and Charles S. Thomas, argued the cause, and, with **Messrs. Charles C. Post** and **Henry A. Dubbs**, filed a brief for defendant:

The bill is framed and the case so stated as to demonstrate that this court is without jurisdiction.

Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331.

The complainant attempts to invoke the jurisdiction of this court by lending its name to the prosecution of the private claims of its citizens against the state of Colorado as a state. This could not be tolerated; nor could the jurisdiction be thus invoked, even though this particular class of claims were presented in a separate bill,
843

and the legal title to the claims thus vested in the state of Kansas for the purposes of the litigation.

New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176.

In order to maintain jurisdiction, it must appear that the controversy to be determined is a controversy arising directly between the state, and not a controversy in vindication of the rights of particular individuals.

Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

The mere fact that states are named as parties does not conclude the question of jurisdiction.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The original jurisdiction of this court over "controversies between two or more states" was declared by the judiciary act of 1789 to be exclusive, as in its nature it necessarily must be.

[140] Reference to the language of the Constitution providing for its exercise, to its historical origin, to the decisions of this court in which the subject has received consideration, which was made at length in *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, demonstrates the comprehensiveness, the importance, and the gravity of this grant of power, and the sagacious foresight of those by whom it was framed. By the 1st clause of § 10 of article 1 of the Constitution it was provided that "no state shall enter into any treaty, alliance, or confederation;" and by the 3d clause that "no state shall, without the consent of the Congress, . . . keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Treaties, alliances, and confederations were thus wholly prohibited; and Judge Tucker in his Appendix to Blackstone (vol. 1, p. 310) found the distinction between them and "agreements or compacts" mentioned in the 3d clause in the fact that the former related "ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time," but agreements or compacts concerned "transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties." But Mr. Justice Story thought this an unsatisfactory exposition, and that the language of the 1st clause might be more plausibly interpreted "to apply to treaties of a political character, such as treaties of alliance for purposes of peace and war and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction or external political depend-

ence or general commercial privileges;" while compacts and agreements might be very properly applied "to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other." 2 Story, Const. §§ 1402, 1403; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

Undoubtedly, as remarked by Mr. Justice Bradley, in *Hans v. Louisiana*, 134 U. S. 1, [141] 15, 33 L. ed. 842, 847, 10 Sup. Ct. Rep. 504, 507, the Constitution made some things justiciable "which were not known as such at the common law,—such, for example, as controversies between states as to boundary lines and other questions admitting of judicial solution." And as the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the states by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.

In *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, it was alleged that an artificial channel or drain constructed by the sanitary district for purposes of sewerage, under authority derived from the state of Illinois, created a continuing nuisance dangerous to the health of the people of the state of Missouri; and the bill charged that the acts of defendants, if not restrained, would result in poisoning the water supply of the inhabitants of Missouri, and in injuriously affecting that portion of the bed of the Mississippi river lying within its territory. In disposing of a demurrer to the bill, numerous cases involving the exercise of original jurisdiction by this court were examined; and the court, speaking through Mr. Justice Shiras, said: "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court. An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state, but it must surely be conceded that if the health and comfort of the inhabitants of a state are threatened, the *state is [142] the proper party to represent and defend them. If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and,

that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering. The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state. Moreover, substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state. That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

As will be perceived, the court there ruled that the mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the state as *parens patriæ*, trustee, guardian, or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

In the case before us the state of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action, and not the action of state officers in abuse or excess of their powers.

[143] *The state of Colorado contends that, as a sovereign and independent state, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that, as the sources of the Arkansas river are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the state of Kansas the same position that foreign states occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent

states in their relations to each other; that by the law of nations the primary and absolute right of a state is self-preservation; that the improvement of her revenues, arts, agriculture, and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a state to observe the demands of comity cannot be made the subject of controversy between states; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining state; and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld.

But when one of our states complains of the infliction of such wrong or the deprivation of such rights by another state, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The states of this Union cannot make war upon each other. They cannot "grant letters of marque and reprisal." They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations, and make treaties.

As Mr. Justice Baldwin remarked in *Rhode Island v. Massachusetts*. *"[Bound[144] hand and foot by the prohibitions of the Constitution, a complaining state can neither treat, agree, or fight with its adversary, without the consent of Congress. A resort to the judicial power is the only means left for legally adjusting or persuading a state which has possession of disputed territory to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made when it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact." 12 Pet. 726, 9 L. ed. 1261.

"War," said Mr. Justice Johnson, "is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails can only derive validity from treaty stipulations." 12 Wheat. 528, 6 L. ed. 717.

The publicists suggest as just causes of war: defense; recovery of one's own; and punishment of an enemy. But, as between states of this Union, who can determine what would be a just cause of war?

Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by treaty; but if a state of this Union deprives another state of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted?

Applying the principles settled in previous cases, we have no special difficulty with the bare question whether facts might

not exist which would justify our interposition, while the manifest importance of the case and the necessity of the ascertainment of all the facts before the propositions of law can be satisfactorily dealt with lead us to the conclusion that the cause should go to issue and proofs before final decision.

The pursuit of this course, on occasion, is thus referred to by Mr. Daniell [Ch. Pl. & Pr. 4th Am. ed.] (p. 542): "The court sometimes declines to decide a doubtful question of title on demurrer, in which case the demurrer will be overruled without [145] prejudice to any question. *A demurrer may also be overruled, with liberty to the defendant to insist upon the same defense by answer, if the allegations of the bill are such that the case ought not to be decided without an answer being put in. . . . A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill and those established by the evidence may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer."

Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one state of the Union to wholly deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter; and that therefore this court, speaking broadly, has jurisdiction.

We do not pause to consider the scope of the relief which it might be possible to accord on such a bill. Doubtless the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that such appropriate decree as the facts might be found to justify could be entered, if consistent with the case made by the bill, and not inconsistent with the specific prayers in whole or in part, if that were also essential. *Taylor v. Merchants' F. Ins. Co.* 9 How. 390, 406, 13 L. ed. 187, 193; Dan. Ch. Pl. & Pr. 4th Am. ed. 380.

Advancing from the preliminary inquiry, other propositions of law are urged as fatal to relief, most of which, perhaps all, are dependent on the actual facts. The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule, and we must decline to do so.

The gravamen of the bill is that the state [146] of Colorado, acting *directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the state of Kansas and its inhabitants of all

the water heretofore accustomed to flow in the Arkansas river through its channel on the surface and through a subterranean course across the state of Kansas; that this is threatened, not only by the impounding and the use of the water at the river's source, but as it flows after reaching the river. In jury, it is averred, is being, and would be, thereby inflicted on the state of Kansas as an individual owner, and on all the inhabitants of the state, and especially on the inhabitants of that part of the state lying in the Arkansas valley. The injury is asserted to be threatened, and as being wrought, in respect of lands located on the banks of the river, lands lying on the line of a subterranean flow, and lands lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that Colorado in doing this is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

The state of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream; and while she concedes that this rule has been modified in the Western states so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other states and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common-law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

Sitting, as it were, as an international, as well as a domestic, *tribunal, we apply Fed- [147] eral law, state law, and international law, as the exigencies of the particular case may demand; and we are unwilling in this case to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas river in Kansas; whether what is described in the bill as the "underflow" is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent

of the watershed or the drainage area of the Arkansas river; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof.

The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence.

Demurrer overruled, without prejudice to any question, and leave to answer.

Mr. Justice **Gray** did not hear the argument, and took no part in the decision.

[148] *ERIE RAILROAD, *Plff. in Err.*,
v.

ALBERT L. PURDY.

Error to state court—Federal question—when sufficiently raised—decision on other grounds.

(See S. C. Reporter's ed. 148-154.)

1. No Federal question is presented by a claim in a state court that a state statute is inconsistent with the power of Congress to regulate commerce among the several states, where the judgment of the state court sustaining the validity of such enactment proceeds on the theory that the statute is intended to and does apply only to domestic transportation.
2. The final judgment of the highest court of a state is not reviewable in the Supreme Court of the United States as a decision in favor of the validity of a state statute challenged as repugnant to the Federal Constitution or as a denial of a right or immunity under such Constitution, where such question is not raised or specially set up in the trial court, and the appellate court does nothing more than decline to pass upon the Federal question because it is not raised in the trial court as required by the state practice.

[No. 171.]

Argued and Submitted March 6, 1902. Decided April 7, 1902.

IN ERROR to the Supreme Court of the State of New York to review a judgment in favor of plaintiff in an action to recover penalties under the mileage book act, affirmed by the Court of Appeals of that State. *Dismissed.*

See same case in New York Court of Appeals, 162 N. Y. 42, 48 L. R. A. 669, 56 N. E. 508.

The facts are stated in the opinion.

Mr. **Adelbert Moot** argued the cause and filed a brief for plaintiff in error:

The question whether a right or privilege,

NOTE.—On Federal jurisdiction over state courts: necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question, when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

185 U. S.

claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of the state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state.

Ncal v. Delaware, 103 U. S. 370, 26 L. ed. 567; *Mitchell v. Clark*, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312; *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687.

After the court of appeals had discussed the Federal question on the merits and determined it against the defendant in error, it should not now be held that it was not sufficiently raised for such discussion, because that court closed the discussion by suggesting a mere "doubt" as to the question being then up which it discussed and determined.

Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

All courts are presumed to know and to apply the Federal Constitution in accordance with the very oath taken by every judge of every state and national court.

Proprietors of Bridges v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429.

It is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

Where a litigant in some manner fairly claims the protection of the Constitution of the United States under its "various" provisions, and does not waive any of them, or limit any of the motions or exceptions put on the record, if the question involved is one that in its very nature goes to the heart and life of the statute, the courts should examine the question on its merits.

Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; *Shoemaker v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Armstrong v. Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965; *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

Mr. **Clarence A. Farnum** submitted the cause for defendant in error:

The allegations in the answers of the defendant corporation, that the statute in question "is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States, and of the Constitution of the state

of New York," is too indefinite under the common-law system or any Code system of pleading to tender an issue.

Purdy v. Erie R. Co. 162 N. Y. 50, 48 L. R. A. 669, 56 N. E. 508.

Having raised one Federal question only in the court below by its pleading and by its conduct of the trial, it is confined in the appellate court to the points made upon the trial.

Purdy v. Erie R. Co. 162 N. Y. 50, 48 L. R. A. 669, 56 N. E. 508; *Dodge v. Cornelius*, 168 N. Y. 242, 61 N. E. 244. See also *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506; *Messenger v. Mason*, 10 Wall. 507, 19 L. ed. 1028; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, ante, 171, 22 Sup. Ct. Rep. 120.

The Supreme Court will not consider questions not raised and passed upon in the court below, nor will the raising of one Federal question in the state court permit the consideration of other Federal questions than the one raised.

Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Messenger v. Mason*, 10 Wall. 507, 19 L. ed. 1028; *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506.

It must appear by the record that the point upon which plaintiff in error relies was made in the court below and decided against him, and that the provision of law in question was brought to the notice of the state court, and the right which he now claims asserted before the trial court.

F. G. Oxley State Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Hoyt v. Shelden*, 1 Black, 518, sub nom. *Hoyt v. Thompson*, 17 L. ed. 65.

The highest court of the state, having affirmed this judgment upon either of two grounds, namely, (1) that the act in question applied to railroad transportation wholly within the state, and was not a regulation of commerce among the states, and also (2) that the objection that the act invaded the property rights of a corporation in violation of the state or Federal Constitutions, was not available in the court of appeals because not taken below.—this court is without jurisdiction to hear the case upon the merits, and should dismiss, for the judgment may well be supported upon the ground not involving a Federal question.

Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Sceberger v. McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128.

Mr. Albert L. Purdy also filed a brief for defendant in error:

The law, as construed by the court of appeals, has reference to transportation only, wholly within the state, and such interpretation will bind this Court.

DeSaussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. 848

ed. 192, 20 Sup. Ct. Rep. 136; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *New York v. Roberts*, 171 U. S. 658, sub nom. *New York ex rel. Parke, D. & Co. v. Roberts*, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755.

A question sought to be raised here, not appearing in the record to have been set up or raised in the trial court according to the law and practice of the state, will not be heard.

Morrison v. Watson, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Chappell v. Bradshaw*, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. 632, 18 L. ed. 904; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Brown v. Massachusetts*, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757; *Tripp v. Santa Rosa Street R. Co.* 144 U. S. 126, 36 L. ed. 372, 12 Sup. Ct. Rep. 655.

No Federal question other than that raised in the supreme court of the state can be raised here. The one Federal question raised in the trial court will not help the plaintiff in error to interject another question here, not interposed there according to the state practice.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Cooley, Const. Lim.* 6th ed. 19, 20; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205.

The claim or allegation in the answer that the act in question is void because it is in violation of various other provisions of the Constitution of the United States is too indefinite to be considered.

Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; *Messenger v. Mason*, 10 Wall. 507, 19 L. ed. 1028.

Mr. Justice Harlan delivered the opinion of the court:

Twenty-one actions were brought by Purdy against the Erie Railroad Company, a corporation of New York, to recover penalties under what is known as the mileage book act of that state, being chapter 1027 of the Laws of 1895, which took effect June 15th, 1895, as amended by chapter 835 of the Laws of 1896, which took effect May 22d, 1896.

The complaint and answer in each case were the same.

Each answer alleged "upon information and belief that the *said act, known as [149] chapter 835 of the Laws of 1896, is unconstitutional and void because it is a violation of the provisions of the Constitution of the United States, which commit to Congress the sole power to regulate commerce between the several states; and that it is unconstitutional
185 U. S.

tional and void because it is in violation of various other provisions of the Constitution of the United States and of the Constitution of the state of New York."

This was the only reference, special or general, in the answers, to the Constitution of the United States.

The twenty-one actions were consolidated into one action, subject to the plaintiff's right to recover in each one as if they had been separately tried.

At the conclusion of the evidence in behalf of the plaintiff, the railroad company moved for a nonsuit in each action upon various grounds, the only one that can be regarded as specially setting up or claiming a Federal right or immunity being the fifth, which stated that if the state legislation under which the defendant sought to recover penalties was intended to apply to the railway lines of defendant, the acts of the legislature were void "because they undertake to interfere with or regulate commerce among the states and the acts of Congress in such case made and provided."

It was not assigned as a ground of nonsuit that the statute in question was in violation "of various other provisions of the Constitution of the United States." Apparently that ground of defense was abandoned at the trial.

The trial court granted the motion for nonsuit in the last eleven cases, and directed a verdict in favor of the plaintiff for \$50 each in the first ten cases, and ordered that the exceptions of each party be heard in the appellate division in the first instance, all proceedings in the meantime being stayed.

In the appellate division the exceptions of the railroad company were overruled and judgment was ordered for the plaintiff, with costs, and that judgment was affirmed in the court of appeals of New York. *Purdy v. Erie R. Co.* 162 N. Y. 42, 50, 51, 48 L. R. A. 669, 672, 56 N. E. 508, 510.

[150] That court, speaking by Judge Cullen, said: "At the opening of the trial the defendant moved to dismiss the complaint because *it failed to state facts sufficient to constitute a cause of action for a penalty. No particular ground for the attack on the complaint is stated. At the close of the evidence the defendant renewed its motion to dismiss the complaint, but the sole ground on which it assailed the validity of the statute itself was that it constituted an interference with the regulation of interstate commerce, and hence was in violation of the Constitution of the United States. The objection that the statute was an invasion of the defendant's property rights, and contravened for that reason either the Constitution of the United States or the Constitution of this state, does not anywhere appear in the record, and the rule seems settled that such an objection, to be available here, must have been raised in the courts below. *Vose v. Cockcroft*, 44 N. Y. 415; *Delaney v. Brett*, 51 N. Y. 78."

Again: "The objection that the statutes of 1895 and 1896 are regulations of interstate commerce, and hence in conflict with the Federal Constitution, is satisfactorily
185 U. S.

dealt with in the very clear opinion of Mr. Justice Merwin, of the appellate division, delivered in the *Beardsley Case*, 15 App. Div. 251, 44 N. Y. Supp. 175. That such a statute, if limited in its scope to transportation wholly within the limits of the state, is a valid exercise of state authority, is settled by the decision of the Supreme Court of the United States in *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, where it was said: 'It (the state) may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state.' This doctrine has never been overruled or limited; on the contrary, it is fully recognized in the later cases. *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Western U. Tele. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465. In *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, a statute of Illinois regulating fares was held void solely on the ground that the act, as interpreted by the supreme court of the state, included cases of transportation partly within and partly without the state. It was there stated: 'If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation *through or into other states, there does not [151] seem to be any difficulty in holding it to be valid.' There is nothing in the language of the statutes now before us that shows they were intended to affect any but intrastate transportation; but if their interpretation be doubtful 'the courts must so construe a statute as to bring it within the constitutional limits, if it is susceptible of such construction.' *Sage v. Brooklyn*, 89 N. Y. 189; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1, 14 N. E. 815. Within this principle, these statutes must be construed as applying to transportation wholly within the state, and so construed they do not infringe upon the Constitution of the United States."

In a petition for the allowance of a writ of error from this court, the railroad company for the first time expressly referred to the 14th Amendment of the Constitution of the United States as affording it protection against the statute of New York. The same ground was repeated in the assignments of error for this court.

We are asked to determine whether the judgment of the court of appeals of New York affirming the judgment of the supreme court of the state did not deny to the railroad company a right or immunity secured to it by that clause of the 14th Amendment declaring that no state shall deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

This question cannot be determined by this court unless it has jurisdiction to review such final judgment of the court of appeals of the state.

The statute defining the authority of this court to re-examine the final judgment of the highest court of a state gives it jurisdiction "where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially *set up or claimed by either party under such Constitution, treaty, statute, commission, or authority." Rev. Stat. § 709.

[152]

By its answer and its motion for a nonsuit at the close of the plaintiff's evidence, the defendant did distinctly claim that the statute of New York in question was inconsistent with the power of Congress to regulate commerce among the several states. But the court of appeals held that the statute was intended to apply and applied only to domestic transportation. We accept this view as to the scope and operation of the statute, and assume that it does not require the railroad company to issue mileage tickets covering the transportation of passengers from one state to another state. So that no Federal question arising under the commerce clause of the Constitution is here for determination.

But the defendant insists that the general allegation in each of its answers; namely, that the statute, besides being void as a regulation of interstate commerce, was in violation "of various other provisions" of the Constitution of the United States, was sufficient to have enabled him, at the trial, to insist that the statute upon which the actions were based was repugnant to the 14th Amendment of the Federal Constitution. If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for nonsuit, or in some other way, distinctly claimed that the statute on which the actions were based was inconsistent with that Amendment, then it would have been the duty of the court of appeals to determine the question so raised, unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground of local or general law adequate to dispose of the case. We state the matter in this way because, as said in *Carter v. Texas*, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687, 689, "the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state. *Neal v. Delaware*, 103 U. S. 370, 396, 397, 26 L. ed. 567, 574; [153] *Mitchell v. Clark*, 110 U. S. 633, 645, 28 L. ed. 279, 283, 4 Sup. Ct. Rep. 170, 312; *Boyd* 850

v. Nebraska ex rel. Thayer, 143 U. S. 135, 180, 36 L. ed. 103, 116, 12 Sup. Ct. Rep. 375."

So, if the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute, or authority exercised under the United States, this court could review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court.

In the present case the statute was not drawn in question in the trial court as invalid under any clause of the Constitution except the one relating to commerce. It was not even asserted there to be invalid under "various other provisions" of that instrument. The statements in the motion for nonsuit, that "the cause of action alleged in such action has not been proved," and that "no cause of action has been proved in either of the actions consolidated in the action on trial," were too vague and general to indicate that the defendant claimed anything under that Amendment. The record before us is consistent with the idea that the defendant did not claim, in the trial court, in any form, generally or specially, that the statute deprived it of its property without due process of law, or denied to it the equal protection of the laws.

We therefore cannot hold that the court of appeals, by its final judgment, sustained the validity under the Constitution of the United States of the statute drawn in question by the defendant, or that it denied any right or immunity now claimed by it under the 14th Amendment; for that court simply declined to consider any Federal question except that made under the commerce clause of the Federal Constitution, assigning as the reason therefor that no point was made at the trial in respect of any other clause of that instrument. In so holding the court followed the settled rule of practice in that state. On that practice alone was based its refusal to consider a Federal question not brought to the attention of the trial court. *Vose v. Cockerolt*, 44 N. Y. 415; *Delancy v. Brett*, 51 N. Y. 78.

*Now, where a party drawing in question [154] in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a state denied to him a right or immunity under the Constitution of the United States, did not raise such question or specially set up or claim such right or immunity in the trial court, this court cannot review such final judgment, and hold that the state enactment was unconstitutional, or that the right or immunity so claimed had been *denied* by the highest court of the state, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the state practice. *Spies v. Illinois*, 123 U. S. 131, 181, *sub nom. Ex parte Spies*, 31 L. ed. 80, 91, 8 Sup. Ct. 185 U. S.

Rep. 21; *Miller v. Texas*, 153 U. S. 535, 538, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Morrison v. Watson*, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 Sup. Ct. Rep. 995. Of course, if upon examining the record this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, then our jurisdiction would not have been defeated by the mere failure of the highest court of the state to dispose of the question so raised, or to pass upon the right or immunity so claimed.

It results from what has been said that no Federal question is sufficiently presented by the record for our determination; consequently, *the writ of error must be dismissed* for want of jurisdiction in this court.

It is so ordered.

Mr. Justice **Gray** did not hear the argument or take part in the decision of this case.

[155] *JANE C. HITZ, Appt.,
v.

JOHN STORY JENKS, William Henry Jenks, Rachel Jenks Randolph, Sarah L. Crane, and Richard W. Tyler.

(See S. C. Reporter's ed. 155-171.)

Receivers—sale by trustee of property in his possession as receiver—effect of pending appeal with supersedeas—leave of court.

1. A sale of real property, without special leave of court, by the trustee in a private deed of trust, while such property was in his possession as receiver in a case to which he was a party and which had at the time been removed to the Supreme Court of the United States by appeal with supersedeas, conferred no title on the beneficiary in the deed of trust, for whose benefit the purchase was made, and who was also a party to the suit, as against a party who by cross bill dismissed by the decree appealed from was seeking to have such deed set aside as void as to her.
2. No authority was conferred upon a trustee in a private deed of trust to sell the property while in his possession as receiver after an appeal from a decree dissolving an injunction restraining any sale by the trustee and dismissing a cross bill to have such deed set aside had been perfected and a supersedeas bond executed and approved, by the provision of such decree appointing the trustee receiver with power, "until a sale shall be made under the said deed of trust," to take and hold possession of the property for certain designated purposes, where neither such receiver nor the beneficiary in the trust deed by the pleadings in the cause asked for any such direction or authority from the court.

[No. 99.]

Argued January 14, 15, 1902. Decided April 7, 1902.

A PPEAL from the Court of Appeals of the District of Columbia to review a decree affirming a decree of the Supreme Court of 185 U. S.

the District which dismissed a bill to restrain a sale under a trust deed. *Reversed.* See same case below, 16 App. D. C. 30.

The facts are stated in the opinion.

Messrs. A. S. Worthington and **Wayne MacVeagh** argued the cause, and, with *Mr. J. S. Flannery*, filed a brief for appellant.

Messrs. Walter D. Davidge, Jr., and **J. J. Darlington** argued the cause and filed a brief for appellees.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **Harlan** delivered the opinion of the court:

The property involved in this suit is certain improved real estate on the northeast corner of Ninth and G streets in the city of Washington, of which the appellant, who was the plaintiff below, asserts ownership subject to the lien created by a deed of trust to which reference will be presently made; but of which property the heirs at law and devisees of the late William P. Jenks also assert ownership in virtue of a conveyance to him by the purchaser at a sale had under that deed by the trustee therein named while he held the property as receiver,—such purchase having been in fact for the benefit of Jenks, in whose favor the deed of trust was executed.

*This land had been inherited by Mrs. Hitz [156] from her father after her marriage to John Hitz in 1856. There were several children of that marriage, and, as stated by the court of appeals, the husband became entitled to an inchoate tenancy by the curtesy in the wife's estate, which remained unaffected by the married woman's act of 1869.

The controlling question presented on this appeal is whether the sale under the deed of trust stands in the way of the redemption of the property by Mrs. Hitz upon her paying the debt secured by the above deed of trust.

The facts necessary to be stated in order to bring out clearly the views of the respective parties touching that question are as follows:

By a deed of trust dated January 26th, 1876, John Hitz and his wife, Jane C. Hitz, conveyed this real estate to R. B. Donaldson and Charles E. Prentiss, trustees, to secure the payment of two promissory notes of \$10,000 each, executed January 5th, 1876, by William R. Chipley to E. P. Halstead, and by the latter indorsed to the German-American Savings Bank.

Subsequently the above notes passed to and became the property of the German-American National Bank, which succeeded the German-American Savings Bank.

On the 16th day of June, 1877 (the deed to Donaldson and Prentiss having been released of record), Hitz and wife by deed conveyed the property to Sarah L. Crane, who, on June 18th, 1877, conveyed to Richard W. Tyler as trustee, to secure the payment of a promissory note for \$20,000 executed by the grantor, and made payable to John Hitz or order three years after date,

with interest at the rate of 8 per cent per annum until paid; which note was indorsed by the payee to William P. Jenks. Sarah L. Crane had no interest in the transaction with Jenks, the real consideration for the note being a loan of money by Jenks to the German-American National Bank, of which John Hitz was president and Charles E. Prentiss, a brother of Sarah L. Crane, was cashier. The title was put in her name in order that she might execute the above note to Jenks and make a deed of trust to secure its payment, which should be a first lien on the property.

[157] *The deed to Tyler as trustee authorized him, upon default in the payment of the note or any quarterly instalment of interest thereon at the rate aforesaid, or of any sums advanced for taxes and insurance when demanded, or of any cost, charge, or commission, to sell the land and premises, or as much thereof as might be necessary, at public auction to the highest bidder, upon such terms and at such time and place as the trustee deemed best for the interest of the parties concerned.

In October, 1878, the German-American National Bank failed, and, by appointment of the Comptroller of the Currency, Benjamin U. Keyser became its receiver. The latter (having first procured from Sarah L. Crane a conveyance of such interest as she had after satisfying the deed of trust to Tyler) obtained possession of the property from Hitz, and proceeded, in his capacity as receiver of the bank, to collect the rents.

Default having occurred in the payment of taxes and interest on the Jenks note, Tyler as trustee gave notice by publication in a newspaper that he would sell the property at public auction on the 20th day of January, 1879.

Thereupon, on the 10th day of January, 1879, Keyser as receiver commenced his suit in equity in the supreme court of the District of Columbia, against John Hitz, Jane C. Hitz, Sarah L. Crane, William P. Jenks, Richard W. Tyler, E. P. Halstead, R. P. Donaldson, Charles E. Prentiss, and William R. Chipley. Part of the relief asked was that pending the cause the defendants Jenks and Tyler and each of them be restrained from advertising and selling the property in question, or in any manner interfering with it.

On the 21st of February, 1879, an order was entered restraining the sale by Tyler.

All of the defendants filed answers, Jenks and Tyler resisting the relief asked. Sarah L. Crane by cross bill asked that the conveyance from her to Keyser be vacated. Mrs. Hitz by cross bill *claimed the property as hers*, and prayed, upon various grounds, *for the cancellation of the deed to Sarah L. Crane, as well as the deed of the latter to Tyler*, and for an accounting in respect of rents and profits. She also charged that there had been *a fraudulent alteration of*

[158] *the deed from her to *Sarah L. Crane*. Answers to the various cross bills were also filed.

The cause having been heard at special

term, the court, on the 28th of November, 1881, rendered a decree adjudging that the two Chipley notes of \$10,000 each had been paid, that the deed of release by Donaldson and Prentiss was a valid instrument; that the deed by Hitz and wife to Crane was null and void as to Mrs. Hitz; that the deed to Tyler, trustee, was valid as to any interest in the property which John Hitz had in virtue of his marital relation, but was null and void as to Mrs. Hitz; and that the deed to Keyser as receiver was null and void from its delivery.

That decree also provided that Keyser, receiver, be directed to account to the court for whatever sums of money he might have collected arising out of the property in question after the same came into his possession, and that he immediately surrender possession "to Richard W. Tyler, *who is hereby appointed receiver*, to take possession of and rent and manage the same, and to collect the rents and profits thereof, and apply the same, so far as may be necessary, to the payment of taxes, insurance, and other expenses needed to keep the said property in tenantable condition until the further order of the court."

Keyser, Mrs. Hitz, and Jenks severally appealed to the general term, and their appeals were allowed.

On the 5th day of December, 1881, Tyler gave a bond as receiver of the court in the penalty of \$5,000. But he did not take immediate possession.

On the 15th day of December, 1881, an order was made at special term that Keyser bring the rents and profits of the property accruing after December 1st, 1881, from month to month, into court, and give bond as receiver of the German-American National Bank in the penalty of \$5,000, and the execution of the decree so far as it transferred the property to the receiver therein named was stayed until final decision. Keyser executed, December 16th, 1881, the required bond.

On the 11th day of December, 1883, the general term, upon final hearing, rendered a decree in which, among other things, it was stated that the court was of opinion "that the complainant, *Benjamin U. Keyser, receiver, as the holder of the notes made by William R. Chipley, is not entitled to any relief, and that the deed of conveyance, dated the 16th of June, 1877, made by Jane C. Hitz and John Hitz to Sarah L. Crane, in fee simple, conveyed as well the right, title, interest, and estate of the said Jane C. Hitz as of the said John Hitz in and to the real estate and premises in said deed mentioned and referred to, and that there is no equity shown in this cause to prevent or delay the execution [or] enforcement of the deed of trust dated the 18th day of June, 1877, whereby the said Sarah L. Crane conveyed the said real estate and premises to Richard W. Tyler in trust to secure the payment of the debt to William P. Jenks, with interest and costs, as in and by the said deed of trust mentioned and provided." It was therefore adjudged that "the injunction granted on

the 21st of February, 1879, enjoining the sale by the said Richard W. Tyler of the said real estate and premises conveyed to him in trust [be], and the same is hereby, dissolved, and that the decree in special term, so far as the same holds that the said deed of conveyance from Jane C. Hitz and John Hitz did not convey the right, title, interest, and estate of the said Jane C. Hitz in and to the said real estate and premises, and so far as the same retains the said injunction in respect of such right, title, interest, and estate of the said Jane C. Hitz, be, and the same is hereby, reversed."

The court adjudged that the deed from Crane to Keyser was void, and directed that Keyser, as receiver, account for the rents and profits received or which should have been received by him before and after the decree in special term, the cause to be retained for the purposes of such accounting.

The decree of the general term also provided:

"Fourth. That the order passed in special term on the 15th of December, 1881, authorizing the collection of said rents and profits by the complainant, be, and the same is hereby, revoked, and that the said Richard W. Tyler be, and he is hereby, appointed receiver, with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate and premises, and to rent and manage the same, and to collect the rents and profits and apply the same to the payments of the taxes, insurance, and any proper expenses; and it shall be the duty of the said receiver, after such application, to pay from time to time the said rents and profits into court, and from time to time to make report to the court of the manner in which he has discharged his trust; and before entering upon the performance of his office as receiver the said Richard W. Tyler shall give bond in the penal sum of \$5,000, and with a surety or sureties to be approved by this court or one of the justices thereof, conditioned for the faithful discharge of the trust hereby reposed in him."

"Seventh. That this decree is without prejudice to the right of any party entitled to the reversion of the said real estate and premises, or any interest in such reversion, to redeem or to make claim, as such party may be advised, to any balance or portion thereof which, upon a sale under the said deed of trust and the satisfaction of the debt secured thereby, with interest and costs, and of the expenses of sale, may remain in the hands of the trustee."

"Eighth. That, save so far as this cause is retained, as above mentioned and decreed, the bill of the complainant, with the amendment and supplement thereto, and the cross bill of Jane C. Hitz, with the amendment thereto, be, and the same are hereby, dismissed."

Mrs. Hitz appealed from the above decree to this court. The appeal was allowed, and such allowance was recited in the decree. On December 31st, 1883, Mrs. Hitz executed

and the court approved a supersedeas bond in the penalty of \$3,000.

In January, 1884, Keyser, in conformity with the decree of the general term, surrendered possession of the property to Tyler, who thereafter held it as receiver appointed by the court. But notwithstanding the allowance of Mrs. Hitz's appeal and the approval of the supersedeas bond executed by her, Tyler, upon his own motion, or by direction of Jenks, and in his capacity only as trustee under the Crane deed, published, on March 3d, 1884, a notice in a newspaper that he would, on the 26th day of March, 1884, sell for cash the property in question, together with the improvements thereon, by virtue of the deed of trust executed to him June 18th, 1877. The notice did not mention the fact that the property was in Tyler's hands as receiver appointed by the court. But he was immediately notified in writing by the attorney of Mrs. Hitz of the fact that she had executed, and that the court in December, 1883, had approved, her supersedeas bond. Tyler ignored that notice and sold the property at public auction on the day named to one Seth Caldwell for the sum of \$29,200,—the latter, it is conceded, making the purchase in behalf of Jenks. On the next day Tyler executed a conveyance to Caldwell, who on April 9th, 1884, conveyed to Jenks. The proceeds of the sale lacked upwards of \$4,000 of discharging the debt due to Jenks.

It should be stated that after the cause was removed to this court by appeal an accounting was had below as to the rents and profits collected or which should have been collected by Tyler as receiver; and on July 13th, 1885, a claim of Mrs. Hitz was disallowed, and the money in the registry of the court was ordered to be paid to Tyler to be applied by him in discharge of taxes and assessments accruing prior to January 1st, 1884. From that order Mrs. Hitz also appealed and executed a bond for costs.

The two appeals were heard in this court, and each decree or order appealed from was affirmed November 14th, 1887. *Hitz v. Jenks*, 123 U. S. 297, 31 L. ed. 156, 8 Sup. Ct. Rep. 143. Pending the cause here William P. Jenks died, and, the record states, John Story Jenks, William Henry Jenks, and Evan Randolph, executors, were made appellees.

The present suit was brought by Mrs. Hitz on the 6th day of November, 1890, the defendants being the sole heirs at law and devisees of Jenks, and Richard W. Tyler, Sarah L. Crane, and Enoch Totten. Its object was to have the sale to Caldwell and the conveyance by him to Jenks set aside and annulled. It is not necessary, in view of the grounds upon which we will dispose of the cause, to set forth all the allegations of the bill. It is sufficient to say that it asked that the sale be set aside for the following reasons:

"1. The property was in the possession and custody of a receiver appointed by the court to take and keep possession thereof and to collect the rents, and an approved

supersedeas bond in due form of law had been given on her appeal to the Supreme Court of the United States from the decree of the general term, and all proceedings were stopped, and no action could be legally taken under said decree while said appeal remained pending.

"2. Said sale was void because the terms of sale were unreasonable; because there were no bids, the bidders there, if any, having been discouraged from bidding; because the pretended sale was made pending an appeal in the cause to the Supreme Court of the United States; because it was given out, stated, and understood at the time of sale that it was intended to make the sale in the face of said appeal for the purpose only of transferring the title to the creditors; because the price bid and accepted at said sale was so grossly inadequate as to amount to a fraud upon the complainant; and because said pretended sale was conceived and carried through solely in the interest of the creditor, and in total disregard and in violation of the rights of the complainant as the owner of the equity of redemption. She therefore submits to the court that said pretended sale should be set aside, and that she ought to be allowed to redeem said property. She is willing and hereby offers to pay for the said heirs at law of said Jenks whatsoever sum may be found justly due to them for principal and interest on the said loan, and also for all expenditures in and upon said property, after charging them with the rents actually received, a fair accounting to be had under the direction of this court to ascertain the true balance due."

The relief prayed for was that the plaintiff be decreed to be the owner of the above property, *subject to the debt* to secure the payment of which the deed to Tyler as trustee was given; that the deed from Tyler to Caldwell be declared void, and that she be allowed to redeem the property *by paying to the heirs of Jenks what might be found due upon a proper accounting in reference to the property*; that Tyler be held chargeable as receiver, and that he be compelled to account for the rents that had been or should have been collected by him; that the heirs of Jenks be restrained from selling or encumbering the property; *that a receiver be appointed to take charge of it and to collect the rents; and that the plaintiff might have such other and further relief as was just and equitable.

The answers were such as to meet all the material issues made by the bill. Upon final hearing the bill was dismissed with costs, and that decree was affirmed in the court of appeals of the District.

We have seen that the relief asked by Mrs. Hitz in her cross bill in the original suit was a decree declaring that the deed to Donaldson and Prentiss, the deed from herself and husband to Sarah L. Crane, the deed from the latter to Tyler as trustee, and the deed from Sarah L. Crane to Keyser as receiver were null and void as to her. She asked to be put in possession of the property, and that it might be conveyed to trust-

tees for her sole and separate benefit, so that it could not be interfered with by her husband or his creditors. We have also seen that the special term declared void as to Mrs. Hitz the deed to Sarah L. Crane, as well as the deed to Tyler, trustee, and the deed to Keyser as receiver. The general term reversed that decree, dissolved the injunction restraining Tyler from selling the property under the trust deed, and dismissed the suit. But Mrs. Hitz appealed to this court, and the decree of the general term reciting the allowance of her appeal was superseded.

It is now said that the appeal from the special to the general term in the *Keyser Case* was only a step in the progress of the cause during its pendency in the same court, and that the decree of the general term took the place of the decree and orders in the special term, and was the final decision in the cause; consequently, it is argued, an appeal to this court from the decree of the general term, with supersedeas, could not have the effect to reinstate or revive the decree of the special term, particularly that part of it enjoining Tyler from selling under the trust deed. Treating the decree of the general term as the final decision in the original suit, and the only one that could have been reviewed on the appeal in that cause to this court, it is further contended that such decree, although appealed from, was not in law superseded, so far as it dissolved the injunction,—no special order having been made by the general *term or by this court staying [164] the execution of that part of the decree pending the cause here. In other words,—and such was the holding of the court of appeals,—the force of the decree dissolving the injunction was not at all affected by the appeal with supersedeas.

In the view we take of the case, it is unnecessary to discuss these questions, and it may be assumed for the purposes of the present examination that the positions just referred to are correct. But does it follow that the decree of the general term in the *Keyser Case* was not superseded so far as it ordered the dismissal of Mrs. Hitz's cross bill with costs, and declared that she was not entitled to have the deed of her husband and herself to Sarah L. Crane, as well as the deed to Tyler, trustee, annulled and set aside, so far as her interests in the property were concerned? We think not. The mere dissolution of the injunction did not conclusively determine the merits of the cause as disclosed by the pleadings. Notwithstanding such dissolution, the way was open for Mrs. Hitz, by her appeal in the original cause, to obtain a decision by this court as to the validity of the deed from herself and husband to Crane, and of the deed from Crane to Tyler, trustee. If this court had adjudged, upon that appeal, that those deeds were void as to Mrs. Hitz, and had remanded the cause for further proceedings, can it be doubted that the court below could have granted the relief asked in her cross bill by setting aside, not only the above deeds, but the sale made by Tyler as trustee under the

deed from Crane to him? If the order dissolving the injunction was not affected by the appeal with supersedeas, and if a stranger to the suit had purchased the property at the sale by Tyler pending the *Keyser Case* here, a different question would have been presented. But all difficulty on that ground is avoided by the fact that the purchase was in fact by the agent and representative of Jenks and for his benefit. As between the plaintiff and Jenks, the title to the property was bound from the filing of the bill. By the pleadings in the cause the parties had joined issue as to the validity of the deed to Tyler, trustee, and as to the right of Jenks to have the property sold under that deed. Jenks and Tyler, being parties to the cause, could not avoid the [165] final determination *of that issue in this court by any direction from the former to Tyler to sell the property under the deed of trust, and by becoming the purchaser through an agent.

We have made these observations for the purpose of showing that the mere dissolution of the injunction by the general term and the subsequent sale at public auction under the trust deed by Tyler—whether acting upon his own motion or by direction of Jenks is immaterial—do not preclude an inquiry in the present suit as to the validity of the sale made by Tyler in his capacity as trustee, pending the *Keyser Cause* here upon appeal by Mrs. Hitz with supersedeas. This question will now be examined.

Tyler, as trustee under the Crane deed, advertised and sold the property while in his possession as receiver appointed by the court. This was done by him after the removal of the cause to this court, and without any special order of court allowing him to take that course. As receiver he held the property for the court and for the benefit of all the parties asserting an interest in it, including Mrs. Hitz. While in his hands as receiver the property was in the custody of the law. As a party to the cause he, as well as Jenks, whom he represented as trustee, knew that Mrs. Hitz by her cross bill sought to have the deed under which he proceeded set aside as void. What he did as trustee tended to defeat the rendition here of any effective decree in favor of Mrs. Hitz, even if this court, upon her appeal, had directed such a decree to be entered. That this court affirmed the decree appealed from did not change the fact that the title to property in the custody of the law, by a receiver, was attempted to be changed by that receiver, acting without special leave of court and under a private deed of trust, the validity of which was in issue in the very case in which the receiver was appointed. If this court had decided that Mrs. Hitz was entitled on her cross bill to have the deed made by herself and husband to Crane, and the deed by the latter to Tyler, set aside, and had remanded the cause with directions to enter a decree to that effect, the court below would have been confronted with the fact that its own receiver, in his capacity as private trustee, and without leave or direction to that [185 U. S.]

end, had sold the property at public auction for cash to the party in whose interest he had been made trustee, *and who was the [166] principal adversary of Mrs. Hitz, one of the parties for whom he held possession as receiver. Let us look at some of the authorities on this general subject.

In *Wiswall v. Sampson*, 14 How. 52, 65, 14 L. ed. 322, 328, it was said: "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel v. Smith*, 9 Ves. Jr. 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment or to permit him to be examined *pro interesse suo*. *Brooks v. Greathed*, 1 Jac. & W. 176; 3 Dan. Ch. Pl. & Pr. 1984. And the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment or to be examined *pro interesse suo*; and this though their right to the possession is clear. 1 Cox, Ch. Cas. 422; 6 Ves. Jr. 287. The proper course to be pursued, says Mr. Daniel in his valuable treatise on Pleading and Practice in Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such examination may be obtained by a party interested, as well where the property consists of goods and chattels, or personalty, as where it is real estate. And the mode of proceeding is the same in the case of the receiver. 6 Ves. Jr. 287; 9 Ves. Jr. 336; 1 Jac. & W. 178; 3 Dan. Ch. Pl. & Pr. 1984."

Again: "The settled rule also appears to be that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court pending the litigation, by the appointment of a receiver, or by sequestration, the title is bound *from the filing of the bill; and any [167] purchaser *pendente lite*, even if for a valuable consideration, comes in at his peril. 3 Swanst. 278, note, 298, note; 2 Dan. Ch. Pl. & Pr. 1267; 6 Ves. Jr. 287; 9 Ves. Jr. 336; 1 Jac. & W. 178; Dan. Ch. Pl. & Pr. 1984."

It was contended in that case that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale therefore, in such a case, should be up-

held. But this court, in words that are strikingly applicable in the present case, thus disposed of that contention: "Conceding [that] the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. *The property is a fund in court, to abide the event of the litigation*, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless." It is true, in administering the fund, the court will take care that the rights of prior liens or encumbrances shall not be destroyed, and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?

But it is not necessary to go this length in the case before us, as it is sufficient to say that the sale under the judgment, pending the equity suit, and while the court was in possession of the estate, without the leave of the court, was illegal and void. We do not doubt but that it would be competent for the court, in case the judgment creditor holding the prior lien had not come in and claimed his interest in the equity suit, to decree a sale in the final disposition of the fund subject to his judgment. The purchaser would then be bound to pay it off.

[168]*But this disposition of the legal prior encumbrance is a very different matter, and comes to a very different result from that of permitting the enforcement of it, *pendente lite*, without the leave of the court. The rights of the several claimants to the estate or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title or charges to which it may be subject."

So, in *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135, which was the case of a sale of property under process from a state court while it was in the actual possession of a district court of the United States. When the sale took place, the property had passed out of the possession of the Federal court, and there was no actual disturbance of such possession. Nevertheless, this court held the sale to be void, under the doctrine of *Wiswell v. Sampson*, saying: "The same conclusion must prevail here; for, although the sale under the judgments in the state court was not made until after the property had passed from the possession of the district court by delivery to the purchaser at the sale under the decree, yet the initial step on

which the sheriff's sale depended—the commencement of the proceedings to enforce the mechanic's lien, asserting the jurisdiction and control of the state court over the property sold—took place when that property was in the exclusive custody and control of the district court, and by reason of its prosecution to a sale was an invasion of the jurisdiction of that court. No stress is laid on the fact that notice of the proceeding, by affixing a copy of the summons upon the building, which was required by the statute, could only be made by an actual entry by the sheriff upon the property, to that extent disturbing the possession of the marshal, because the same result, in our opinion, would have followed if no such notice had been required or given. The substantial violation of the jurisdiction of the district court consisted in the control over the property in its possession, assumed and asserted, in commencing the proceedings to enforce against it the lien claimed by the plaintiffs in those actions, prosecuting them to judgment, and consummating them by a sale. The principle applied in *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322, must be regarded as firmly established in the decisions of this court. It *has been often ap-[169] proved and confirmed. *Peale v. Phipps*, 14 How. 368, 14 L. ed. 459; *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470; *Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007; *Pulliam v. Osborne*, 17 How. 471, 15 L. ed. 154; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *People's Bank v. Calhoun*, 102 U. S. 256, sub nom. *People's Bank v. Winslow*, 26 L. ed. 101; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355."

We are not aware of any decision of this court modifying the rule laid down in these cases.

To the same effect are *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65; *Porter v. Kingman*, 126 Mass. 141; *Dugger v. Collins*, 69 Ala. 324; *Thompson v. McCleary*, 159 Pa. 191, 28 Atl. 254; *Ellis v. Vernon Ice, Light & W. Co.* 86 Tex. 109, 23 S. W. 858; *High, Receivers*, 3d ed. 141; *Kerr, Receivers*, 2d ed. 177.

In view of what has been said in the adjudged cases, it is clear that as between the parties to the original cause the title to the real estate in question was bound from the filing of the cross bill of Mrs. Hitz, and that her appeal, with supersedeas, from the decree of the general term, preserved her right to have this court determine the whole cause upon the merits, as from the commencement of her suit and as between her and the parties hostile to her claim. It is also clear, under the authorities, that if Tyler, while holding as receiver, had, in a separate suit against Sarah L. Crane, obtained a decree for its sale under the deed of trust, no title would have been acquired by the purchaser at such a sale. Still less could any title be acquired under a sale at public auction by Tyler acting in his capacity as private trustee,—the property being at the time in his

possession as receiver in another cause to which he was a party, and which had, at the time, been removed to this court by appeal with supersedeas. As receiver he held the property for Mrs. Hitz, as well as for Jenks, and he could not throw off the responsibility attaching to him in that capacity, and act, pending the appeal, simply as a private trustee under the deed from Sarah L. Crane.

[170] But it is said that the decree of the general term must be construed as authorizing Tyler as trustee, in his discretion, to sell the property while in his possession as receiver after the appeal from that decree by Mrs. Hitz had been perfected and *a supersedeas bond executed and approved. A complete answer to this suggestion is that Tyler sought no such relief at the hands of the court. He asked no affirmative relief. He only desired that the court should not restrain him by injunction from acting under the deed of trust.

The words in the decree, "and he [Tyler] is hereby appointed receiver with power, until a sale shall be made under the said deed of trust, to take and hold possession of said real estate and premises, and to rent and manage the same, and to collect the rents and profits and apply the same to the payment of taxes, insurance, and any proper expenses," did not confer any direct authority on Tyler as trustee to sell the property.

The court, having recited in the decree the allowance to Mrs. Hitz of an appeal, knew that such allowance removed the whole cause to this court (*Ridings v. Johnson*, 128 U. S. 212, 218, 32 L. ed. 401, 403, 9 Sup. Ct. Rep. 72; *United States v. Rio Grande Dam & Irrig. Co.* 184 U. S. 416, ante, p. 619, 22 Sup. Ct. Rep. 428), and that this court could determine, at least as between the parties, whether the deed of trust to Tyler was a valid instrument so far as it affected the rights of Mrs. Hitz. It knew that one of the questions to be determined upon her appeal was as to Tyler's right to proceed under that deed. We should not, therefore, interpret the words referred to as intended to authorize, much less direct, Tyler, the receiver for all the parties and the representative of the court, to proceed in his private capacity as trustee for one of the parties to sell the property outright, without any special order or direction to that effect. Neither Tyler nor Jenks, by their pleadings, asked for any such direction or authority from the court. The words "until a sale shall be made under said deed of trust," reasonably interpreted, meant no more than that the power of Tyler as receiver to take and hold possession of the property for the purposes designated should continue until there had been such a sale under the deed of trust as could properly and legally be made, and such as would give the purchaser a good title. By dissolving the injunction—which was a matter of judicial discretion—the court, in effect, declared nothing more than that it would not, by injunction, restrain the trustee from doing what he might rightfully do under the deed to him. It

185 U. S. U. S., Book 46.

did not, we must assume, *intend to direct [171] or authorize a sale by the trustee, whereby the right of Mrs. Hitz to have a final determination, upon her appeal in the original cause, as to the binding force, as between the parties, of the deeds purporting to pass her interest in the property, would be overreached or defeated.

Other questions were discussed at the bar, but they do not require to be specially noticed.

In our judgment it must be held: (1) That the deeds which Mrs. Hitz sought by her cross bill to have set aside are to be deemed valid and enforceable instruments, it having been so adjudged in *Hitz v. Jenks*, 123 U. S. 297, 31 L. ed. 156, 8 Sup. Ct. Rep. 143; (2) that the sale by Tyler as trustee, on the 26th day of March, 1884, while holding possession of the property as receiver, and when the suit to which he was a party was pending here upon appeal with supersedeas, conferred no title upon Jenks as against Mrs. Hitz; (3) that as no sale has been made under the deed from Sarah L. Crane to Tyler, trustee, which would bind Mrs. Hitz, she is entitled in this suit to redeem the property by paying such sum as may be due on account of the debt to secure which that deed was executed,—that sum to be ascertained by an accounting in the court of original jurisdiction, and the amount of all rents collected and all sums expended in the preservation or protection of the property to be taken into consideration.

It results that the decree of the supreme court of the District of Columbia dismissing the bill in the present suit, and the decree of the court of appeals affirming that decree, were both erroneous.

The decree of the Court of Appeals of the District is reversed, and the cause remanded to that court, with directions to reverse the decree of the Supreme Court of the District, and for such further orders in each court as will be in conformity with the principles of this opinion.

Reversed.

Mr. Justice Brewer dissented.

*DANIEL H. TALBOT, Plff. in Err., [172] v.

FIRST NATIONAL BANK OF SIOUX CITY, Iowa.

(See S. C. Reporter's ed. 172-181.)

Error to state court—Federal question—

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kiple v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On usury by national banks—see notes to *Farmers' & M. Nat. Bank v. Bearing*, 23 L. ed. U. S. 196, and *Citizens' Nat. Bank v. Gentry* (Ky.) 56 L. R. A. 673.

—usury by national banks—double recovery of usurious interest.

1. The denial by a state court of a right of action expressly based on an act of Congress presents a Federal question which gives the Supreme Court of the United States jurisdiction to review a decision of such state court.
2. No recovery, under U. S. Rev. Stat. § 5198, of twice the amount of usurious interest alleged to have been paid to a national bank, can be had on the theory that illegal interest was paid by a sale under foreclosure because, after deducting the interest charged in excess of the legal rate, the remaining legal interest, which under that section was subject to forfeiture, was included in the foreclosure decree, since it is the interest charged, and not the interest as to which a forfeiture might be enforced, that the statute regards as illegal.

[No. 164.]

Argued March 17, 18, 1902. Decided April 14, 1902.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment affirming a judgment of the District Court of Iowa for Woodbury County in favor of defendant in an action to recover back usurious interest from a national bank. *Affirmed.*

See same case below, 106 Iowa, 361, 76 N. W. 726.

Statement by Mr. Justice **McKenna**:

This action was brought by the plaintiff in error in the district court of Iowa, in and for Woodbury county, under § 5198 of the Revised Statutes of the United States, to recover twice the amount of interest alleged to have been due the defendant by the plaintiff on account of certain transactions had between it and the plaintiff. The district court gave judgment against the plaintiff, and the supreme court of the state affirmed the judgment. The Chief Justice of the state allowed this writ of error.

The defendant in error was at the time of the transactions between it and the plaintiff a national bank. Plaintiff did business with it from January 1, 1886, until March, 1890, the instances of which are detailed in a pleading which occupies fifty-six pages of the record. During that time deposits were made by plaintiff with the bank, drafts were drawn by him, and his own and the promissory notes of others were given to the bank. Finally the transactions culminated, according to the petition, as follows:

[173] "That on or about the 15th day of March, 1890, all of the indebtedness evidenced by said charges, account, and notes then claimed by defendant against plaintiff was incorporated into *certain bonds of that date made and executed and delivered by plaintiff to the Union Loan & Trust Company of Sioux City, Iowa, as trustee for defendant, which said bonds were in the sum of \$1,000 each, in all one hundred bonds, into which at that time and subsequently all of

said indebtedness, except that represented by said note for \$3,040.38, executed and delivered to the defendant on the 17th day of June, 1890, was merged. That said bonds were secured by mortgage on certain lands situated in the counties of Woodbury and Plymouth, in the state of Iowa. On or about the 3d day of March, 1892, a suit in equity was commenced in the district court of Woodbury county, Iowa, and a judgment and decree was entered against plaintiff on or about the 23d day of December, 1893, for the sum of \$94,578.90, being the entire indebtedness due from plaintiff to defendant as entered by said court upon the said bonds and said note for \$3,040.38. And on the 19th day of March, 1894, upon the execution sale of the premises mortgaged to secure said indebtedness, the defendant knowingly took and received the entire sum of said judgment, including all the usurious interest before that time, knowingly charged in the said account for overdrafts upon all of the said notes and bonds, in all the sum of \$47,020.37. That the items of interest upon the overdrafts aforesaid, charged upon account against plaintiff, were so charged without any contract therefor, at the time of such charging were each and all at a higher rate of interest than that allowed by law of Iowa, corrupt and usurious, and in violation of §§ 5197 and 5198 of the Revised Statutes of the United States. The items of interest upon overdrafts aforesaid, charged by defendant and carried into the notes aforesaid, were knowingly charged, contracted for by their incorporation in said notes, reserved, taken, and received by the defendant as a part of the entire amount of interest paid by the plaintiff and knowingly received by defendant, in the total amount of money collected upon said judgment and decree, and knowingly charging, contracting, reserving, taking, and receiving of which was a corrupt and usurious transaction, in violation of §§ 5197 and 5198 of the Revised Statutes of the United States, and occurred within two years prior to the commencement of this action. *That the entire [174] amount of interest as aforesaid, knowingly charged, contracted for, taken, and received was in amount the sum of \$47,020.37, whereby defendant became indebted to plaintiff in the sum of \$94,040.74, no part of which has been paid."

The answer of the defendant admitted substantially the allegations of the petition detailing the transactions between it and the plaintiff, but alleged that it charged plaintiff only the interest permitted by the laws of Iowa, "and that if at times, through the inadvertence or mistake of the clerks and accountants of the bank, the bank charged more than such proper rate, at other times, through similar inadvertence and mistake, a less amount was charged, so that, during the course of its business with the plaintiff, the total amount charged to him as interest upon overdrafts was two thousand seventy-eight dollars and eighty cents (\$2,078.80), while at the legal rate under the laws of Iowa, and according to the custom of bank-

ers, there was due from the plaintiff to the defendant the sum of two thousand ninety-six dollars and sixty cents (\$2,096.60), and there was no intention to charge usurious interest at any time."

The answer also admitted that all the unpaid indebtedness of plaintiff remaining was included in the bonds of plaintiff, which was secured by a mortgage upon his real estate as alleged, and that the mortgage was foreclosed and the property sold, but denied that any interest upon the overdrafts was paid by the sale, but averred "that before the rendition of the judgment and decree in the said foreclosure proceedings, the court ordered deducted from the amount found due all sums charged as interest upon overdrafts, which was in fact deducted, and such sums were not included in the judgment and decree, and the defendant denies that on the sale of the property of the plaintiff on the said judgment foreclosure, any of the sums of interest upon overdrafts were thereby paid, but, on the contrary, alleges that there is still a large deficit on the said judgment, amounting to about the sum of ten thousand dollars (\$10,000), which was not paid by the sale of the said property, and has not since been paid."

[175] "The answer also alleged that if usurious interest was paid by the plaintiff "it was so paid more than two years prior to the time of the commencement of this suit, and therefore said suit is barred by lapse of time."

The answer also alleged a settlement between defendant and the plaintiff on the 17th of June, 1890, in pursuance of which the plaintiff delivered to the defendant \$61,000 in the bonds already mentioned, and his promissory note for \$3,048.38, and "that the said bonds and note were received by the defendant in full payment and settlement of all existing liability and indebtedness on the part of the plaintiff to the defendant, and thereby the plaintiff paid to this defendant all sums charged for interest or otherwise, and that the said settlement took place more than two years prior to the bringing of this suit, and this suit is therefore barred by limitation."

The answer also pleaded the foreclosure suit in bar.

The plaintiff filed a reply traversing the allegations of the answer.

The case was referred to a referee to report the facts. It is not necessary to give the report of the referee in full. He found that defendant had charged interest on plaintiff's overdrafts to the amount of \$2,064, and that the average rate of interest charged was 10.22 per cent, and the total amount of interest charged in excess of 10 per cent was \$72. That the interest on the overdrafts was included in the various notes given by the plaintiff prior to March 15, 1890; "and all of the indebtedness of plaintiff to defendant, arising or growing out of said bank account from January 1, 1886, to March 15, 1890, was evidenced by said notes, but said notes were not given in payment of said indebtedness."

The referee also found the execution of

the negotiable bonds by plaintiff, and the mortgage to secure the same as alleged in the proceedings, the foreclosure of the mortgage, and that plaintiff, "in his answer and amendments in said case set up that excessive interest had been charged on overdrafts by the First National Bank, and said interest had been included in the notes afterwards given, and said notes were merged in the bonds in suit, and asked that an accounting be had of the amount of excessive interest charged on said overdrafts, and that the amount so found be deducted from the amount due on the bonds; and said D. H. Talbot, in support of his allegation, introduced evidence showing the amount of interest charged on said overdrafts; and in the determination of the case the court found that excessive interest on overdrafts to the amount of two thousand and sixty-four dollars (\$2,064.00) had been charged the plaintiff, and ordered that said two thousand and sixty-four dollars (\$2,064.00), with interest at the rate named in the bonds, amounting to five hundred ninety-five dollars and forty-six cents (\$595.46), making a total of two thousand six hundred nine dollars and forty-six cents (\$2,609.46), be deducted from the amount due on the bonds, and a decree was entered in said case for the amount due on said bonds, less said sum of two thousand six hundred nine dollars and forty-six cents (\$2,609.46).

"Ninth. That in said cause a decree for ninety-four thousand five hundred seventy-eight dollars and ninety cents (\$94,578.90) was rendered, of which forty-nine thousand seventy dollars and forty-seven cents (\$49,070.47) was principal, thirty thousand nine hundred eighty-eight dollars and fifty-two cents (\$30,988.52) was interest, and fourteen thousand five hundred nineteen dollars and ninety-one cents (\$14,519.91) was the amount paid on prior liens, taxes, and interest on same by plaintiff in that action.

"Tenth. That the sheriff, under an execution issued on said decree, sold, March 19, 1894, plaintiff's property, amounting to thirty-six thousand four hundred thirty-nine dollars and fifteen cents (\$36,439.15); and on May 19, 1894, under said execution, sold property amounting to fifty thousand and sixty dollars (\$50,060); and on July 2, 1894, sold under said execution property amounting to twelve hundred dollars (\$1,200.00), making a total of eighty-seven thousand six hundred ninety-nine dollars and fifteen cents (\$87,699.15) realized from sheriff's sale of said land under said decree, and leaving a balance, including the interest to date of sale of eleven thousand one hundred forty-one dollars and five cents (\$11,141.05) unpaid on said judgment and decree, which balance, with interest, has not been paid.

"Eleventh. That the interest on overdrafts, not having been included in said decree, was not paid by the sale of plaintiff's land under said execution.

"Twelfth. That plaintiff's overdrafts, including interest thereon, was paid June 17,

1890, more than four (4) years before the commencement of this action."

As conclusions of law the referee found as follows:

"First. That interest on overdraft was excessive, but not illegal or usurious, and did not taint the subsequent debt, notes, and bonds, of which it formed a part of the consideration.

"Second. That the custom of bankers to compute interest on a commercial basis of thirty days to the month, making three hundred and sixty days to the year, under the tables, is legal.

"Third. That plaintiff's cause of action accrued June 17th, and this suit is barred under § 5198 of the Revised Statutes of the United States, on which this action is based.

"Fourth. That the matter in this suit was adjudicated between the same parties in the case of the *Union Loan & T. Co. v. D. H. Talbot*, and that relief could have been granted, and plaintiff is now estopped from maintaining this suit.

"Fifth. That interest charged plaintiff on overdraft was not included in and did not form a part of the decree in the case of the *Union Loan & T. Co. v. D. H. Talbot*, and was not paid by said sheriff's sale of plaintiff's property under execution issued on that decree."

He recommended that judgment be entered dismissing plaintiff's petition, and that defendant have judgment for costs.

The plaintiff filed exceptions to the report, and the matter came on to be heard March 19, 1896, and the court adjudged that the conclusions of the referee were correct; that the matters in the suit had been adjudicated in the former action; that plaintiff's cause of action had accrued June 17, 1890, and that his suit was barred by the statute of the United States upon which the action was based, and plaintiff's petition was dismissed.

[178] The supreme court of the state, in passing on the case, affirmed the findings of fact of the referee, but said that it was "entirely clear under the evidence that all interest charged on overdrafts in excess of 6 per cent was a greater rate of interest than was allowed by the laws of this state."

The court further said:

"We have seen that unless the plaintiff has paid the illegal interest he is not entitled to recover it in this action. If it may be said that the delivery of the sixty-one bonds on June 17, 1890, was a payment, this action is barred, as it was not commenced 'within two years from the time the usurious transactions occurred,' having been commenced March 8, 1895.

"The interest on overdrafts was surely not paid by the sale of the land, for, as we have seen, it was not included in the decree. As we view the case, we think the illegal charges of interest have never been paid, and therefore the plaintiff is not entitled to recover in this action.

"IV. There is some dispute as to whether plaintiff set up these charges of illegal interest in the action to foreclose the trust

deed so as to constitute a former adjudication. That he set it up and that it was adjudicated we have no doubt. True, it was not set up with the same fulness and elaboration as in this case. Unquestionably it is matter which might have been pleaded in that case, and under a familiar rule the plaintiff must be held to have asserted all available defenses to that action.

"V. Said § 5198 provides that actions to recover back illegal interest paid must be commenced 'within two years from the time the usurious transaction occurred.' Now, whether or not we call the delivery of the bonds a payment, it is evident that the usurious transaction occurred on and before June 17, 1890, and it follows that this action is barred. These questions are so largely questions of fact, and rest upon familiar and undisputed principles of law, that we do not find it necessary to refer to any of the many authorities cited.

"The lower court was fully warranted in affirming the finding of fact as reported by the referee. While we do not concur in the conclusions of law that the interest on overdrafts was excessive, but not illegal or usurious, and that the custom of banks to compute interest on the commercial basis of thirty *days to the month is legal, still it [179] does not follow that the judgment of the district court is erroneous.

"It is correct notwithstanding the charge of illegal interest, because the plaintiff has never paid that interest, but has been allowed the full benefit of the facts in the foreclosure case, and because this action was not brought within two years of the time the usurious transaction occurred." [106 Iowa, 361, 76 N. W. 726.]

The assignments of error present the following contentions: That the agreement of June 17, 1890, in pursuance of which the negotiable bonds of plaintiff were delivered to the defendant, did not constitute a payment of the interest on the overdrafts theretofore charged, but that the sales in the foreclosure suit May 19 and July 2, 1894, constituted such payment, and as the action was brought within two years from the latter dates, it was not barred; that the foreclosure suit was not *res judicata* because the defense of illegal interest was based upon the law of the state of Iowa, and not upon the Revised Statutes of the United States; that illegal interest was embraced in the judgment in the foreclosure suit; that the deduction which was made was only of the illegal interest on the overdrafts, and of no other interest; that the Revised Statutes direct "a forfeiture of the entire interest," not merely of the amount of interest paid in excess of that allowed by law; that § 5198 provides that in case the greater rate of interest has been paid, the person so paying the sum "may recover back . . . the amount of the interest thus paid."

Messrs. A. A. Hoehling, Jr., and James K. Redington argued the cause and filed a brief for plaintiff in error:

If usury enters into the original transac-

tion, or subsequent transactions of a similar nature, it affects all consecutive securities, however remote, growing out of such transaction; neither the renewals of old nor the substitution of new securities can efface the usury, and the infirmity pervades the entire transaction to its close.

Campbell v. McHarg, 9 Iowa, 354; *Smith v. Coopers*, 9 Iowa, 376; *Garth v. Cooper*, 12 Iowa, 364; *First Nat. Bank v. Stauffer*, 1 Fed. 187; *Farmers' & M. Bank v. Hoagland*, 7 Fed. 159; *Danforth v. National State Bank*, 17 L. R. A. 622, 1 C. C. A. 62, 3 U. S. App. 7, 48 Fed. 271; *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390.

As the indebtedness of plaintiff was to a national bank, the definition of usury and the penalties affixed thereto are to be determined by sections 5197 and 5198 of the Revised Statutes of the United States, and not by the laws of the state of Iowa.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; *Haseltine v. Central Nat. Bank*, 183 U. S. 132, ante, 118, 22 Sup. Ct. Rep. 50.

Under this Federal legislation the penalty recoverable is twice the amount of the entire interest paid, not twice the excess of interest paid over the legal rate.

Crocker v. First Nat. Bank, 4 Dill. 358, Fed. Cas. No. 3,397; *National Bank v. Davis*, 8 Biss. 100, Fed. Cas. No. 10,038; *National Exch. Bank v. Moore*, 2 Bond, 175, Fed. Cas. No. 10,041; *Brown v. Second Nat. Bank*, 72 Pa. 211; *Overholt v. First Nat. Bank*, 82 Pa. 490; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143; *Louisville Trust Co. v. Kentucky Nat. Bank*, 102 Fed. 442.

Payment of the illegal interest in this case was not made by the delivery of the bonds.

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390.

Such payment was made by the sale of the premises in controversy and the appropriation of the proceeds of such sale by the defendant in error to the part satisfaction of its claim.

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852.

The remedy given by the statute for the wrong is a penal suit, and such aggrieved party can have redress in no other mode or form of procedure, either by way of counterclaim, set-off, or otherwise.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212.

Mr. Asa F. Call argued the cause and filed a brief for defendant in error:

To sustain a writ of error from this Court, something more must appear than that the parties claim a right under an act of Congress.

De Lamar's Nevada Gold Min. Co. v. Nes-
185 U. S.

bitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

In proceedings in this Court to review the action of state courts, this Court does not enter into consideration of questions of fact, but will accept the determination of the state courts in such matters as conclusive, and inquire simply whether there have been errors of law.

Gardner v. Bonestell, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399.

That a Federal statute was construed unfavorably to one of the parties to a suit is no ground of jurisdiction of this Court, unless such construction is not only unfavorable, but is against the right, etc., especially set up and claimed under the statute.

Kizer v. Tezarkana & Ft. S. R. Co. 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100.

Where the decision of the state court rests on questions not Federal in their character, this Court will not take jurisdiction.

Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co. 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

Where Federal questions were involved, but the decision of the state court could be properly rested on questions not Federal in their character, and the Federal question was not necessary to the determination of the case, this Court could not take jurisdiction.

Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 651, 34 L. ed. 1115, 11 Sup. Ct. Rep. 435; *O'Neil v. Vermont*, 144 U. S. 336, 36 L. ed. 457, 12 Sup. Ct. Rep. 693.

Mr. Justice McKenna delivered the opinion of the court:

1. We are first confronted by a motion to dismiss the action on the ground that no Federal question was decided by the supreme court of Iowa. We think the motion should be overruled. *The plaintiff explicitly based his right of action upon §§ 5197 and 5198 of the Revised Statutes of the United States. The judgment of the trial court and that of the supreme court of the state denied such right. Stat. § 709. This court therefore has jurisdiction.

2. Section 5197 authorizes a national bank to charge the rate of interest fixed by the laws of the state in which the bank is doing business. The consequences of a charge in excess of such rate are expressed in § 5198 to be as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such ac-

tion is commenced within two years from the time the usurious transaction occurred."

Two cases are provided for (1) where illegal interest has been taken, received, or charged; (2) where illegal interest has been paid. In the first case the entire interest which the "evidence of debt carries with it" shall be deemed forfeited. In the second case the person who has paid "the greater rate of interest may recover twice the amount of interest thus paid."

In what way is the statute available to plaintiff? Or, rather, in what way was it available when the foreclosure suit was brought, and in what way is it yet available? Had illegal interest been paid by plaintiff at that time, or had illegal interest been only charged by defendant? The latter is the contention of the plaintiff, and he controverts the position taken by the supreme court of Iowa, that the agreement of June 17, 1890, constituted a payment, and that the action was barred because not commenced within two years from that date. We may yield, *arguendo*, to plaintiff's contention, and thereby eliminate the statute of limitations from consideration. But nevertheless the judgment must be affirmed.

[181] *The plaintiff's situation, then, at the time of the foreclosure suit, was that he was sued for illegal interest charged but not paid, and he entered a defense to avoid its payment. He was successful. The court found that he had been charged illegal interest, and deducted its amount from the sum for which he was sued. In other words, judgment was rendered against him for the principal sum and legal interest. But he insists that such judgment was not the full relief to which he was entitled. To that judgment, he claims, he was entitled under the state law which he pleaded, but that under the statutes of the United States, which he could not plead, as he contends, he was entitled to a forfeiture of the entire interest, and as such forfeited interest was included in the judgment, it was paid by the sale under the judgment of the property mortgaged, and a cause of action immediately arose to recover twice the amount of that interest so paid. We cannot assent to the contention. It is the interest charged, not the interest to which a forfeiture might be enforced, that the statute regards as illegal. And a forfeiture may or may not occur. Interest greater than the legal rate may be charged, but it may be relinquished and recovery be had of the legal rate. This was decided in *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852, and repeated in *Savings & L. Soc. v. Multnomah County*, 169 U. S. 416, 42 L. ed. 803, 18 Sup. Ct. Rep. 392. Those cases also decided that illegal interest ("the greater rate" the statute calls it) must be paid, to be recovered back. Indeed, it is a contradiction to say that interest may be recovered back which has not been paid, and whether it is relinquished before suit or deducted by order of the court before judgment, it is in neither case paid by the judgment or by the satisfaction of the judgment. The fact of

payment of the illegal interest the statute makes a condition of the recovery of its penalty. If there can be a substitute for such payment it cannot be found in the insufficiency of the pleading or the deficiency of the relief in another action.

Judgment affirmed.

Mr. Justice Gray took no part in the decision.

*DANIEL H. TALBOT, *Plff. in Err.*, [182]
v.

SIoux NATIONAL BANK OF SIOUX CITY, IOWA.

(See S. C. Reporter's ed. 182-188.)

Error to state court—Federal question—usury by national banks—action to recover back usurious interest—when barred by limitation—concealment of wrong—sufficiency of petition.

1. A decision by the highest court of a state adverse to the right claimed under U. S. Rev. Stat. §§ 5197, 5198, to recover back usurious interest from a national bank, presents a Federal question, which gives to the Supreme Court of the United States the right to review the judgment of such state court.
2. A petition to recover back usurious interest from a national bank, under U. S. Rev. Stat. §§ 5197, 5198, which shows on its face that the action was not "commenced within two years from the time the usurious transactions occurred," as required by the latter section, cannot withstand a demurrer because of an allegation that the charge and reservation of the usurious interest were without plaintiff's knowledge or consent, since, even if the period of limitation of the statute does not begin until discovery of the wrong, the court will not indulge the presumption that plaintiff's consciousness of the wrong was not aroused until sometime within two years before the commencement of the action.

[No. 190.]

Argued March 17, 18, 1902. Decided April 14, 1902.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the District Court of

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On usury by national banks—see notes to *Farmers' & M. Nat. Bank v. Dearing*, 23 L. ed. U. S. 196, and *Citizens' Nat. Bank v. Gentry (Ky.)* 56 L. R. A. 673.

That the statute of limitations runs from the discovery of concealed fraud—see notes to *Carrier v. Chicago, R. I. & P. R. Co. (Iowa)* 6 L. R. A. 799; *Peck v. Bank of America (R. I.)* 7 L. R. A. 826; *Amaker v. New (S. C.)* 8 L. R. A. 687, and *Hammond v. Hopkins*, 36 L. ed. U. S. 135.

Woodbury County sustaining a demurrer to a petition in an action to recover back usurious interest from a national bank. *Affirmed.*

See same case below, 111 Iowa, 583, 82 N. W. 963.

Statement by Mr. Justice **McKenna**:

This is an action brought in the district court of Woodbury county, Iowa, under §§ 5197 and 5198 of the Revised Statutes of the United States, relating to national banks, to recover the sum of \$16,250, the amount of interest alleged to have been unlawfully charged and collected by the defendant bank.

The original petition alleged as follows:

"The plaintiff claims of the defendants, and each of them, the sum of \$16,000, as money justly due plaintiff from defendants, on account of unlawful and usurious interest knowingly and unlawfully taken from the plaintiff within the seven years last past.

"The plaintiff further alleges that during said time he had various and numerous business transactions with the defendant bank; in all said transactions defendant charged and exacted a greater rate of interest for the use of moneys had and received by plaintiff from the defendants than the law recognizes or permits a national bank to charge for the use of money."

The petition also alleged that the books and accounts wherein said transactions were kept were in the possession of the defendant, and "that the plaintiff has no itemized statement of the account between him and [183] the defendant," and that therefore "he was unable to incorporate in the petition a statement of the accounts or bill of particulars.

The petition also alleged that there was due plaintiff the sum of \$250, deposited by him with the defendant, which had never been drawn out or paid to him.

Upon demurrer to the petition the court ordered it to be more specific, "so far as to require the plaintiff to state his cause of action for usury in one count, and also to state his cause of action for a deposit in a separate count, and also to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action." The petition was thereupon amended.

We are only concerned with the first and second counts, which alleged the usury. It was alleged in the first count that on or about the 27th of May, 1889, the plaintiff commenced doing business with the bank in the ordinary way between the bank and its patrons, and continued to so do business with it until it closed its doors on or about the 27th of August, 1896. That during that time the bank knowingly charged him with a greater rate of interest than allowed by the laws of Iowa, which amounted to more than \$1, but the exact amount of which he was unable to state, because the books containing the transactions were in the possession of the bank.

That on the 24th of February, 1890, the bank added the amount of usurious interest charged by it to the legitimate indebtedness of plaintiff, and included both and the sum 185 U. S.

of \$2,000 advanced to plaintiff, making a total of \$10,000, in a promissory note bearing interest at the rate of 10 per cent per annum, and as collateral security for said note plaintiff assigned to the bank all of his equity in eighty-one contracts, covering 3,290.57 acres of land in Plymouth county, Iowa.

That on the 4th of March, 1890, plaintiff executed to the bank a non-negotiable promissory note for \$28,000, to cover all of his indebtedness to the bank, to wit, \$14,500, in a draft, to pay on certain railroad lands, the \$10,000 note herein mentioned before, and the unlawful and usurious interest knowingly reserved and charged prior thereto, and continued in said \$10,000 note *aforesaid. [184] and continued and renewed in the \$28,000 note."

To secure said note plaintiff executed a mortgage of the land aforesaid.

"That the above note and mortgage, which were made upon the 4th day of March, 1890, did include the \$10,000 illegal and unearned note, and interest to the amount of \$17.10; and which said note and mortgage were made to date back and to bear date of March 1, 1890, thereby increasing the rate of interest on the \$10,000 note to about 14 per cent per annum; and which said illegal, unlawful, and usurious interest was knowingly reserved and charged by the defendant, and included in and is a part of the \$28,000 note aforesaid.

"That the unlawful and usurious interest knowingly reserved and charged by said defendant bank against the plaintiff herein, together with the interest which in law and in fact was and is forfeited, but was unlawfully and wrongfully put in a pretended judgment against plaintiff herein in a certain case entitled *J. W. White v. D. H. Talbot et al.*, in the district court of Plymouth county, Iowa, and the forfeited interest which has since accrued, amounts in all to about \$9,000; the exact amount plaintiff cannot state for the reason the accounts, books, papers, and records of said business between plaintiff and defendant bank is in the custody and possession of said defendant, and to which plaintiff has no access; and which amount of \$9,000 is due and owing to the plaintiff from the defendant."

The second count alleged the transactions between the plaintiff and the bank, substantially as in the first count, though in somewhat different order and form, and not so much in detail, and that the charges and reservations of usurious interest and its additions and continuations through the various forms of his indebtedness were without his knowledge or consent.

That the bank without the knowledge or consent of plaintiff delivered the \$28,000 note and the mortgage which was executed to secure the same to one J. W. White, a stockholder in the bank, "who afterwards unlawfully, and before said note *was due and [185] payable, commenced foreclosure proceedings in the district court of Plymouth county, Iowa."

That said White with certain officers of 863

the bank "did conspire with a view to the bringing about a foreclosure, and by this means adjudicate the liabilities which they would bear under the provisions of § 5329, Revised Statutes, because of the knowingly reserving and charging of unlawful and illegal interest as heretofore set out in this amended petition. And that said interested parties as officers or agents of the said bank, unlawfully and with the intent to impose upon the court, by fraudulent representations to the honorable judge of the district court in Plymouth county, Iowa, set out in their petition for said foreclosure the right and justice of foreclosure upon the sole ground of nonpayment of interest, which interest they, individually and collectively, had full knowledge of having been reserved and charged, and of which the defendant in said proceedings was without knowledge at that time, and the said interest was forfeited under the provisions of §§ 5197 and 5198 of the Revised Statutes.

"Par. 6. That the said J. W. White, in pursuance of the conspiracy formed with the said A. S. Garretson and W. L. Joy as aforesaid, and for the purpose of misleading and deceiving said district court and causing it to assume jurisdiction in said case, wrongfully and unlawfully suppressed the fact that said \$28,000 note contained unlawful and usurious interest, and that all of the interest in said note and the indebtedness of the plaintiff to defendant and said Garretson had been forfeited, and suppressed the fact that said note had lost its interest-bearing power and was not due, and that no right of action then existed, and suppressed the fact that the court had no jurisdiction to try or hear said cause or render judgment therein.

"Par. 7. The plaintiff further states that on or about the 9th day of April, 1891, the said J. W. White, A. S. Garretson, W. L. Joy, and the firm of Joy, Hudson, Call. & Joy, and the defendant bank, did wrongfully and unlawfully combine, conspire, and confederate together to and did cause an action to be commenced and proceedings to be instituted against the plaintiff herein, and the land described in said Exhibit 'B,' in the district court of Plymouth county, Iowa, in the name of said J. W. White, instead of the name of the defendant herein, The Sioux National Bank, the real party in interest. That said action was so commenced in the name of said J. W. White for the purpose of avoiding and evading the force and effect of the sections of the Revised Statutes of the United States hereinbefore set forth and referred to in this amendment."

That on the 6th of May, 1891, judgment was obtained in the foreclosure suit for the sum of \$31,986.50, which included "the unlawful and usurious interest and the forfeited interest." The land mortgaged was sold "on special execution" to satisfy the judgment, and, except three 40-acre pieces was purchased by C. L. Joy, a director of the bank, for White. Sheriff's deeds were subsequently executed to the purchasers and recorded in Plymouth county.

That the court in the foreclosure suit re-

lied on the statements of counsel and the allegation of the petition, and did not know that usurious interest was charged, and, "deceived and misled by the fraud practised upon it," rendered judgment "for the sum of \$13,125.40, more than would be actually due at maturity of said note and mortgage, to wit, March 1, 1895."

That the district court of Plymouth county did not have jurisdiction of plaintiff or the lands mortgaged because by reason of the circumstances set out, and that the note was not due, and the judgment, decree, and the execution were void.

That the said White and the defendant bank, on or about the 31st of May, 1894, took possession of the lands and property described in the mortgage, and has forcibly held possession ever since.

The defendant demurred to the petition, and stated as grounds of demurrer to the first count, among others, that it did not appear that any usurious interest had been paid by plaintiff, and that it did not state a cause of action within the provisions of §§ 5197 and 5198 of the Revised Statutes of the United States. As grounds of demurrer to the second count it was stated: "1st. That said action is barred by the limitations prescribed in § 5198, Revised Statutes of the United States, under which said action purports to be brought." [187]

The demurrer was sustained, and the plaintiff not pleading further, the action was dismissed. The supreme court of the state affirmed the judgment. Thereupon this writ of error was allowed.

The supreme court of the state, passing on the case, said:

"The defendant demurred to the two counts of the petition alleging the cause of action herein stated. Several grounds were stated in the demurrer,—among others, that the statute of limitations had run against plaintiff's claim. The demurrer was sustained generally, and, the plaintiff electing to stand on his pleadings, the cause as to the claim made in counts one and two of the petition was dismissed.

"The \$28,000 note was never paid by the plaintiff. A land mortgage was given to secure it, and that was foreclosed in Plymouth county, Iowa, and a decree rendered against the plaintiff thereon May 6, 1891. The land covered by this mortgage was sold sometime thereafter,—just when does not certainly appear, but it was more than two years prior to the commencement of this action.

"Section 5198 of the Revised Statutes of the United States provides for the recovery back of twice the amount of unlawful interest paid if the action therefor be commenced within two years from the time the usurious transaction occurred.

"This action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred, and the demurrer for that reason was properly sustained. There was no error in striking a part of the prayer from the third count of the petition.

"The judgment is affirmed." [111 Iowa, 583, 82 N. W. 963.]

The assignments of error assert in various

ways plaintiff's claim of rights under §§ 5197 and 5198 of the Revised Statutes of the United States.

Messrs. A. A. Hoehling, Jr., and James K. Redington argued the cause and filed a brief for plaintiff in error:

The obligation to sue for the recovery of the penalties provided by U. S. Rev. Stat. § 5198, does not arise until the actual payment of the usurious interest in whatever form that payment may be made or enforced and then for the first time the statute of limitations of two years commences to run.

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390.

Fraudulent concealment would prevent the running of the statute until the discovery of the fraud.

Pearsall v. Smith, 149 U. S. 236, 37 L. ed. 717, 13 Sup. Ct. Rep. 833. See also to the same effect, *Bank of United States v. Moss*, 6 How. 37, 12 L. ed. 334; *Page v. Bank of Alexandria*, 7 Wheat. 35, 5 L. ed. 390; *Penn v. Flack*, 3 Gill & J. 369; *Lewis v. Kramer*, 3 Md. 265; *Hopkins v. Kent*, 17 Md. 113; *Stone v. Lawrence*, 4 Cranch C. C. 11, Fed. Cas. No. 13,484; *Randon v. Toby*, 11 How. 521, 13 L. ed. 796; *Moses v. Taylor*, 6 Mackey, 255.

Messrs. Jeremiah M. Wilson, James K. Redington and A. A. Hochling, Jr., filed a brief in opposition to motion to dismiss or affirm.

Mr. Francis F. Oldham argued the cause and filed a brief for defendant in error:

To give the Supreme Court of the United States jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a Federal question was involved, but that the judgment as rendered could not have been given without deciding such question.

De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111.

As the suit was not commenced until more than two years after the transactions there was no cause of action by the express terms of the proviso of U. S. Rev. Stat. § 5198.

Norfolk Nat. Bank v. Schwenk, 46 Neb. 381, 64 N. W. 1073; *Bobo v. People's Nat. Bank*, 92 Tenn. 444, 21 S. W. 888; *Higley v. First Nat. Bank*, 26 Ohio St. 75, 20 Am. Rep. 759.

The petition of plaintiff fails to give color to any right under a statute of the United States. Merely reciting a statute, as plaintiff has done, does not constitute a claim of right.

Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *St. Louis, C. G. & Ft. S. R. Co. v. Missouri ex rel. Merriam*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443.

This Court can review the judgment of a
185 U. S.

state court only when the right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States was especially set up or claimed in the state court at the proper time and in the proper way.

Chappell v. Bradshaw, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Spies v. Illinois*, 123 U. S. 131, sub nom. *Ex parte Spies*, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Re Buchanan*, 158 U. S. 31, 39 L. ed. 884, 15 Sup. Ct. Rep. 723; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 540, 40 L. ed. 252, 16 Sup. Ct. Rep. 88.

Mr. Asa F. Call also argued the cause, and, with *Mr. Henry J. Taylor*, filed a brief for defendant in error:

On error this Court will not review a question of fact found by the supreme court of Iowa.

Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Egan v. Hart*, 165 U. S. 193, 41 L. ed. 682, 17 Sup. Ct. Rep. 300; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

This Court has no jurisdiction of this case on error, because the allegations of the petition in error affirmatively show that the action was determinable and determined on a mere question of fact in which the meaning, construction, or validity of the Federal statute was not drawn into question.

Carothers v. Mayer, 164 U. S. 325, 41 L. ed. 453, 17 Sup. Ct. Rep. 106; *Moran v. Horshy*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

To give this Court jurisdiction, on this writ of error, it must appear by apt allegations, not only that the application of the Federal statute was involved, but that the controversy was actually determined by a construction put upon the Federal statute adverse to the contention of the plaintiff in error.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Shoshone Min. Co. v. Rutter*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 726.

The time within which the action must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the very right to sue. Time is made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitation of the remedy is to be treated also as a limitation of the right.

Hasseltine v. Central Nat. Bank, 183 U. S. 132, ante, 118, 22 Sup. Ct. Rep. 50; *Daingerfield Nat. Bank v. Ragland*, 181 U. S. 45, 45 L. ed. 738, 21 Sup. Ct. Rep. 536; 19 Am. & Eng. Enc. Law, pp. 150, 151; *Bartlett v. Manor*, 146 Ind. 621, 45 N. E. 1060; *The Harrisburg v. Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *Finnell v. Southern Kansas R. Co.* 33 Fed. 427; *Hudson v. Bishop*, 35 Fed. 820; *Spicer v. Hockman*, 72 Ind. 120; *Potts v. Felton*, 70 Ind. 166; *Taylor v. Cranberry*

Iron & C. Co. 94 N. C. 525; *Smith v. Tripp*, 14 R. I. 112. See also *Palen v. Johnson*, 50 N. Y. 49; *Savings & T. Co. v. Bear Valley Irrig. Co.* 89 Fed. 38; *Atchison, T. & S. F. R. Co. v. Tanner*, 19 Colo. 564, 36 Pac. 541; *Goodwin v. Cunningham*, 54 Neb. 16, 74 N. W. 315; *Lambert v. Ensign Mfg. Co.* 42 W. Va. 817, 26 S. E. 431; *McCartney v. Tyrer*, 94 Va. 203, 26 S. E. 421; *Hoover v. Chesapeake & O. R. Co.* 46 W. Va. 270, 33 S. E. 224.

The two-year period of this statute cannot be extended by any engrafted qualification for fraud concealed or newly discovered.

19 Am. & Eng. Enc. Law, p. 151; *Taylor v. Cranberry Iron & C. Co.* 94 N. C. 525; *Suggs v. Travelers Ins. Co.* 71 Tex. 579, 1 L. R. A. 847, 9 S. W. 676; *Cochran v. Young*, 104 Pa. 333; *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166; *Spicer v. Hockman*, 72 Ind. 120; *Potts v. Felton*, 70 Ind. 166.

[188] *Mr. Justice **McKenna** delivered the opinion of the court:

1. A motion is made to dismiss on the ground that the record presents no Federal question. The motion is overruled. Plaintiff claimed a right under §§ 5197 and 5198 of the Revised Statutes, and the decisions of the courts of the state were adverse to such right. Rev. Stat. § 709.

2. The demurrer of defendant in error was sustained because the action was not "commenced within two years from the time the usurious transaction occurred." This ruling was indubitably right if any date mentioned in the petition be that of the usurious transaction or transactions relied on. The latest date mentioned in the petition is the 31st of May, 1894, when, it is alleged, "J. W. White and the defendant herein (plaintiff in error) . . . took possession of the lands and property described" in the mortgage which Talbot gave to the bank March 4, 1890. The present suit was commenced October 7, 1896, hence not within two years from the 31st of May, 1894, and not within six years from the date of the judgment upon which the property was sold.

But it is contended that the bank fraudulently concealed from the plaintiff that it had charged him with usurious interest, and that therefore the period of limitation of the statute did not begin "until the discovery of the wrong,"—a disputable proposition. Besides, it is not available to the plaintiff. The petition does not disclose when the wrong was discovered. On the face of the petition the action was barred, and against its allegations and the circumstances detailed in it we cannot indulge the supposition that plaintiff's consciousness of the wrong was not aroused until sometime within two years before the commencement of this action.

Judgment affirmed.

Mr. Justice **Gray** took no part in the decision.

*UNITED STATES, *Appt.*,

[189]

v.

M. R. PENDELL and J. Escobar.

(See S. C. Reporter's ed. 189-202.)

Private land claims—evidence of grant—conclusiveness of findings of fact—presumption of grant and of record from possession.

1. Sufficient support in the evidence for a finding of the court of private land claims that a Spanish grant of land was made to the original grantees, from whom the petitioners derived their title, is afforded by a correct copy of the original and uncontroverted record in *ex parte* proceedings taken before a civil judge of the canton, under the act of the Republic of Mexico of May 23, 1837, to perpetuate evidence of the title, in which, upon evidence of a grant and continuous possession under it, and of the destruction by the military forces of the United States of the original documents of title, with the official registry where they were recorded, judgment was entered recognizing the possession of the heir of the original grantee, and reaffirming the title of his ancestor, and such heir was placed in formal and legal possession of the land.
2. The decision of the court of private land claims as to the sufficiency of the evidence of possession under a Spanish land grant will not be reviewed by the United States Supreme Court merely because the evidence is such that different inferences might be drawn therefrom.
3. The existence of a proper and valid Spanish grant, and its proper record in the archives of Mexico, within the provisions of article 6 of the treaty of December 30, 1853, with that country, that no grant should be respected which had not been so recorded, may be presumed from satisfactory proof of exclusive and uninterrupted possession under a claim of title continuing from 1790 until the filing of the petition for confirmation of the grant in the court of private land claims, together with evidence of the existence of a grant covering the land so possessed, and of the destruction by the military forces of the United States of the original documents of title, and of the record of the grant in the place where records of grants of land in the neighborhood were customarily made.

[No. 211.]

Submitted March 20, 1902. Decided April 21, 1902.

A PPEAL from the Court of Private Land Claims to review a decree confirming title under a Spanish land grant. *Affirmed.*

The facts are stated in the opinion.

Solicitor General Richards and *Messrs. Matthew G. Reynolds* and *William H. Pope* submitted the cause for appellant:

The presumption of a grant from the long possession of land is repelled and destroyed by the production or proof of the instrument under which the possession was held.

Nieto v. Carpenter, 21 Cal. 455. To the same effect is *Hays v. United States*, 175 U. S. 248, 44 L. ed. 150, 20 Sup. Ct. Rep. 80.

While the Mexican law of May 23, 1837, 185 U. S.

gave the power to judges of first instance to take testimony *ad perpetuam*, such power was not one to proceed *ex parte* to examine witnesses and to render judgments against either private citizens or the government. On the contrary, it was the power simply to proceed in certain cases and upon certain conditions, in default of a compliance with which the proceeding was simply void.

Eseriche's Dictionary of Legislation & Jurisp. p. 867.

Similar proceedings were considered by this court in *Whitney v. United States*, 167 U. S. 529, 42 L. ed. 263, 17 Sup. Ct. Rep. 857, and it was held that, since the Crown was no party to the proceedings, they could not be considered in the light of *res judicata*.

Both continuous and exclusive possession is essential to a prescriptive title.

Whitney v. United States, 167 U. S. 529, 42 L. ed. 263, 17 Sup. Ct. Rep. 857. See also *Bergere v. United States*, 168 U. S. 79, 42 L. ed. 387, 18 Sup. Ct. Rep. 4.

Testimony as to possession since the treaty, no matter how "exclusive and notorious," is not to be regarded as an element going to make up a title.

Hays v. United States, 175 U. S. 259, 44 L. ed. 154, 20 Sup. Ct. Rep. 80.

The principle of *nullum tempus* is one universal to all nations, and is firmly engrafted upon our own system of government.

Lindsey v. Miller, 6 Pet. 672, 8 L. ed. 541; *Weber v. State Harbor Comrs.* 18 Wall. 70, 21 L. ed. 803; *Sparks v. Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Gibson v. Chouteau*, 13 Wall. 99, 20 L. ed. 536; *Redfield v. Parks*, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83.

The Novísima Recopilacion having been approved and ordered observed as the law of the Spanish dominion by King Charles IV. in a cedula dated July 15, 1805, this was a declaration which interrupted the running of prescription from that date, even if it ran before against the Crown.

Weber v. State Harbor Comrs. 18 Wall. 57, 21 L. ed. 798.

Time did not run against the sovereign in Mexico.

Hall, Mexican Law, §§ 56, 612, 639; *Ely v. United States*, 171 U. S. 233, 43 L. ed. 147, 18 Sup. Ct. Rep. 840; *Crespin v. United States*, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53.

A title resting solely on prescription is not such a claim as the court of private land claims has jurisdiction to confirm.

Lafayette v. Blane, 3 La. Ann. 59. See also *State v. Cardinas*, 47 Tex. 250; *United States v. Power*, 11 How. 570, 13 L. ed. 817; *United States v. Rillieux*, 14 How. 189, 14 L. ed. 381.

A title derived from the Spanish or Mexican government must be one "lawfully and regularly derived" from one of those governments, and it must be made to "appear" that it is so derived.

Hayes v. United States, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735.

There is no proof that this grant was

duly recorded in the archives of Mexico, as required by article 6 of the Gadsden treaty.

Fuentes v. United States, 22 How. 443, 16 L. ed. 376; *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221; *Lueo v. United States*, 23 How. 515, 16 L. ed. 545; *United States v. Bolton*, 23 How. 347, 16 L. ed. 571; *United States v. Vallejo*, 1 Black, 541, 17 L. ed. 232; *United States v. Castro*, 24 How. 346, 349, 16 L. ed. 659, 660; *Berreyesa v. United States*, 154 U. S. 623, and 23 L. ed. 913, 14 Sup. Ct. Rep. 1179; *Whitney v. United States*, 181 U. S. 110, 45 L. ed. 773, 21 Sup. Ct. Rep. 565; *United States v. Teschmaker*, 22 How. 405, 16 L. ed. 357; *United States v. Pico*, 22 How. 406, 16 L. ed. 357; *United States v. Knight*, 1 Black, 228, *sub nom. United States v. Moorehead*, 17 L. ed. 76; *United States v. Neleigh*, 1 Black, 298, 17 L. ed. 144; *Romero v. United States*, 1 Wall. 742, 17 L. ed. 632; *White v. United States*, 1 Wall. 660, 17 L. ed. 698; *United States v. Ortiz*, 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466; *United States v. Elder*, 177 U. S. 104, 44 L. ed. 690, 20 Sup. Ct. Rep. 537.

General proof of destruction of papers is one thing, and proof that a given grant had been duly recorded and the record thereof destroyed is something very different.

United States v. Knight, 1 Black, 228, *sub nom. United States v. Moorehead*, 17 L. ed. 76; *Peralta v. United States*, 3 Wall. 440, 18 L. ed. 223.

Mr. T. B. Catron submitted the cause for appellees:

Even if there was no actual documentary evidence of a grant, yet the open, notorious, continuous, adverse possession of the tract under the claim of title by grant, for twenty years or more, would invoke in favor of the claimant the presumption of the existence of a grant; and not only that, but a presumption of the existence of every fact necessary to make a valid and complete grant, including the requisite or necessary record thereof.

United States v. Chaves, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57; *United States v. Charez*, 175 U. S. 523, 44 L. ed. 260, 20 Sup. Ct. Rep. 159; *Williams v. Donnell*, 2 Head, 697; *Ely v. United States*, 171 U. S. 233, 43 L. ed. 147, 18 Sup. Ct. Rep. 840.

Every act of a court of competent jurisdiction shall be presumed to have been rightly done until the contrary appears.

Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 9 L. ed. 490; *Williams v. United States*, 1 How. 290, 11 L. ed. 135; *Nations v. Johnson*, 24 How. 195, 16 L. ed. 628; *Harvey v. Tyler*, 2 Wall. 328, 17 L. ed. 871; *Baltimore & P. R. Co. v. Sixth Presby. Church*, 91 U. S. 127, 23 L. ed. 260.

Mr. Justice Peckham delivered the opinion of the court:

The government appeals in this case from a decree of the court of private land claims in favor of the appellees, confirming their title to a certain tract of land in the county of

[190] Dona Ana, territory of New Mexico, alleged in the petition to contain 4 square leagues. The petition of the appellees alleged the making of a grant to their predecessors prior to the year 1790, of a tract of land known as Santa Teresa; that the grant was a good and valid one, and the grantee entered upon and took possession of the same, and that he and his heirs and assigns continued in peaceable possession up to and after the ratification of the treaty of December 30, 1853, between the governments of Mexico and the United States, by the terms of which treaty territory, including the Santa Teresa grant, was transferred to the sovereignty of the United States. The petition then alleged that in the year 1846, while the original documents of title were in existence in the town of Paso del Norte, in the state of Chihuahua, where the heir resided, the place was occupied by the military forces of the United States, and the original documents of title and the official registry where they were recorded were destroyed by the American forces; that proceedings had been taken on January 7, 1853, for the purpose of perpetuating evidence of the title, and in accordance with which the judicial authorities re-established the boundaries and monuments of the grant, and placed the heir in formal and legal possession of the same on January 16, 1853. A certified record of these proceedings was alleged to be on file in the office of the United States surveyor general for the territory of New Mexico, a duplicate copy of the same in the Spanish language, with a translation also in duplicate, being filed with the petition. The boundaries of the grant were stated, and the petitioners averred that they were the owners in fee of the land contained in the grant by inheritance and purchase from the original grantee, Francisco Garcia, and that the title of the original grantee, his heirs and assigns, in and to the grant, was complete and perfect at the date when the United States acquired sovereignty over the territory of New Mexico, and also at the time of the ratification of the treaty between the United States and the Mexican Republic, known as the Gadsden purchase, on December 30, 1853; and it was averred that the land had been in the peaceable and undisturbed possession of the original grantee, his heirs, etc., from the date of the making of the grant to the present time; and that there was no person in possession of the land claiming the same adversely to the petitioners or otherwise than by lease or permission from them.

[191] The answer of the United States denied all the material averments of the petition, and denied that the petitioners were entitled to the relief or any part thereof prayed for, and asked that the petition should be dismissed. Subsequently, certain persons, claiming adversely to the petitioners, entered their appearance by their solicitor as defendants.

The principal issue in the case in regard to the boundaries of the alleged grant related to the southern line, the petitioners claiming that it was located at the international boundary line, while the government claimed

it was above the Southern Pacific Railroad bridge, a considerable distance north of that line. The interests of the individual defendants, who were codefendants with the government, were upon the tract of land lying between the international boundary and the line of the Southern Pacific Railroad bridge. The decree of the court fixed the south boundary at the point contended for by the government, thus leaving the lands in which the individual defendants were interested untouched, and, as this location of the line has been acquiesced in by the petitioners, the case no longer has any bearing upon the interests of those defendants.

The decree of the court was in favor of the petitioners, establishing their grant, with the southern line thereof as stated, and found that the petitioners were the grantees or assignees of the title of the original grantee, Garcia. Two of the judges dissented from the opinion and judgment of the court upon grounds stated in their opinions. The court made the following findings of fact:

"That prior to the year 1790, in accordance with the petition of Francisco Garcia, a citizen of the province of New Mexico and Kingdom of Spain, then and there duly made and presented to the duly authorized representatives of the King of Spain in and for New Biscay, which is now the state of Chihuahua of the Mexican Republic, the said authorities and representatives of the Crown and the King of Spain, by virtue of the power and authority in them vested as such, and in accordance with the laws, usages, and customs of the said Kingdom of Spain, made to the said Francisco Garcia a grant of a certain piece and parcel of land situate in the county of Dona Ana, in the territory of New Mexico, as at present constituted, the same then being a dependency [192] and province of the said Kingdom of Spain, said piece and parcel of land so granted as aforesaid being bounded, described, located, and designated as follows:

"The tract of land known as the 'Santa Teresa.' Bounded on the north by that bend known as the 'Cobrena;' on the south by the bend of the Piedras Paradise, the same being somewhat to the north of the present location of the Southern Pacific Railroad bridge, where the same crosses the Rio Grande del Norte; on the east the old bed of the said Rio Grande del Norte, as the same ran and existed in the year 1853; and on the west the brow of the ridge running parallel with the said river.

"2. That thereupon then and there the said Francisco Garcia was duly placed in legal possession of the said grant by officials to that end duly authorized by the laws, usages, and customs of the said Kingdom of Spain, according to the laws, usages, and customs then in force.

"3. That the land included in the said out-boundaries continued in the possession of the said grantee, his heirs, legal representatives, and assigns, from the time of the making thereof, prior to the year 1790, as aforesaid, down to the present time, and that the petitioners herein have succeeded in part to the rights of the said original grantee.

"And the court thereupon finds, as matter of law, that by reason of the facts aforesaid an imperfect or equitable title and right, such as the United States under the stipulations of the treaty of Guadalupe Hidalgo ought to recognize and confirm, to the said land, was vested in the said original grantee aforesaid, which right and title existed at the date when the United States acquired sovereignty over the country now embraced within the territory of New Mexico, within which the said grant is situated, and that the petitioners herein are entitled to have the same confirmed to the heirs, representatives, and assigns of the said original grantee.

[193] "It is therefore adjudged, decreed, and specified that the said private land claim, the subject of this suit, is a valid claim against the United States of America for the land included within *the natural boundaries above set forth, and the claim to the said land grant as designated, located, bounded, and described herein be, and the same hereby is, confirmed to the heirs, legal representatives, and assigns of the said original grantee, excepting, however, from this confirmation any right or title to any gold, silver, or quicksilver mines or minerals of the same, the same remaining the property of the United States."

The government now raises several objections to these findings, and it is stated (1) that there was no evidence that any grant by an officer authorized to make it had ever been made to the original grantees from whom the petitioners derived title; (2) that there is no evidence that the grant, even if one were made, was ever recorded as required by the treaty with Mexico, dated December 30, 1853, concluding the Gadsden purchase (10 Stat. at L. 1031, 1035), the 6th article of which provides that no grant made prior to September 25, 1853, will be respected or considered as obligatory which has not been located and duly recorded in the archives of Mexico; (3) that there was no sufficient evidence of possession upon which to base a presumption that a grant had ever been made.

1. For the purpose of proving that a grant had once been made of the land in question, the petitioners introduced in evidence a correct copy of the original documents showing the proceedings taken before the second civil judge of the canton, the original of which was on file in the office of the judge at Paso del Norte. From these proceedings it appears that on January 7, 1853, José Maria García, residing in the then town of El Paso del Norte, presented to the second civil judge, etc., a petition, in which he alleged that he was the testamentary executor under the will of his deceased mother, the widow of García, and that among the property of that estate was a ranch called Santa Teresa, the document of which he had lost when the American forces took possession of the town; and he prayed that in order to supply in some manner the lack of the original document there be taken the testimony of certain reputable persons existing in the town, who knew that these documents were

the title to the land in question, which prior to the year 1790 had been possessed by his father and thereafter occupied by his family until the Indians *caused them to [194] leave the premises. Pursuant to the petition the judge cited the witnesses named therein to appear before him, which they did, and some of them testified to the existence of certain documents relating to the ranch Santa Teresa; that they had seen those documents relating to that ranch, and had seen them on file in the archives, and that they were authenticated by one of the lieutenant governors that came into the district about the close of the last century, and that, by reason of the father of one of the witnesses being an employee of the town after 1821, such witness saw the original documents as to said ranch on file in the archives of his father's office, and which documents were lost when the Americans took possession of the archives of the town; that the town had been occupied by the American forces, and it was a notorious fact that those forces took a part of the public archives, and also occupied José Maria García's house, taking therefrom documents relating to his property and papers of importance, among them the document of such ranch. Possession of the ranch from the time of the alleged grant was also proved. Upon evidence of this nature, testified to by several witnesses, the judge made a finding in favor of García as follows:

"In view of the foregoing judicial inquiry with which the executor, José Maria García, has proved legally the possession that for many years they have had of the ranch called Santa Teresa, above the dam of the town and the Muleros bend, and it appearing that they have ever had titles to said property, and these have been lost, and from what appears from the testament and judicial inquiry there is given to the executor José Maria García, for himself and in the name of the coheirs, *without prejudice to any third party proving a better right*, the real, actual, personal, corporal possession, or that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch, with the enjoyment and benefits of the lands, woods, and pastures, and all other products to be found on said premises; and it is ordered that he be protected and defended therein, warning all not to interrupt or molest him in said possession and free use that he may deem fit to make *there- [195] of, without he being first heard and judgment rendered against him in court after a trial."

The judge also ordered that García should at a certain day named attend with the judge and witnesses, in order that he might be placed in possession, and it is afterwards recited that García went to the place named with the witnesses and was placed in possession of the land described in the petition. This record of all the proceedings thus taken formed part of the archives of the office of the judge, and was an official public document belonging to such archives, as testified to by the successor of the judge. It was not the record of the original grant, such as is

referred to in the treaty of 1853, but only a record of the proceedings just mentioned, and was contained in a book or collection of papers indorsed 1853. The record was received in evidence under the objection of the government, one of the objections being that the whole proceeding was *ex parte*, and therefore incompetent as evidence for any of the parties. The court below regarded the proceeding as in the nature of one to perpetuate evidence, and held that the testimony had been taken under the provisions of the law of the Republic of Mexico of May 23, 1837, and in the judgment of the court the record was therefore admissible in evidence. The law is said to be a re-enactment of article 14 of the decree of July 22, 1833. Reynolds, p. 173. As translated the law reads: "Art. 14. The district judges, with respect to the towns where they live, shall have cognizance, by way of precaution, with the alcaldes of the same, in the making of inventories, evidence *ad perpetuam*, and other judicial proceedings of like nature, in which there is yet no opposition of parties."

We are not prepared to say that the record thus put in evidence was void or irregular under the law just quoted. The judgment by its terms does not assume to be conclusive. It was a judicial inquiry made according to law, before a judicial officer of the state; and while the judgment gives to the petitioner, on account of the grant proved, the lands described in his petition, yet such judgment is by its terms "without prejudice to any third party proving a better right;" and it gives, subject to such proof, "the real, actual, personal, corporal [196] possession,*or that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch, with the enjoyments and benefits of the lands, woods, and pastures, and all other products to be found on such premises," etc. In other words, the judgment recognizes his possession and reaffirms the title of Garcia.

In the absence of any sufficient attack upon the record, or of any evidence on the part of the government going to disprove or discredit the averments contained therein, we think it formed enough of a basis for the finding of the court below that there was a grant made as stated in its findings, and that such grant and the record thereof in the archives had been destroyed under the circumstances mentioned. While this evidence, as to the existence of a grant, possibly might not be sufficient of itself upon which to found a decree confirming a title under it, yet, taken in connection with the proof which will be hereafter referred to, of possession under a grant, since 1790 up to the time of the filing of the petition in the court below, it was sufficient upon which to base a presumption of the existence of all papers necessary to constitute a title to the land possessed under it.

2. The objection of a lack of evidence that the alleged grant had ever been recorded may be considered with the one averring there was no sufficient evidence of possession upon which to base a presumption of a grant. It is claimed by the appellee that under the

facts a presumption of a record, as well as of the grant, may be made. In regard to the matter of possession, it was stated in the opinion of the court below as follows:

Our view of the evidence is that this tract of land was in the possession of Francisco Garcia exclusively during his lifetime from the beginning of this century, and that upon his death it passed to the hands of his children and remained in their possession until long after the transfer of sovereignty of the country to the United States, and is now in the possession of their grantees and their families. There have been very few claims based upon long possession more satisfactorily made out, in our minds, than is made out by the evidence in this case. These being the facts as we find them, we feel absolutely bound by *the doctrine established [197] in the case of *United States v. Chavez*, 175 U. S. 509, 44 L. ed. 255, 20 Sup. Ct. Rep. 159.

There are no adverse claimants to the land in question, and the proof of possession, exclusive in its nature, has been satisfactory to the court below. What constitutes such possession of a large tract of land depends to some extent upon circumstances, the fact varying with different conditions, such as the general state of the surrounding country, whether similar land is customarily devoted to pasturage or to the raising of crops, to the growth of timber or to mining, or other purposes. That which might show substantial possession, exclusive in its character, where the land was devoted to the grazing of numerous cattle, might be insufficient to show the same kind of possession where the land was situated in the midst of a large population, and the country devoted, for instance, to manufacturing purposes. Personal familiarity with the general character of the country and of its lands, and also knowledge of the nature and manner of the use to which most of the lands in the same vicinity are put, have given the judges of the court below unusual readiness for correctly judging and appreciating the weight and value to be accorded evidence upon the subject of possession of such lands as are here involved.

Those judges will also be presumed to have been familiar with the cases involving possession decided here,—such as *Whitney v. United States*, 167 U. S. 529, 546, 42 L. ed. 263, 269, 17 Sup. Ct. Rep. 857, and *Bergere v. United States*, 168 U. S. 66, 77, 42 L. ed. 383, 386, 18 Sup. Ct. Rep. 4. When, therefore, a majority of the court decides that the evidence of possession given in the case is most satisfactory, we are inclined to concur in that view unless it is clear that the court fell into a plain error, which we think is not the case. A majority of the court has held that "there have been very few claims based upon long possession more satisfactorily made out, in our minds, than is made out by the evidence in this case." That the dissenting justices came to a different conclusion merely shows that the evidence was such that different inferences might be drawn therefrom, and under such circumstances we are indisposed to review and re-

verse the decision of the court upon such a question of fact.

[198] In this case we therefore take the fact to be that there was a *possession under a grant of some kind, starting before 1790, and continuing, uninterrupted, until the filing of the petition. There was also evidence of the existence of a grant covering the land so possessed, together with evidence of the destruction of the documents constituting the grant, and also evidence of the destruction of the archives where the record of the grant had been; and the question arises whether such possession under these circumstances is not sufficient to presume, not alone the existence of a proper and valid grant, but its proper record in the archives of Mexico, within the provisions of the treaty of 1853 with that country. We think it is, and that the evidence is sufficient not only to presume a grant, but to presume any other matter which would have occurred in order to render the grant a perfectly valid one and the evidence of it sufficient within the requirements of the treaty. The treaty of 1853 did not require a record, in all cases, to be made at the seat of government of Mexico as a condition of the recognition of the grant by the government of the United States. If the record had been made in the place where records of that nature were customarily made for lands granted in the vicinity, it was, as we think, within the provisions of the treaty. It appears sufficiently, in our opinion, that Paso del Norte was the place where the archives of Mexico were kept in regard to grants of land in that neighborhood, and there is some evidence of the destruction of those archives, or of part of them, including the record of the grant in question here, by the American troops.

The appellants further claim that a lieutenant governor had no authority to grant public lands unless he were a subdelegate or had been authorized by the governor to make the grant, and that there is here no evidence of either fact. But possession under a grant, so long continued and so complete as is the case here, may well authorize, if necessary, the presumption that the lieutenant governor was either a subdelegate or that he had been authorized or his act ratified by the governor, and the grant duly recorded. It is not the case of basing a presumption of authority to make a grant upon the mere fact that the officer made it, and must therefore be presumed to have had authority. Lieutenant governors in the province of Louisiana*were, by virtue of their office, subdelegates, and as such had power to grant what is termed incomplete titles, and such grants might be confirmed. *Chouteau v. United States*, 9 Pet. 137, 144, 9 L. ed. 78, 81. There is no evidence that lieutenant governors in Mexico did not have the same powers, and a presumption of confirmation might be made in cases of long-continued, exclusive, and uninterrupted possession under such a grant. It is the long-continued, uninterrupted, and exclusive character of the possession here proved which is so important; and when supported, as it has been by the evidence of a grant, and of possession in accordance

[199]

with and under it, the presumption of validity may safely be made.

A record may in a case like this be presumed to have been made, just as well as the existence of a grant may be presumed. Where the exclusive character of the possession is so long, so uninterrupted, and so satisfactorily made out as in this case, and where other proof exists of the actual making of a grant of some kind of the land in controversy, the papers constituting such grant having been seen among the archives of Mexico, although the papers themselves have been destroyed, we think a case is made out showing not only that a grant had been made, but that it was duly located and recorded. The record was to be in the archives of Mexico, under the provisions of the treaty, and those archives, according to the evidence, may be presumed in fact to have existed at the place where the documents and their record were in truth destroyed. Taking all the evidence, there is room for the presumption of a record of the grant, as well as that for the existence of the grant itself.

In *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57, Mr. Justice Shiras, after speaking of the fact that there was ample evidence to show that the claimants had been put in juridical possession of the land covered by the grant from the government of New Mexico, which had authority to make it, continued (page 463. L. ed. 220, Sup. Ct. Rep. 62):

"However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American*law that a grant will be presumed[200] upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law. 1 Greenl. Ev. 12th ed. § 17; *Ricard v. Williams*, 7 Wheat. 59, 109, 5 L. ed. 398, 410; *Coolidge v. Learned*, 8 Pick. 503. Nothing, it is true, can be claimed by prescription which owes its origin to and can only be had by matter of record; but lapse of time, accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *Nullum tempus occurrit regi*, yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued, peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev. § 45. The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon (Best,

Ev. § 366), and was therefore a feature of the Mexican law at the time of the cession."

In the still later case of *United States v. Chavez*, 175 U. S. 509, 44 L. ed. 255, 20 Sup. Ct. Rep. 159, long-continued and uninterrupted possession of lands in Mexico, beginning long prior to the transfer of the territory to this country and continuing after that transfer, was held sufficient upon which to base presumptions enough for a legal judgment in favor of such possession, in the absence of rebutting circumstances. It is true there was an original grant to one of the occupants, Antonio Gutierrez, but the claimant was unable to present any direct conveyance from the original grantee or from his heirs with which he was in any way connected. He relied in fact upon evidence of possession by himself and his predecessors in title. Mr. Justice McKenna, in delivering the opinion of the court, made an extended examination of the law in regard to presumptions from possession, and it was held [201] that "proof of possession may be sufficient to admit of a presumption that everything had been done that was necessary to be done by way of a grant or conveyance of the title to the individual in possession or his predecessors."

But the court below has not acted in this case upon evidence of mere possession, unaccompanied by any written evidence conferring, or professing to confer, a title of some description.

In *United States v. Power*, 11 How. 570, 580, 13 L. ed. 817, 821, the grant actually proved was held to have no force, and it was alleged that those under whom plaintiff claimed possession held by some verbal permission from the government for many years under France and Great Britain. But no proof, even of that fact, was made; and, as said in the opinion of the court, "If there had been such proof, it would be of no value, as the district court did not possess power to act on evidence of naked possession, unaccompanied by written evidence conferring, or professing to confer, a title of some description."

To the same effect is *United States v. Rillieux*, 14 How. 189, 14 L. ed. 381, where it was said that under the acts of Congress no decree could be founded upon mere possession.

In this case proof was given of a grant of some nature to petitioner's predecessor, which covered the land in question, accompanied by proof that such grant had been actually destroyed by the American troops, so that it could not be produced. Proof of the grant tended to characterize the possession which was also proved, and to render it of an adverse and exclusive nature. The lower court found as a fact the exclusive possession of such land by Garcia during his lifetime, from the beginning of the century, and then by his children, until long after the transfer of the sovereignty of the country to the United States, and that such possession continued in the hands of their grantees and their families. Evidence of the actual existence of the grant, together with evidence of this kind of exclusive possession

872

under a claim of title, is more than mere proof of naked possession given solely for the purpose of therefrom inferring, in the absence of all other evidence of its existence, that a grant had once been made. It does not come within the principle of the above-cited cases nor violate the act of 1891 establishing the court. *We do not understand [202] that the treaty or that act made it absolutely necessary that a grant should actually be produced upon the trial, and that if one had been executed and by some accident destroyed no proof could be given of its contents, or any proof of possession of the lands in accordance with the grant be received. Nor do we understand that it was requisite that a record of the grant should be produced, in all cases, or that in its absence the petitioner must inevitably fail.

The contents of written instruments may be proved by parol, when it is shown that the instrument itself has been lost or destroyed under such circumstances as to show the loss or destruction was not the voluntary and intentional act of the party claiming a benefit under its provisions. And in such case as this we do not think the treaty or the act of Congress was intended to debar parol proof of the existence and of the contents of a grant which had been destroyed under the circumstances detailed, or that under such circumstances a presumption that the grant had been recorded could not be indulged. *United States v. Sutter*, 21 How. 170-174, 16 L. ed. 119, 120; *United States v. Castro*, 24 How. 346, 350, 16 L. ed. 659, 660; *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221.

Within the cases heretofore cited, we are of opinion that the evidence of possession was sufficient, in connection with the other evidence referred to, upon which to base a presumption that the petitioner had a title to the land which should be confirmed, within the treaty of 1853 and the provisions of the act of 1891 establishing the court of private land claims; and the judgment should therefore be affirmed.

Mr. Justice Gray and Mr. Justice White took no part in the decision of this case.

*CONSOLIDATED COAL COMPANY OF ST. LOUIS, Plff. in Err.,
v.

PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 203-212.)

Error to state court—Federal question—

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

As to validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note, and *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

On delegation of power—see note to *Bradshaw v. Lankford* (Md.) 11 L. R. A. 582.

185 U. S.

when sufficiently raised—constitutional law—validity of mining inspection law—classification—delegation of power.

1. The denial of a motion made in arrest of a judgment of a state court enforcing a state statute, by which motion the invalidity of such statute was specially set up on the ground of its repugnancy to U. S. Const. 14th Amend., presents a Federal question which gives the Supreme Court jurisdiction to review the judgment of the highest court of the state affirming such judgment, although such court did not in terms pass upon the Federal constitutionality of the law.
2. The classification of coal mines, which is made by Ill. Sess. Laws 1897, p. 269, § 11c, by which coal mines where not more than five men are employed at any one time are exempted from the operation of Ill. act May 28, 1879, providing for the appointment of state mine inspectors, whose fees should be paid by the owners of the mines, is not arbitrary or unreasonable.
3. The discretion confided to state mine inspectors by Ill. act May 28, 1879, § 11d, as amended in 1897, to determine the number of times each mine shall be inspected, and to regulate the charges therefor, which must be paid by the mine owner, does not make the act repugnant to U. S. Const. 14th Amend., where it requires that at least four inspections annually shall be made by each inspector of each mine in his district, and that his fees shall be dependent upon the length of time consumed and the expense necessarily incurred, and for each inspection shall not be less than \$6 nor more than \$10, and provides a regular salary for each inspector, which is neither increased nor diminished by the number of inspections or the amount paid therefor.

[No. 197.]

Submitted March 19, 1902. Decided April 14, 1902.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a judgment of the Circuit Court of St. Clair County enforcing the payment of the fees of state mine inspectors. *Affirmed.*

See same case below, 186 Ill. 134, 57 N. E. 880.

Statement by Mr. Justice Brown:

This was an action of assumpsit originally brought in the circuit court of St. Clair county by the people of the state of Illinois against the Consolidated Coal Company of St. Louis, a corporation of Illinois, to recover the sum of \$1,818 for the fees of state mine inspectors for the inspection of certain coal mines located in Illinois, owned and operated by the defendant, under "An Act Providing for the Health and Safety of Persons Employed in Coal Mines," originally enacted May 28, 1879, and the amendments thereto.

The case was submitted to the court without a jury, upon a stipulation of facts, in which it was agreed that the mines of the defendant, thirty-one in number, had been inspected between November 2, 1895, and June 26, 1899, by a state inspector, whose aggregate fees were \$1,818; that the secre-

tary of the bureau of labor statistics presented the defendant with the inspection bills and demanded payment therefor, which defendant refused to pay.

*It was further stipulated that the charge [204] for the recovery of which this action was brought was made in pursuance of the act of May 28, 1879, and that the question to be raised and disposed of was the validity and constitutionality of so much of said above-entitled act and the amendments thereto as related to the inspection fees of the said mine inspectors, and the imposing upon the mine operator and owner the duty of paying such fees, and also whether there was any remedy at law to recover such fees.

A judgment having been entered for the payment of these fees, the case was carried by writ of error to the supreme court, where the judgment of the circuit court of St. Clair county was affirmed.

Mr. Charles W. Thomas submitted the cause for plaintiff in error:

The 14th Amendment to the Constitution of the United States prohibits statutes which are capable of being executed arbitrarily and with discrimination, unequally and unjustly, and without regard to a legal discretion.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Baltimore v. Radcliffe*, 49 Md. 217, 33 Am. Rep. 239; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458; 6 Am. & Eng. Enc. Law, 2d ed. p. 967.

And the constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority, be done.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

And while it is competent and proper for any state to exercise its police power for the protection of the health and morals of its people, every regulation made in the exercise of that power must be uniform as to the class upon which it operates, and leave no arbitrary discretion in executive officers as to what persons are to be included in the class, and no discretion to be exercised in the way of discrimination against or in favor of any who are, by the regulation itself, placed in any particular class.

St. Louis & S. F. R. Co. v. Matthews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; 6 Am. & Eng. Enc. Law, 2d ed. p. 967, note 8; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 58 N. E. 616.

Genuine inspection laws are upheld because it is their purpose and effect to protect the public health or insure the public safety; but a law, the evident purpose of which is to ascertain whether a statute has

been disregarded, or to fix the guilt or innocence of any citizen, or to obtain evidence against him, is not a proper inspection law, no matter what it calls itself.

New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87.

Mr. **Howland J. Hamlin** submitted the cause for defendant in error:

State legislation is not obnoxious to the provision of the 14th Amendment to the Constitution of the United States, if all persons subject to it are treated alike under similar circumstances and conditions, in respect both to the privileges conferred and the liabilities imposed.

6 Am. & Eng. Enc. Law, 2d ed. p. 967.

And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.

Missouri P. R. Co. v. Mackey, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; 6 Am. & Eng. Enc. Law, 2d ed. p. 968; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Powell v. Pennsylvania*, 127 U. S. 687, 32 L. ed. 257, 8 Sup. Ct. Rep. 992, 1257; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beekwith*, 129 U. S. 27, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Ex parte Moynier*, 65 Cal. 33, 2 Pac. 728.

A statute, being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power, does not deny to the persons upon whom it operates the equal protection of the laws.

Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Jones v. Brim*, 165 U. S. 184, 41 L. ed. 679, 17 Sup. Ct. Rep. 282.

The 14th Amendment to the Constitution does not limit the subjects in relation to which the power of the state may be exercised for the protection of its citizens.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beekwith*, 129 U. S. 27, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Davis v. Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731.

Classification of persons and things subject to the operation of the police power of

the state is not inimical to the provisions of the 14th Amendment to the Federal Constitution.

Brannon, 14th Amend. 323; *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Missouri P. R. Co. v. Mackey*, 127 U. S. 207, 32 L. ed. 108, 8 Sup. Ct. Rep. 1161.

An act requiring coal mines to be inspected and ventilated to protect miners from the foul air and dangerous gases, and requiring the mine owners to pay the inspection fees, is valid as a legitimate exercise of the police power of the state, and such payment of inspection fees is for services beneficial to the owners of the mines.

Chicago, W. & V. Coal Co. v. People, 181 Ill. 270, 48 L. R. A. 554, 54 N. E. 961; *Consolidated Coal Co. v. People*, 186 Ill. 134, 57 N. E. 880; *People v. Harper*, 91 Ill. 357.

Inspection fees to be paid by mine owners, under the statutes of Illinois, are not charged for the purposes of revenue, but to cover the expenses of inspections, and the amount of such fees, having been determined by the legislature, is conclusive, unless it is manifest that the real purpose is to raise revenue under the guise of police regulation, or to prohibit the exercise by a citizen of a lawful calling by means of oppressive license fees.

Chicago, W. & V. Coal Co. v. People, 181 Ill. 275, 48 L. R. A. 554, 54 N. E. 961; *Price v. People*, 193 Ill. 114, 55 L. R. A. 588, 61 N. E. 844; *People v. Harper*, 91 Ill. 357.

It is within the power of the legislature to vest certain officers with the power and authority to prescribe what fees shall be charged in the enforcement of an inspection law which is authorized under the police power of the state.

People v. Harper, 91 Ill. 357.

Inspection is the examination of certain articles made by law subject to such examination so that they may be declared fit for commerce; an examination of an article to determine its fitness for a given purpose.

16 Am. & Eng. Enc. Law, p. 899.

Mr. Justice **Brown** delivered the opinion of the court:

The act of the general assembly of the state of Illinois, entitled "An Act to Provide for the Health and Safety of Persons Employed in Coal Mines," originally passed May 28, 1879, subsequently incorporated in the Revised Statutes of 1895, and amended in 1897 (Hurd's Stat. 1897, p. 1088), provides as printed in the margin.†

†"Sec. 11a. This state shall be divided into seven inspection districts, as follows:" etc.

"Sec. 11b. The governor shall, upon a recommendation of a board of examiners elected for that purpose, composed of two practical coal miners, two coal operators, and one mining engineer, to be appointed by the bureau of labor statistics of this state, all of whom shall be sworn to a faithful discharge of their duties, appoint seven properly qualified persons to fill the offices of inspectors of coal mines in this state (being one inspector for each district pro-

[205] *The supreme court found that all the state questions involved in this case had been disposed of in *Chicago, W. & V. Coal Co. v. People*, 181 Ill. 270, 48 L. R. A. 554, 54 N. E. 961. It only remains for us to determine whether the validity of the state statute above cited was drawn in question on the ground of its repugnancy to the Constitution and laws of the United States, and the decision was in favor of its validity, when it should have been held invalid. While the constitutionality of the law was not specially set up and claimed before the trial in the circuit court, there was a motion made in arrest of judgment, in which the invalidity of the statute was specially set up upon the

ground of its repugnancy to the 14th Amendment to the Constitution. The motion was denied, although the supreme court did not [207] in terms pass upon the Federal constitutionality of the law. But this was a sufficient presentation of the Federal question.

The regulation of mines and miners, their hours of labor, and the precautions that shall be taken to insure their safety, health, and comfort, are so obviously within the police power of the several states that no citation of authorities is necessary to vindicate the general principle. Many of these cases are reviewed in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, in which it was held to be competent

vided for in this act), whose commission shall be for the term of two years; but they shall at all times be subject to removal from office for neglect of duty or malfeasance in the discharge of duty, as hereinafter provided for.

"Sec. 11c. The inspectors so appointed shall have attained the age of thirty years, be citizens of this state, and have a knowledge of mining engineering sufficient to conduct the development of coal mines, and a practical knowledge of the methods of conducting mining for coal in the presence of explosive gases, and of the proper ventilation of coal mines. They shall have had a practical mining experience of ten years, and shall not be interested as owner, operator, stockholder, superintendent, or mining engineer of any coal mine during their term of office, and shall be of good moral character and temperate habits, and shall not be guilty of any act tending to the injury of miners or operators of mines during their term of office. They shall provide themselves with the most approved modern instruments for carrying out the intention of this act," etc.

"Sec. 11d. Any person, company, or corporation operating any coal mine in this state shall be required to pay an inspection fee of not less than \$6 nor more than \$10 for each visit of inspection or investigation of a coal mine by a state mine inspector, such fee to be regulated by the class of the mine (which shall be fixed by the inspector, and depend upon the length of time consumed, and the expense necessarily incurred in the inspection of such mine), and such fees shall be paid quarterly by the person, company, or corporation operating the mine inspected to the secretary of the bureau of labor statistics, and by him covered into the state treasury, to be held as a fund for the payment of salaries of state mine inspectors, as herein provided. *It shall be the duty of each inspector, as often as he may deem it necessary and proper, and at least four times a year, to inspect each and every mine in his inspection district.* Each inspection shall be certified to by the pit committee and mine manager of said mine. It shall be the duty of each inspector to keep a detailed record of all inspections and of all fees for such inspections, and he shall file a copy of the same with the secretary of the state bureau of labor statistics quarterly, between the 1st and 15th days of the following months: October, January, April, and July, which reports shall be published annually as a part of the regular report of the state bureau of labor statistics. The inspectors provided for in this act shall receive as full compensation for their services the sum of \$1,800 each per annum, to be paid quarterly out of such funds in the state treasury as may be received for inspection fees: *Provided, however, That in the event of such fees being inadequate to compensate the inspectors in the amount provided*

herein, the deficiency in the salaries shall be paid out of any moneys in the state treasury not otherwise appropriated. The mine inspector shall be required to post up in some conspicuous place, at the top of each mine visited and inspected by him, a plain statement of the condition of said mine, showing what, in his judgment, is necessary for the better protection of the lives and health of persons employed in said mine; such statement shall give the date of inspection and the number of hours spent in the inspection, also the date of the last previous inspection, and shall be signed by the inspector and the check weighman, and, if there be no check weighman employed by the miners, then said statement shall be signed by the weighman at the mine.

"Sec. 11e. It shall be unlawful for any person, company, or corporation to operate any coal mine in this state without first having complied with all the conditions and sanitary regulations required under existing laws, and paying all inspection fees provided for in this section; and in case of the refusal of any person, company, corporation, owner, agent, or operator to pay said inspection fees, after assuming to operate a coal mine, it shall be the duty of the state's attorney of the county, or any other attorney, in case of his refusal promptly to act, to proceed on behalf of the state against said person, company, corporation, owner, agent, or operator of said mine, by injunction, without bond, to restrain said person, company, corporation, owner, agent, or operator from continuing or attempting to continue to operate said mine or carry on a mining business."

In 1897, § 11e was amended so as to read as follows, the words in italics being inserted into the paragraph as it was originally enacted (Sess. Laws 1897, p. 269):

"Sec. 11e. It shall be unlawful for any person, company, or corporation to operate any coal mine in this state, *where more than five men are employed at any one time*, without first having complied with all the conditions and sanitary regulations required under existing laws, and paying all inspection fees provided for in this section; and in case of the refusal of any person, company, corporation, owner, agent, or operator to pay said inspection fees, after assuming to operate a coal mine, it shall be the duty of the mine inspector in said district, through the state's attorney of the county, or any other attorney, in case of his refusal to promptly act, to proceed on behalf of the state against said person, company, corporation, owner, agent, or operator of said mine by injunction, without bond, to restrain said person, company, corporation, owner, agent, or operator from continuing or attempting to continue to operate said mine or carry on a mining business."

for a state legislature to limit the hours of labor, in mines and smelting works, to eight per day.

1. We do not understand the general principle to be questioned that the state may appoint mining inspectors and provide for their payment by the owners of mines (*Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 688; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 101, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Chicago, W. & V. Coal Co. v. People*, 181 Ill. 270, 48 L. R. A. 554, 54 N. E. 961); but it is insisted that the acts here involved, in so far as they give to district mining inspectors a discretion as to the number of times they shall inspect such mines and a further discrimination as to what fees they shall charge, within the limit fixed by these acts, is in contravention of the 14th Amendment forbidding a state from depriving any person of life, liberty, or property without due process of law, or denying any person within its jurisdiction the equal protection of the law.

2. Another question is whether the act, as amended in 1897, in so far as it discriminates as to penalties imposed upon some persons engaged in the mining business, and not upon others, is a proper exercise of the police power. It is true that the act of 1897 amended the former law of 1895, by limiting its application to coal mines "where more than five men are employed at any one time." This is a species of classification which the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable, as it was in *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cotting v. Godard*, ante, 92, 22 Sup. Ct. Rep. 30, in which an act defining what should constitute public stock yards, and [208] regulating all charges connected therewith, was held to be unconstitutional, because it applied only to one particular company, and not to other companies or corporations engaged in a like business in Kansas, and thereby denied to that company the equal protection of the laws. In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for a discrimination here.

It is true that the act of 1897 does not in terms declare that the act of 1895 shall only apply to coal mines where more than five men are employed at any one time, but merely exempts the owners of such mines from punishment for violations of the general law. No one, however, can read this act, in connection with the prior act of 1895, without perceiving an intention on the part of the legislature to exempt such mines from the scope of the act. An act which declares it to be unlawful for any person to operate mines of a certain class without first complying with all the conditions and sanitary regulations required under existing laws, and paying all inspection fees, and, in case of refusal, to make it the duty of the mine inspector, through the state's attorney, to proceed in behalf of the state against such person, to compel the discontinuance of the mine, is so plainly an exemption from the operation of the law of all other mines as to constitute a classification in their favor.

3. Another charge is that by § 11d "it shall be the duty of each inspector, as often as he may deem it necessary and proper, and at least four times a year, to inspect each and every mine in his inspection district." It requires no argument to show that, for the protection of the operatives, one mine may be *required to be inspected [209] oftener than another, depending largely upon the number of miners, the depths of their workings, and the nature of the ground through which the excavations are made. While at a certain stage of excavation the precautions imposed by the mining inspector may be quite adequate for the protection of the operatives, at another time the same precautions would be obviously insufficient, depending largely upon the rapidity with which the excavations were made and the changes of air observed as the excavations progressed.

It is true that the act itself furnishes no basis for a classification as to the number of inspections and as to the price charged in each case, except that it provides that no inspection shall be required unless five operatives are employed at the same time, that at least four inspections shall be made each year, and that the fees shall be dependent upon the length of time consumed and the expense necessarily incurred in the inspection of such mine. It also provides that the charges for each inspection shall not be less than \$6 nor more than \$10.

It is insisted that such classification of mines, as to the number of inspections and fees therefor, should be made by the legislature, and nothing be left to the inspectors or other officers to determine the number of times a particular mine shall be inspected and the fees chargeable therefor. The ordinary classification is made by the legislature, where such classification can be logically made, either upon the basis of capital stock, number of operatives, mileage, or other facts which can be seized upon as an easy and an approximately just basis for classification. But in such a case as this there are so many elements entering into the classification as to make it impossible to seize

upon one or two, and make them the only basis. For instance, the number of inspections to be made might depend not only upon the size of the mines and the number of the operatives, but upon the character of the work being done, the nature of the soil being excavated, the depth of the excavation, and a dozen other features, all of which might enter into the basis of a classification by a competent inspector, and no one of which can be said to be determinative.

[210] We do not regard the act as necessarily violative of the 14th *Amendment, in the fact that some discretion is allowed to the inspector in determining the number of times the mines shall be inspected and the fees fixed therefor, particularly in view of the fact that no complaint is made of the abuse of such discretion, or that the inspector has been "guilty of any act tending to the injury of miners or operators of mines during their term of office." § 11c.

While it is undoubtedly true that legislative power cannot be delegated to the courts or to the executive, there are some exceptions to the rule under which it is held that Congress may leave to the President the power of determining the time when or exigency upon the happening of which a certain act shall take effect. Thus, in the leading case of *The Aurora v. United States*, 7 Cranch, 382, 3 L. ed. 378, it was held that Congress might make the revival of a law conditional upon a fact then contingent, and empower the President to declare by proclamation that such fact has occurred and the law revived. It has also been the immemorable policy in this country and in England to vest in municipal organizations certain local powers in respect to which they are peculiarly interested, and of the necessities of which they are much better informed than a general legislature possibly could be. Other instances are cited by Judge Cooley in his work upon Constitutional Limitations [6th ed. p. 139]: "For the like reasons the question whether a county or a township shall be divided and a new one formed, or two townships or school districts, formerly one, be reunited, . . . or a county seat located at a particular place, or after its location removed elsewhere, or the municipality contract particular debts or engage in a particular improvement,—is always a question which may be with propriety referred to the voters of the municipality for decision."

The last case in this court in which the question arose is that of *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, in which it was held that while Congress could not under the Constitution delegate its legislative power to the President, it might authorize him to suspend, by proclamation, the free introduction of sugar, coffee, and similar articles, when he was satisfied that any country producing such articles imposed duties or other exactions upon the products *of the United States which he might deem to be reciprocally unequal or unreasonable.

In enacting a law with regard to the inspection of mines, we see no objection, in case the legislature find it impracticable to

classify the mines for the purposes of inspection, to commit that power to a body of experts who are not only experienced in the operation of mines, but are acquainted with the details necessary to be known to make a reasonable classification, although it may affect the amount of fees to be paid by the mine owners.

It is obviously necessary that the number of inspections per year shall be determined by some one and by some executive officer. As it is clearly a matter of detail which could not be determined by the courts, it occurs to us that it could be intrusted to no one so safely as to the inspector of the district, who is appointed with great care, and who must be thirty years of age, a citizen of the state, and have a knowledge of mining engineering sufficient to conduct the development of coal mines, and a practical knowledge of the method of conducting the mining for coal in the presence of explosive gases, and of the ventilation of coal mines. Each one must have a practical mining experience of ten years, not interested as owner, operator, stockholder, superintendent, or mining engineer of any coal mine during his term of office, and be of good moral character and temperate habits.

The stipulation upon which the case was tried shows that the defendants were the owners of thirty-one mines, and that they were inspected between November 22, 1895, and June 26, 1899, 240 times, which was at the rate of about seventy-eight times per year for all of the thirty-one mines, or about two and one half times per year for each mine. As § 11d of the act requires each inspector to inspect each and every mine in his district at least four times a year, it would seem that, instead of overdoing his duty, he had been derelict in the performance of it.

3. It is also true that the fees for each inspection shall not be less than \$6 nor more than \$10, and that such fees shall be regulated by the class of the mine, which shall be fixed by the inspector, and depend upon the length of time consumed *and the expense [212] necessarily incurred in the inspection of such mine. Objection is made upon the ground that it gives to each mining inspector, not only the right to determine the number of times each mine shall be inspected, but the fees to be charged in each case. If his discretion were unlimited in this direction, and the fees were retained by himself, there would be much force in the suggestion; but the truth is that the amount of the fee must be in each case somewhere between \$6 and \$10, and must be paid to the secretary of the bureau of labor statistics, and by him covered into the state treasury, to be held as a fund for the payment of the salaries of the mining inspectors. Each inspector provided for by the act receives for his services \$1,800 per annum, to be paid quarterly out of the funds in the state treasury received for the inspection fees, and, in the event of such fees being inadequate to compensate such inspectors in the amount provided for herein, the deficiency of the salaries shall be paid out of the money in the state treasury

not otherwise appropriated. It appears then, first, that the state inspector receives a regular salary, neither increased nor diminished by the number of inspections or the amount paid for each inspection; and, second, that he receives such salary directly from the bureau of labor statistics, and not from the fees paid to him therefor. As his compensation is dependent neither upon the number of his visits nor upon the amount of his fees, it is difficult to see how he would gain by multiplying one or magnifying the other. We know of no reason why the legislature should deprive itself of the best attainable evidence of the facts it seeks to make determinative of these two questions.

As we fail to discover any repugnancy between the acts in question and the 14th Amendment to the Constitution, we are of opinion that *the decree of the Supreme Court was right, and should be affirmed.*

[213] *UNITED STATES, *Appt.*,
v.

LEE YEN TAI.

(See S. C. Reporter's ed. 213-223.)

Statutes—repeal by subsequent treaty—Chinese exclusion act.

No abrogation of the judicial procedure for deportation of Chinese laborers, provided for by the act of May 6, 1882, § 12, as amended by the act of July 5, 1884, and continued in force for ten years from and after the passage of the act of May 5, 1892, was effected by the treaty with China of December 8, 1894, because of its failure to prescribe any such procedure for deportation, or to continue in force any prior statute on that subject, as such provision is in harmony with, and can be enforced without affecting or impairing any right secured by, the treaty, and such enforcement will serve to advance the purpose of the two countries in respect of Chinese laborers, as avowed in such treaty.

[No. 503.]

Argued March 13, 14, 1902. Decided April 21, 1902.

ON CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting a question arising under the Chinese exclusion act. *Answered in the negative.*

The facts are stated in the opinion.

Assistant Attorney General Hoyt argued the cause and filed a brief for appellant:

The effect of the decisions in the cases of *United States v. Gue Lim*, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415, and *Li Sing v. United States*, 180 U. S. 486, 45 L. ed.

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey* (N. C.) 4 L. R. A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136; and *United States v. 356 Caddies of Tobacco*, 20 L. ed. U. S. 235.

On construction and operation of treaties—see note to *United States v. The Amistad*, 10 L. ed. U. S. 826.

878

634, 21 Sup. Ct. Rep. 449, is necessarily fatal to the contention that the Chinese exclusion acts were repealed by the treaty of 1894. Many cases have been decided in lower Federal courts since the ratification and promulgation of this treaty, which intimate no doubt of the entire consistency between the treaty and the statutes.

United States v. Loo Way, 68 Fed. 475; *Wong Fong v. United States*, 23 C. C. A. 110, 44 U. S. App. 674, 77 Fed. 168; *Re Chu Poy*, 81 Fed. 826; *United States v. Yong Yew*, 83 Fed. 832; *Re Li Sing*, 30 C. C. A. 451, 58 U. S. App. 1, 86 Fed. 896; *Re Jew Wong Loy*, 91 Fed. 240; *United States v. Chu Chee*, 35 C. C. A. 613, 93 Fed. 797.

It seems apparent from the decisions of the court that there is a certain hesitation about giving to a treaty the effect of a repeal, even where the language is explicit to that effect.

Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568. See also *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628.

Though the power to make treaties is general and unrestricted, it is not so to be construed as to destroy the fundamental laws of the state. A power given by the Constitution cannot be construed to authorize the destruction of other powers given in the same instrument.

2 Story, Const. 4th ed. § 1508.

The provision of the treaty extending to Chinese persons all of the most favored nation's rights except the right to become naturalized citizens does not overthrow positive law, or carry more than a general assurance of fair dealing and security from violence under the law.

Re Parrott, 6 Sawy. 349, 1 Fed. 481; *Re Quong Woo*, 13 Fed. 229.

The favored nation privileges are only such as are gratuitous. Little is to be inferred from them. Special engagements, as, for instance, of extradition, stand in each case on particular stipulations of the treaty.

2 Wharton, International Law Digest, § 134; Lawrence's Wheaton, International Law, 493; 6 Ops. Atty. Gen. 148.

Such clauses most frequently refer to commercial reciprocity, and, even in that particular, complete equality is difficult to obtain under such clauses.

Calvo, Le Droit International, Paris, 1896, Tome III. § 1597, pp. 365, 366.

Mr. Max J. Kohler argued the cause, and, with Mr. B. Lewinson, filed a brief for appellee:

This treaty covers the whole subject of Chinese immigration, designedly makes most radical changes in the law, all by implication, and is and was intended to be, a substitute for the prior laws and treaties, which it repealed by implication.

Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327; *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *United States v. Hewecker*, 164 U. S. 46, 41 L. ed. 345, 17 Sup. Ct. Rep. 18; *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153; *Distriet of Columbia v. Hutton*, 143 U. S. 18.

185 U. S.

36 L. ed. 60, 12 Sup. Ct. Rep. 369; *The Paquete Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

This principle of repeal by implication has peculiar force where the inquiry is whether an international agreement is designed to serve as a substitute for a prior municipal law of one of the contracting parties, which the other had deemed objectionable. Such other cannot be regarded as acquiescing in the continuance of the very municipal enactment it had objected to.

Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Tucker v. Alexandroff*, 183 U. S. 424, ante, 264, 22 Sup. Ct. Rep. 195.

Treaties, like statutes, must rest on the words used; "nothing adding thereto, nothing diminishing."

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; *King v. Burrell*, 12 Ad. & Fl. 468.

The principle, *Expressio unius est exclusio alterius*, applies, and establishes the repeal by the treaty of the procedure provision.

Tucker v. Alexandroff, 183 U. S. 424, ante, 264, 22 Sup. Ct. Rep. 195. See also *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

The treaty of 1880 with China was a consent, on China's part, to subsequent legislation by the United States restricting the immigration of Chinese laborers within definite limits; without it, such acts would have violated the treaty of 1868.

Fong Yue Ting v. United States, 149 U. S. 716, 37 L. ed. 914, 13 Sup. Ct. Rep. 1016.

The treaty of 1880 was not self-executing, did not by its terms exclude any Chinese person, and required legislation to carry it out.

6 Ops. Atty. Gen. 296, 750; *Foster v. Neilson*, 2 Pet. 253, 7 L. ed. 415; *Chouteau v. Eckhart*, 2 How. 344, 11 L. ed. 293; *Fong Yue Ting v. United States*, 149 U. S. 720, 37 L. ed. 915, 13 Sup. Ct. Rep. 1016.

The title and recitals of a statute designed to execute a treaty which is not self-executing are an essential and important part of the statute, and not merely nominal.

Price v. Forrest, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *United States v. Palmer*, 3 Wheat. 610, 4 L. ed. 471.

They have been so regarded in this instance, and effect has been given to this circumstance with respect to this very treaty.

Chev Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; *United States v. Gue Lim*, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415.

But the treaty of 1880 was repealed by the treaty of 1894, every paragraph and sentence of the latter being inconsistent with the former, with the single exception of article 3 of the former, which was accordingly in terms re-enacted in article 4 of the latter.

185 U. S.

La Republique Francaise v. Schultz, 57 Fed. 37.

If a statute which does not itself contain any limitation is to be governed by another which is temporary merely, the former will also be temporary, and dependent upon the existence of the latter.

23 Am. & Eng. Enc. Law, p. 155, art. *Statutes*; 9 Bacon, Abr., *Statutes*, I., 1876 ed. p. 223; *Ex parte Gallile*, 7 T. R. 673. See also 20 Ops. Atty. Gen. 467.

With the repeal of the treaty of 1880 in 1894, the statutes to execute it fell *ipso facto*, except in as far as the new treaty expressly in terms continued them. No judicial procedure for deportation was, in terms or even by implication, continued by the treaty, and hence the commissioner herein was without jurisdiction.

The treaty of 1894 prescribed a new and different certificate to be produced by Chinese applicants, and the penalties for entry without the former certificate were not continued, and fell by their own terms.

21 Ops. Atty. Gen. 347.

The language of the treaty has its present shape by design, because a reference in a prior draft thereof to the certificate "required by the act of 1884" was expressly stricken out by consent, as a result of a conference between Secretary Bayard and the Chinese minister.

1 Foreign Relations of U. S. 1888, pp. 393, 394, art. 3.

The diplomatic correspondence immediately antedating the treaty shows that Chinese persons objected to judicial proceedings to pass upon their rights during an unlimited period after they had entered; that these objections were communicated to the American Secretary of State by the Chinese minister, were specifically acquiesced in by our government, and the references to the prior certificate and its mandatory provision eliminated, thus carrying with it this procedure provision.

1 Foreign Relations of U. S. 1888, pp. 368-370, propositions 7, 13, 371-373, 393, 398.

Reference is proper to treaty negotiations, as evidence of the history of the times, the attending circumstances, and the evils aimed at and the purposes of the drafters of the treaty.

United States v. Ah Fawn, 57 Fed. 591; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; *Dunlap v. United States*, 173 U. S. 65, 43 L. ed. 616, 19 Sup. Ct. Rep. 319; *United States v. Payne*, 2 McCrary, 289, 8 Fed. 892; *United States v. Perhegman*, 7 Pet. 51, 8 L. ed. 604.

Procedure and penalty provisions of one act are inapplicable to subsequent statutes, in the absence of language expressly adopting them.

Bartram v. United States, 77 Fed. 604; *Re Kearns*, 64 Fed. 481; *Re Kinney*, 102 Fed. 468; *United States v. Paul*, 6 Pet. 141, 8 L. ed. 348; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed.

212; *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852; *United States v. Gilmore*, 8 Wall. 330, 19 L. ed. 396.

This principle applies to treaties.

Tucker v. Alexandroff, 183 U. S. 424, ante, 264, 22 Sup. Ct. Rep. 195. See also *The Amiable Isabella*, 6 Wheat. 1, 5 L. ed. 191.

Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.

Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

This principle requires a holding that "may," in article 3 of this treaty, is permissive, and not mandatory.

United States ex rel. Siegel v. Thoman, 156 U. S. 359, 39 L. ed. 452, 15 Sup. Ct. Rep. 378; *Minor v. Mechanics Bank*, 1 Pet. 46, 7 L. ed. 47; *The Mary N. Hogan*, 17 Fed. 814; *United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; *United States v. Jung Ah Lung*, 124 U. S. 621, 31 L. ed. 591, 8 Sup. Ct. Rep. 663.

Accordingly, the mandatory provisions for a certificate under §§ 6 and 12 of the act of 1884 have been superseded, and such certificates have become optional, and hence persons can no longer be excluded as laborers because not shown by the statutory certificate to be nonlaborers.

It is not competent for the courts to supply supposed defects and gaps in legislation, particularly where such proposed additional legislation would be such a gross violation of individual liberty and personal rights.

United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; *The Amiable Isabella*, 6 Wheat. 1, 5 L. ed. 191.

Article 4 of the treaty, giving Chinese all the rights of the most favored nation, except the right to become citizens by naturalization, may itself be invoked as sufficient authority for terminating this barbarous Chinese exclusion system.

Re Quong Woo, 13 Fed. 229; *Re Ah Chong*, 6 Sawy. 451, 2 Fed. 733; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456. See also *Storti v. Massachusetts*, 183 U. S. 138, ante, 120, 22 Sup. Ct. Rep. 72.

Mr. Justice Harlan delivered the opinion of the court:

This case is here upon a certified question of law arising in the circuit court of appeals for the second circuit.

The facts out of which the question arose and the question itself are shown by the following statement sent up by that court:

[214] "On the 8th day of October, 1900, complaint was made under oath before a commissioner of the United States for the northern district of New York, charging that Lee Gin Moy, alias Lee Yen Tai, on the 6th day of October, A. D. 1900, 'did unlawfully come

into the United States from China, he being then and there a Chinese person and laborer, and not being a diplomatic or other officer of the Chinese or any other government, and without producing the certificate required of Chinese persons seeking to enter the United States, and that he was not entitled to be or remain within the United States.' A warrant for said defendant's arrest was issued by said United States commissioner on the same day, and after a hearing before said commissioner he issued a warrant of deportation in which the following adjudication was placed on record:

"I now hereby find and adjudge that the said Lee Gin Moy is a Chinese person and laborer; that he is not a diplomatic or other officer of the Chinese, or of any other government, and unlawfully entered the United States as charged in said complaint; and I further adjudge him, said Lee Gin Moy, guilty of not being lawfully entitled to be or remain in the United States."

"Said defendant's immediate removal to China by the United States marshal for said northern district of New York upon said warrant was ordered by said commissioner. While the marshal had him in custody, and in process of deportation, habeas corpus was issued by the district court for the southern district of New York. The petition upon which the writ of habeas corpus issued averred, among other things, that said Lee Yen Tai was a merchant having an interest of one thousand dollars (\$1,000) in the capital of the firm, and is not a laborer, and has not been a laborer, but is a merchant and member of a firm specified in the petition, and has always been a merchant since he had any status.

"Before the district court the prisoner was produced, and a return made which included the aforesaid warrant of deportation; said return was traversed, and no evidence as to defendant's status other than the allegations in the aforesaid petition and return was before the district court. Upon the hearing in the district court the petitioner was discharged upon giving* bail for his ap-[215] pearance as may be determined by any final order on appeal. Appeal was duly taken by the United States to this court."

By the preamble of the act of May 6th, 1882, chap. 126, it was declared that in the opinion of the government of the United States the coming of Chinese laborers to this country endangered the good order of certain localities within our territory. It was therefore provided that from and after the expiration of ninety days from the above date, and until the expiration of ten years from such date, the coming of Chinese laborers to the United States should be suspended, and during such suspension it was made unlawful for any Chinese laborer to come, or having come after the expiration of said ninety days, to remain within the United States. § 1. Penalties were imposed upon the master of any vessel who should knowingly bring within the United States on his vessel and land, or permit to be landed, any Chinese laborer from any foreign port or place. § 2. In order to identify such Chi-

nese as were entitled, under the treaty of November 17th, 1880 (22 Stat. at L. 826), to go from and come to the United States of their free will and accord, provision was made for certificates to be granted to such persons § 4.

The 12th section of the above act was as follows:

"That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States." 22 Stat. at L. 58, 61.

By the act of July 5th, 1884, chap. 220, the 12th section of the above act of May 6th, 1882, was amended so as to read as follows:

[216] "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons *seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several states and territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of any of the provisions of this act." 23 Stat. at L. 115, 117, 118.

Subsequently, by the act of May 5th, 1892, chap. 60, entitled "An Act to Prohibit the Coming of Chinese Persons into the United States," it was provided that "all laws now [then] in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this [that] act." 27 Stat. at L. 25, § 1.

185 U. S.

The question certified to us is whether the 12th section of the act of 1882, amended and continued in force as above stated, was abrogated by the treaty with China proclaimed December 8th, 1894. 28 Stat. at L. 1210.

As this question cannot be properly disposed of without examining the entire treaty, the provisions of the treaty are here given in full:

"Whereas, on the 17th day of November, A. D. 1880, and of Kwanghsii the sixth year, tenth moon, fifteenth day, a treaty *was concluded between the United States and China, for the purpose of regulating, limiting, or suspending the coming of Chinese laborers to, and their residence in, the United States;

"And whereas the government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

"And whereas the two governments desire to co-operate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;

"And whereas the two governments are desirous of adopting reciprocal measures for the better protection of the citizens or subjects of each within the jurisdiction of the other;

"Now, therefore, etc. . . .

"Art. I. The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States, shall be absolutely prohibited.

"Art. II. The preceding article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of \$1,000, or debts of like amount due him and pending settlement. Nevertheless, every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this treaty as the laws of the United States may now or hereafter prescribe, and not inconsistent with the provisions of this treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited. And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States *may be [218] extended for an additional period, not to exceed one year, in cases where, by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return,—which

facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.

"Art. III. The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the government of the United States as may be necessary to prevent said privilege of transit from being abused.

"Art. IV. In pursuance of article 3 of the immigration treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghsii, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the government of the United States reaffirms its obligation, as [219] stated in said article 3,* to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

"Art. V. The government of the United States, having by an act of Congress, approved May 5th, 1892, as amended by an act approved November 3d, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first-named act to be registered as in said acts provided, with a view of affording them better protection, the Chinese government will not object to the enforcement of such acts, and reciprocally the government of the United States recognizes the right of the government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled (not merchants as defined by said acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports. And the government of the United States agrees that within twelve months from the date of the exchange of the ratifications of this convention, and annually thereafter, it will furnish to the

government of China registers or reports showing the full name, age, occupation, and number or place of residence of all other citizens of the United States, including missionaries, residing both within and without the treaty ports of China, not including, however, diplomatic and other officers of the United States residing or traveling in China upon official business, together with their body and household servants.

"Art. VI. This convention shall remain in force for a period of ten years, beginning with the date of the exchange of ratifications, and if, six months before the expiration of the said period of ten years, neither government shall have formally given notice of its final termination to the other, it shall remain in full force for another like period of ten years." 28 Stat. at L. 1210.

The first proposition made on behalf of the defendant is that the treaty of 1894 should be construed as covering the whole subject of Chinese exclusion, and that its failure to prescribe any judicial procedure for deportation, or to continue in force any prior statute on that subject, shows that the commissioner was without jurisdiction.

*If the words of the treaty of 1894, reason- [220] ably interpreted, indicate a purpose to cover the whole subject of Chinese exclusion, including the methods to be employed to effect that result, then the proceedings against the defendant before the commissioner were without authority of law; for the treaty itself does not provide any particular method by which Chinese laborers may be prevented from entering the United States, or for sending them out of the country if they illegally enter, although both nations expressed in the treaty a desire to co-operate in preventing the immigration or coming to this country of such persons. China itself recognized it to be its duty to co-operate with the United States to that end, "in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States." As both countries were agreed that this result should be attained, the court ought to hesitate to adopt any construction of the treaty that would tend to defeat the object each had in view. We must assume that the two governments knew that a general prohibition of the coming of Chinese laborers to the United States would be ineffectual if no provision were made for determining whether a particular Chinaman seeking to enter the country, and whose right to enter was denied, belonged to the class prohibited from coming within our territorial limits.

It is not disputed that such provision exists if § 12 of the act of May 6th, 1882, as amended by the act of July 5th, 1884, and as continued in force by the act of May 5th, 1892, be held not to have been repealed or superseded by the treaty of 1894.

That it was competent for the two countries by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument,

shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior act of Congress on the same subject. In *Foster v. Neilson*, 2 Pet. 253, [221] 314, 7 L. ed. 415, 435, it was *said that a treaty was "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." In the case of *The Cherokee Tobacco*, 11 Wall. 616, 621, *sub nom.* 207 *Half Pound Papers Smoking Tobacco v. United States*, 20 L. ed. 227, 229, this court said "a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." So, in the *Head Money Cases*, 112 U. S. 580, 599, *sub nom.* *Edye v. Robertson*, 28 L. ed. 798, 804, 5 Sup. Ct. Rep. 247, 254, this court said: "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." Again, in *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456, 458: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." See also *Taylor v. Morton*, 2 Curt. C. C. 454, 459, Fed. Cas. No. 13,799; *Clinton Bridge Case*, Woolw. 155, Fed. Cas. No. 2,900; *Ropes v. Clinch*, 8 Blatchf. 304, Fed. Cas. No. 12,041; 2 Story, Const. § 1838. Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty.

In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that "there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy;" and that "if harmony is impossible, and only in that event, the former law is repealed, in part or wholly, as the case may be." *Wood v. United States*, 16 [222] Pet. 342, 363, 10 L. ed. 987, 995; **United* 185 U. S.

States v. Tynen, 11 Wall. 88, 93, 20 L. ed. 153, 154; *South Carolina v. Stoll*, 17 Wall. 425, 431, 21 L. ed. 650, 654. In *Frost v. Wenie*, 157 U. S. 46, 58, 39 L. ed. 614, 619, 15 Sup. Ct. Rep. 532, 537, this court said: "It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute."

The same rules have been applied where the claim was that an act of Congress had abrogated some of the provisions of a prior treaty between the United States and China. *Chew Heong v. United States*, 112 U. S. 536, 550, 28 L. ed. 770, 774, 5 Sup. Ct. Rep. 255. In that case it was held that the treaty could stand with the subsequent statutes, and, consequently, it was enforced.

Like principles must control when the question is whether an act of Congress has been superseded in whole or in part by a subsequent treaty. A statute enacted by Congress expresses the will of the people of the United States in the most solemn form. If not repugnant to the Constitution, it is made by that instrument a part of the supreme law of the land, and should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced. So far from there being any inconsistency between the statute and treaty here in question, the 12th section of the act of 1882, as amended in 1884, and continued in force for ten years from and after the passage of the act of 1892, is in absolute harmony with the treaty, and can be enforced without affecting or impairing any right secured by the treaty. On the contrary, the enforcement of that section as amended will serve to advance the purpose of the two countries in respect of Chinese laborers, as avowed in the treaty of 1894. Despite the ingenious argument to the contrary, we do not perceive any difficulty whatever in reaching this conclusion, after carefully *scrutinizing the treaty and [223] the statute. A different conclusion would be hostile to the objects which, as avowed in the treaty, both the United States and China desired to accomplish. This is so clearly manifest that argument cannot, as we think, make it more so.

The question certified is answered in the negative, and an order so declaring will be sent to the Circuit Court of Appeals.

Mr. Justice Gray did not hear the argument, and took no part in the decision.

UNITED STATES, *Appt.*,
v.
CHARLES BORCHERLING, Receiver.

(See S. C. Reporter's ed. 223-236.)

Claims—debt due from United States—transfer by appointment of receiver by state court—preference to local creditors.

1. Payment to a creditor of the United States by the Secretary of the Treasury after due notice of the appointment, by a court of chancery of the state where the creditor was domiciled and personally served with process, of a receiver of such creditor's personal property for the payment of an unsatisfied judgment against him, and of an order of such court restraining such creditor from receiving any part of the debt to his credit, is no defense to a claim by the receiver to recover from the United States in the court of claims the amount so paid.
2. The general rule that the courts of one state will not aid the officers of another to withdraw funds or property of a decedent, without providing for local creditors, does not require the Treasurer of the United States, authorized to adjust and pay over the amount found due a creditor of the United States, to prefer the latter's creditors resident in the District of Columbia over a receiver of personal property of such creditor appointed by a court of chancery of the state where he was domiciled and was personally served with process.
3. An *ex parte* modification of an order of the supreme court of the District of Columbia enjoining a creditor of the United States from receiving or collecting the sum due him, so as to permit the payment of his creditors resident in that District, does not justify the Treasurer of the United States in paying such creditors, where he had prior notice of the appointment, by a court of chancery in the state where the creditor of the government was domiciled and personally served with process, of a receiver of his personal property, and of an order restraining such creditor from receiving such debt to his credit.

[No. 150.]

Argued January 30, 31, 1902. Decided April 14, 1902.

APPEAL from the Court of Claims to review a judgment awarding the receiver of a creditor of the United States a sum of money paid to such creditor in disregard of the order of a state court appointing a receiver of such creditor's personal property. *Affirmed.*

See same case below, 35 Ct. Cl. 311.

Statement by Mr. Justice **Shiras**:

The facts of this case were thus found by the court of claims:

"By act of Congress approved February 23, 1891, the Secretary of the Treasury of the United States was authorized and directed to adjust, upon principles of equity and justice, the accounts of Rodman M. Price, late purser in the United States Navy and acting navy agent at San Francisco, crediting him with the sum paid over to and re-

ceived for by his successor, A. M. Van Nostrand, acting purser, January 14, 1850, and pay to said Rodman M. Price, or his heirs, out of any money in the Treasury not otherwise appropriated, any sum that may be found due him upon such adjustment.

*"August 31, 1892, the Treasury officials [224] adjusted Price's accounts, and found there was due him \$76,204.08, which included a credit of \$75,000 that Price said he had advanced to Van Nostrand from his private funds.

"In 1857 Samuel Forrest recovered in the supreme court of New Jersey a judgment against Price for \$17,000 and costs. Execution on that judgment was returned unsatisfied. Forrest died in 1869, intestate.

"In 1874 his widow, Anna M. Forrest, as administratrix of his estate, revived the judgment by scire facias. In her bill she prayed discovery, injunction, and the appointment of a receiver. Price and his wife answered. The cause slept till August 9, 1892, when Mrs. Forrest, administratrix, filed a petition stating that since filing her bill of complaint no payment had been made on the judgment against Price; that neither she nor her solicitors had been able to find any personalty or real estate belonging to Price by levy upon and sale of which any part of the amount due on the judgment could be obtained; that it had lately come to her knowledge that about \$45,000 was about to be paid Price by officers of the Treasury of the United States; that that sum was to be paid by the delivery to Price or his attorneys of a draft of the Treasurer of the United States payable to his order; that said draft was to be made and the transaction closed on the 15th day of August thereafter; and if Price obtained said money he would, unless restrained, put the same beyond the reach of the petitioner.

"The petitioner prayed the appointment of a receiver of the draft, and that Price be ordered immediately on the receipt of such draft to indorse the same to the receiver, to the end that the same might be received by him as an officer of the court and disposed of according to law.

"The chancellor, August 8, 1892, issued a rule, returnable September 12, 1892, to show cause, and restraining Price from making any indorsement of the draft referred to in the petition.

"A duly certified copy of the order was served upon Price August 10, 1892. Nevertheless, after that date Price received from the Assistant Treasurer of the United States at Washington, and, without permission of the court, collected for several drafts signed [225] by that officer for the respective sums of \$2,704.08, \$13,500, \$20,000, and \$9,000, in all the sum of \$45,204.08, leaving in the hands of the United States of the amount due on the settlement of Price's accounts the sum of about \$31,000.

"On the 10th day of October, 1892, Charles Borchering was appointed by the chancery court receiver in said cause of the property and things in action belonging or due to or held in trust for Price at the time of issuing said executions, or at any time after-

wards, and especially of said four drafts, with authority to possess, receive, and sue for such property and things in action and the evidence thereof; and it was made the duty of the receiver to hold such drafts subject to the further order of the court. The receiver was required to give bond in the sum of \$40,000, conditioned for the faithful discharge of his duties. At the same time Price was ordered to convey and deliver to the receiver all such property and things in action and the evidence thereof, and especially forthwith to indorse and deliver the drafts to him, and he and all agents or attorneys appointed by him were enjoined and restrained from intermeddling with the receiver in regard to said drafts, and ordered, if in possession or control thereof, to deliver them to the receiver with an indorsement to that officer or to the clerk of the court for deposit; provided the order should be void if the drafts other than the one for \$9,000 were delivered with Price's indorsement to the clerk, the proceeds to be deposited to the credit of the cause. Price was expressly enjoined from making any indorsement or appropriation of the drafts other than to the receiver or the clerk for deposit.

"The receiver gave the required bond, and having entered upon the duties of his office, he caused a copy of the above order to be served upon Price, and demanded compliance with its provisions.

"In 1892, the particular day not being stated, the chancery court issued an attachment against Price for contempt of court in disobeying the order of August 8, 1892. By an order made May 18, 1894, the court held him to be guilty of such contempt, and he was directed to pay the receiver the sum of \$31,704.08, and a fine of \$50 and costs, and [226] in default of obedience to that order to be imprisoned in the county jail until it was complied with. 52 N. J. Eq. 16, 31, 29 Atl. 215. Upon appeal to the court of errors and appeals, the order of the chancery court was affirmed. 53 N. J. Eq. 693, 35 Atl. 1130.

"The Treasury Department, at the time of allowing the \$76,204.08, withheld \$31,000, under the provisions of the act of March 3, 1875 (18 Stat. at L. 481, chap. 149), to await the determination of a suit to be instituted against Price, or surety upon Van Nostrand's bond as acting purser, United States Navy.

"The suit was instituted, but was dismissed some time previous to December 22, 1893.

"On the 16th of July, 1892, counsel for Mrs. Forrest wrote the Secretary of the Treasury referring to a previous letter to the Department of May 14, 1891, in the matter of the claim of Rodman M. Price, and asking to be seasonably advised in case the Department took action in the direction desired by Price.

"The Secretary was advised that Mrs. Forrest could prove to the satisfaction of the Department that if Mr. Price did turn over \$75,000, or any large sum, to the United States, a part of that sum, namely, \$17,078.04, must have belonged to Mrs. Forrest; that it was trust money, and it would not be

equitable to cause that much to be paid to Price.

"By letter of November 27, 1893, counsel for the receiver notified the Secretary of the Treasury of Borchering's appointment and qualification by giving bond of \$40,000; that Price, though personally enjoined, had, in contempt of the New Jersey court, indorsed the drafts and collected the proceeds. The letter inclosed is a certified copy of the order of the court, October 10, 1892, appointing the receiver. Counsel in behalf of the receiver made claim for the balance of \$31,000 about to be paid Price under act of February 23, 1891.

"The letter closed as follows: 'I respectfully ask that comity be shown the chancellor of New Jersey, and that the draft to be issued in payment of the balance due and payable to the order of Rodman M. Price be not delivered (or mailed) to said Price or his attorney, but be transmitted to the chancery court of the state of New Jersey, at Trenton, N. J., where said Price's *rights [227] will be abundantly protected, the receiver, of course, being an impartial officer of the court. I request that before action is taken (other than as asked for by the receiver) due notice may be given me that the receiver may be heard, to set forth the reasons why this disposition should be made of the drafts in question. Let me add that the Forrest judgment and interest now exceeds the sum of \$60,000.'

"On December 4, 1893, the chancery court of New Jersey, being informed by the receiver that Price, assisted by John C. Fay, Esq., his attorney, was endeavoring to obtain payment at the Treasury of the balance, about \$30,000, of this debt, and appropriate it for his own use, issued orders against Price, enjoining him from seeking to obtain payment of any part of that sum.

"On December 6, 1893, the receiver notified the Secretary of the Treasury, by letter, that a copy of injunction of December 4 had been served upon Price, and inclosed a copy of the same to the secretary. He also invited the attention of the Secretary to the opinion of the court of claims in *Redfield v. United States*, in the twenty-seventh volume of reports of the court [p. 393] informed him that he (the receiver) had applied to the supreme court of the District of Columbia for an injunction, and asked that if that court should not grant relief he might have the benefit of the injunction of the New Jersey court now brought to the Secretary's notice. The receiver asked that if no relief were granted by the supreme court of the District that the Secretary send the drafts (otherwise to be handed to R. M. Price) to the chancellor of New Jersey, at Trenton.

"The supreme court of the District of Columbia, December 19, 1893, in a proceeding for injunction upon bill of Borchering, receiver, and Anna M. Forrest, administratrix, after personal service upon Price and Fay, enjoined Price from receiving, assigning, collecting, or indorsing to his own use, by himself or by attorney, any warrants or drafts from the Treasury of the United States in payment, in whole or in part, of any balance

remaining unpaid under act of February 23, 1891, until the further order of the court; and it being the design of this order in no wise to interfere with the claim of any creditor of *the said Rodman M. Price, resident in this District, against said Price, it is further ordered and decreed that, upon the representation of any person so claiming to be a creditor in this District and the establishment of such claim in a manner that shall satisfy the court of the bona fide existence of such claim, so much of said balance as shall be sufficient to cover any and all such claims so established shall be considered as exonerated from the effect of this decree.

"The supreme court of the District, on the 22d of December, 1893, passed the following order in the said suit:

"From the affidavits of John C. Fay and Jeremiah M. Wilson, claimants, and the assent and affidavit of the said Rodman M. Price, filed this day, it appearing to the satisfaction of the court that John C. Fay, Richard J. Bright, Frank S. Bright, Samuel Shellabarger, J. M. Wilson, and M. L. Woods, residents of the District of Columbia, appear to be bona fide creditors of the defendant, Rodman M. Price; and it appearing to the satisfaction of the court that as such they have bona fide claims for services rendered said Price to the extent of \$7,900, it is ordered that the sum of seven thousand nine hundred dollars (\$7,900) shall be exonerated from the effects of the decree passed herein on the 19th of December, instant, restraining and enjoining Rodman M. Price from receiving, etc., any warrants or drafts from the Treasury in payment of the whole or any part of the balance due him under the act of February 23, 1891; and said injunction order shall not operate to affect said sum of \$7,900."

"Counsel for the receiver, Friday, December 22, 1893, addressed the Assistant Secretary of the Treasury, setting forth the fact that the order of that day had been hastily acted upon, and explaining that the judge sent a verbal order to counsel to be in court at 1 o'clock; that he had already told Mr. Fay, attorney of Price, that he wanted copies of his papers served two days in advance, in compliance with the rules; that at 12 o'clock he had been telegraphed for to go out of the city on account of illness in his family, and had sent a message to that effect to the judge. The letter also notified the Secretary that the receiver claimed that the money

[229] under the *Redfield Case* belonged *to the receiver, and not to Price. Counsel asked a reasonable delay; that he was obliged to leave Washington, but expected fully to return Saturday night; and expressed hope that 'no action will be railroaded through to pay out any money to-morrow.' He also notified the Treasury that a mandatory order had been issued against Price in New Jersey, and asked that before any action was taken to paying Price, that he (counsel) might he heard show reason why the money had not passed to the receiver under the ruling of the *Redfield Case*, copy of which he inclosed.

"The same day counsel for the receiver

sent the following telegram to the Secretary of the Treasury:

"Washington, D. C., December 22, 1893.

"To Secretary of Treasury,

"Washington, D. C.:

"Please defer action in Price matter over to-morrow. The receiver notifies Treasury that he claims the money is his, not Price's, and will hold the United States responsible if paid Price or his attorney.

"Frank W. Hackett,

"Attorney for Receiver."

"On the same day, namely, Friday, December 22, 1893, the Acting Secretary of the Treasury indorsed a copy of the order of the supreme court of the District of Columbia of December 22, with a reference to the Second Comptroller to issue a certificate in favor of Rodman M. Price for \$7,900, 'the balance to be withheld pending an injunction against Price from receiving said balance.'

"On the same day, Friday, December 22, 1893, Second Comptroller certified that there were due and payable to Rodman M. Price \$7,900, the balance, \$23,100, to be withheld 'pending an injunction against Price from recovering said balance now pending before the supreme court of the District of Columbia.'

"The draft on navy warrant No. 907, dated December 23, 1893, and payable to the order of Rodman M. Price, late purser, United States Navy, for \$7,900, was paid at the Treasury December 23, 1893, by the Treasurer of the United States, said draft being indorsed 'Rodman M. Price, late purser, United States Navy: John C. Fay.'

"On the 25th of December, 1893, Borchertling, receiver, addressed a letter to the Secretary of the Treasury, claiming that on *and [230] after October 10, 1892, all property in the right to Price to receive from the United States the balance under the act approved February 19, 1881, passed to him, the receiver. He reminded the Secretary that on the 27th of November, 1893, he had the honor of advising the Treasury of his appointment and inclosing a copy of the order of the chancellor; that Mr. Fay, attorney for Mr. Price, had full notice of the receivership, as well as of the injunction of the court of chancery addressed to Price and his attorneys forbidding them from receiving any part of the \$31,000; and that both Fay and Price had committed contempt of court. The receiver asked the Secretary to take the opinion of the Attorney General upon the following questions:

"1. Did the appointment of a receiver by the chancery court of New Jersey convey to that officer the property in the claim against the United States of Rodman M. Price?

"2. Would payment to the receiver be a quitance to the United States in the premises?

"3. Can the Secretary of the Treasury safely pay to Rodman M. Price or his heirs the money still unpaid under the act of February 19, 1891, now that the receiver claims that it should be paid over to him?

"A similar letter was addressed by the receiver and his counsel to the Secretary of the Navy.

"On April 1, 1899, the Comptroller ordered the balance, \$23,100, to be paid to Charles Borchering, receiver, and the same was paid at the Treasury that day to Mr. Borchering, the present claimant."

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover from the United States the sum of seven thousand and nine hundred dollars (\$7,900).

Thereafter an appeal was allowed and taken to this court.

Mr. William H. Button argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellant:

The manner in which the United States shall pay a debt it owes, to whom it shall be paid, whether it shall be paid at all, and whether it may be sued for, are matters entirely within the control of the United States, and beyond the control of the laws and courts of New Jersey or of any of the other states.

United States v. Clarke, 8 Pet. 436, 8 L. ed. 1001; *Nichols v. United States*, 7 Wall. 122, 19 L. ed. 125; *Carr v. United States*, 98 U. S. 433, 25 L. ed. 209.

Whether the United States shall allow the ownership of any debt against it to pass to another than the original creditor, either by voluntary assignment or by operation of law, is likewise within its control.

The Federal courts, including the court of claims, although they may be deemed to be sitting in the state of New Jersey, yet are courts of another sovereignty.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *United States v. Gillis*, 95 U. S. 407, 24 L. ed. 503; *Erwin v. United States*, 97 U. S. 392, 24 L. ed. 1065; *Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229; *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 28 L. ed. 861, 5 Sup. Ct. Rep. 366; *Ball v. Hallsell*, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554; *Price v. Forrest*, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434.

The laws of one sovereignty have absolutely no force by their own operation within another sovereignty.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Harrison v. Sterry*, 5 Cranch, 298, 3 L. ed. 106; *Boyle v. Zacharie*, 6 Pet. 648, 8 L. ed. 532; *Boyle v. Zacharie*, 6 Pet. 635, 8 L. ed. 527; *Baker v. Wheaton*, 5 Mass. 509, 4 Am. Dec. 71; *Suydam v. Broadnax*, 14 Pet. 67, 10 L. ed. 357; *Oakey v. Bennett*, 11 How. 33, 13 L. ed. 593; *Baldwin v. Hale*, 1 Wall. 223, 17 L. ed. 531; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Reynolds v. Aden*, 136 U. S. 348, 34 L. ed. 360, 10 Sup. Ct. Rep. 843; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545; *Wood v. Parsons*, 27 Mich. 159; *Catlin v. Wilcox Silver-Plate Co.* 123 Ind. 477, 8 L. R. A. 62, 24 N. E. 250; *Willitts v. Waite*, 25 N. Y. 577; *Filkins v. Nunnemacher*, 81 Wis. 91, 51 N. W. 79; *State Bank v. First Nat. Bank*, 185 U. S.

34 N. J. Eq. 450; *Smith, Receiverships*, p. 109.

If recognition is extended to the laws of a foreign state, such laws do not operate by their own force, but by force of the local law, which says that under the circumstances the foreign law shall be applied. The foreign law becomes part of the local law *pro hac vice*.

Dalrymple v. Dalrymple, 2 Hagg. Consist. Rep. 45; *Scrimshire v. Scrimshire*, 2 Hagg. Consist. Rep. 407; *Caldwell v. Vanvlietssen*, 9 Hare, 415.

This comity will be extended or withheld as the self-interest, public policy, or generosity of the particular state may dictate. It is not a matter of obligation, but a matter of accommodation.

Willitts v. Waite, 25 N. Y. 577; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274.

The United States does not recognize through comity a statute of a state or a decree of a state court transferring to a receiver title to or the right to possession of a debt owed by a person beyond the jurisdiction of such state; and, so far as the United States is concerned, such receiver can sue only in the jurisdiction appointing him.

Booth v. Clark, 17 How. 322, 15 L. ed. 164; *Olney v. Tanner*, 10 Fed. 101; *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. 725; *Mississippi Mills Co. v. Ranlett*, 19 Fed. 191; *Hazard v. Durant*, 19 Fed. 471; *Young v. Aronson*, 27 Fed. 241; *Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. 161; *Philadelphia & R. Coal & I. Co. v. Daube*, 71 Fed. 583; *Hale v. Hardon*, 89 Fed. 283; *Baltimore Bldg. & L. Asso. v. Alderson*, 32 C. C. A. 542, 61 U. S. App. 636, 90 Fed. 142; *Coltrane v. Templeton*, 45 C. C. A. 328, 106 Fed. 370; *Zacher v. Fidelity Trust & Safety-Vault Co.* 45 C. C. A. 480, 106 Fed. 593.

Whatever may be held as to statutory receivers in supplementary proceedings in New Jersey, it is the law of that state that receivers appointed in chancery do not take title to property, but only the right to the possession and disposition of it under the order of the court.

Miller v. Mackenzie, 29 N. J. Eq. 291; *Harrison v. Maxwell*, 44 N. J. L. 316; *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450.

Such a receiver is of the same sort as the one described in the cases of *Booth v. Clark*, 17 How. 322, 15 L. ed. 164, and *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013.

It seems to be well recognized by the courts of New Jersey that the laws of that state and the decrees of its courts have no effect beyond the limits of that state.

State Bank v. First Nat. Bank, 34 N. J. Eq. 450; *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435.

This receiver is one for the benefit only of the creditors who brought the bill under which the receiver was appointed.

Whitney v. Robbins, 17 N. J. Eq. 360. See also *Annin v. Annin*, 24 N. J. Eq. 184.

In those states in which a voluntary assignment or an assignment by operation of law effected in another state is recognized.

such recognition has been made subject to the rights always of creditors resident in the jurisdiction in which the suit is brought, and sometimes the creditors resident in still another jurisdiction.

Security Trust Co. v. Dodd, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545.

A debt due from the United States has no locality either at the seat of government or in any of the states. The government of the United States, which controls the disposition of such a debt, has no locality at any particular place.

Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639.

Messrs. Cortlandt Parker and Frank W. Hackett argued the cause and filed a brief for appellee:

All right and title in Price to collect of the United States the money found due him passed to the receiver. No right remained in Price to receive the money, or to give lawful quittance therefor to the United States.

Smith. Receiverships (1897) 259; *Harrison v. Maxwell*, 44 N. J. L. 316.

The passing to a receiver of the right to be paid by the Treasury is not prohibited by § 3477 of the Revised Statutes, relative to assignments.

Price v. Forrest, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434.

Debts due from the United States have no locality at the seat of government.

Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; *Wyman v. Halstead*, 109 U. S. 654, *sub nom. Wyman v. United States ex rel. Halstead*, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; *King v. United States*, 27 Ct. Cl. 537.

All debts follow the person, not of the debtor in respect of the right of property, but of the creditor to whom due.

Wilkins v. Ellett, 9 Wall. 742, 19 L. ed. 587; *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61; 2 Harvard Law Rev. June, 1897, pp. 95-113; *Cole v. Cunningham*, 133 U. S. 128, 33 L. ed. 547, 10 Sup. Ct. Rep. 269.

The extent to which the decisions go is that a receiver appointed in another state shall not be permitted to avail himself of the process of the court to the disadvantage of creditors of that jurisdiction.

Wilkins v. Ellett, 9 Wall. 742, 19 L. ed. 587.

The debtor, upon being notified of a valid assignment and asked by the assignee to pay the debt, cannot discharge himself from liability of paying the debt, or a part of it, to the original creditor.

Burrill, Assign. 3d ed. 575.

Mr. Cortlandt Parker also filed an additional brief for appellee:

In case of a claim due by the United States to an intestate, payment to his administrator appointed in the state of his domicile is right, and discharges the debt. Such claims are assets, having their situs in that state, and not in the district, or elsewhere; nor can the administrator be made responsible as such for the money he received elsewhere than where he got his letters.

888

Vaughan v. Northup, 15 Pet. 1, 6, 10 L. ed. 639, 641; *Wyman v. Halstead*, 109 U. S. 654, *sub nom. Wyman v. United States ex rel. Halstead*, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417.

Assignments by operation of law, or voluntary assignments in general terms, for benefit of creditors, include claims against the government.

Erwin v. United States, 97 U. S. 392, 24 L. ed. 1065; *Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229.

***Mr. Justice Shiras** delivered the opinion-[231] ion of the court:

The facts and law of this case were so fully and satisfactorily discussed in the court below that its opinion might well be adopted as that of this court. 35 Ct. Cl. 311.

We shall, however, briefly examine some of the propositions urged in the brief of the government filed in the case.

The first and principal contention is that the United States is a sovereignty, and has absolute control of the manner in which it shall pay its debts, the persons to whom they shall be paid, and, in fact, whether they shall be paid or sued upon at all; that it is incompetent for the state of New Jersey, through a statute or a decree of its courts, to direct to whom such a debt shall be paid; that the United States, through comity, may or may not recognize such a New Jersey statute or decree, as it may determine, but without such recognition such statute or decree is inoperative upon the disposition of such debt; that the United States does not recognize, through comity, the passing of title to a claim against it to a receiver appointed under a state statute or decree; and that consequently, in the present case, the United States had a right to pay the debt to the original creditor, and was discharged by such payment.

It is not necessary for us to consider whether the power of the United States over debts due by it and over the mode by which such debts shall be paid is wholly unrestricted, because the United States has not chosen to stand upon its sovereignty in such particulars, but has provided in the act of March 3, 1887 (24 Stat. at L. 505, chap. 359), that the court of claims and, concurrently, the district and circuit courts of the United States, "shall have jurisdiction to hear and determine all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of any executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

*This is not a case within the category of [232] payments by way of gratuity, payments as of grace, and not of right, as was the case of *Emerson v. Hall*, 13 Pet. 409, 10 L. ed. 223, and where it was said by Mr. Justice McLean: "A claim having no foundation in
185 U. S.

law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government, from motives of public policy, or any other considerations, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation,—a donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government. In the present case the government might have directed the money to be paid to the creditors of Emerson, or to any part of his heirs. Being the donor, it could, in the exercise of its discretion, make such distribution or application of its bounty as circumstances might require. And it has, under the title of an act 'for the Relief of the Heirs of Emerson,' directed, in the body of the act, the money to be paid to his legal representatives. That the heirs were intended by this designation is clear; and we think the payment which has been paid to them under this act has been rightfully made; and that the fund cannot be considered as assets in their hands for the payment of debts."

This distinction between mere grants by the government by way of gratuity and debts or claims of right was likewise recognized by this court in the French spoliation cases, where it was held that the payments prescribed by the acts of Congress were gratuities, and that creditors, legatees, and assignees in bankruptcy could be rightfully excluded. *Blagge v. Balch*, 162 U. S. 439, 40 L. ed. 1032, 16 Sup. Ct. Rep. 853.

Here the government was not the donor of the money of Price, but was its custodian, awaiting its lawful distribution.

As to the contention that the debt due from the United States to Price could not be transferred from Price to the claimant by operation of the laws of New Jersey, nor by [233] any decree that "the courts of New Jersey, operating under such laws, could make, it is sufficient to say that this court has held otherwise.

In *Vaughan v. Northrup*, 15 Pet. 1, 10 L. ed. 639, Mr. Justice Story, delivering the opinion of the court, said: "The debts due from the government of the United States have no locality at the seat of government. The United States in their sovereign capacity have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile;" and, accordingly, it was held in that case that "the administrator of a creditor of the government, duly appointed in the state where he [the creditor] was domiciled at his death, has full authority to receive payment and give a full discharge of the debt due his intestate in any place where the government may choose to pay it, whether it be at the seat of government or at any other place where the public

funds are deposited; . . . but the moneys so received constituted assets under that administration, for which he was accountable to the proper tribunals . . . [of the state where he was appointed]."

Price v. Forrest, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434, was one phase in the present controversy. There the question was between the heirs of Rodman M. Price and Borchering, who had been appointed by the chancery court of New Jersey receiver of the assets of Price, including the money belonging to him in the Treasury of the United States. It was held by the courts of New Jersey that the receiver was entitled to the money in the Treasury, and the heirs and administrator of Price were enjoined from demanding or receiving from the Secretary of the Treasury, or any officer thereof, the said money or any part thereof. The cause was brought to this court, and, after full consideration, the decree of the court of errors and appeals of the state of New Jersey was affirmed. Two things were thus determined,—first, generally, that it was competent for a state court of the domicile of a creditor of the United States, and having jurisdiction over his person, to decide a controversy between his heirs and creditors as to the right to receive moneys held in trust by the United States; and, second, specifically, under the facts of the present case, that the title to the moneys of Price in the Treasury of the United States had passed, under the laws of the state of New Jersey and the decree of its courts, from Price and his heirs, and had become vested in Borchering, the receiver. [234]

It is not open to doubt that the court of claims has jurisdiction to entertain the claim of the receiver to receive the fund, the title to which had thus become vested in him. The jurisdiction of that court extends throughout the United States. It issues writs to every part of the United States, and is specially authorized to enforce them. 10 Stat. at L. 612, chap. 122, § 3. By establishing this court the United States created a tribunal to determine the right to receive moneys due by the government. Such legislation did not leave the Treasury or its officers free to arbitrarily select, between conflicting claimants, the one to whom payment should be made.

It is finally contended, in behalf of the government, that even if it was competent for the state courts to determine the controversy between the rival claimants to this fund, and even if the court of claims has jurisdiction to give effect to such determination, yet the rights of creditors resident within the District of Columbia were paramount to those of the New Jersey receiver, and that a payment made directly to them by the acting Secretary of the Treasury would be a lawful discharge of the United States.

Undoubtedly, as between different states or sovereignties, the general rule is that the courts of one will not aid the officers of another to withdraw funds or property of a decedent without providing for local creditors. But such a rule has no application in

a case like the present, where the government of the United States has ubiquity in all the states of the Union, and does not hold moneys due a creditor subject to the local demands or claims of residents of the District of Columbia. Moreover, such a rule is for a court having control over the fund in dispute. It is not for a ministerial officer of the Treasury, having no judicial powers, to give effect to such demands.

[235] It is, indeed, suggested that the action of the supreme court of the District of December 22, 1893, was a legal determination which operated to relieve Price, as to a portion of this fund, from the injunction of that court enjoining him from receiving or collecting moneys due him in the Treasury of the United States, and to authorize the Treasurer of the United States to pay such portion of the fund in disregard of the decree of the New Jersey court.

But it is obvious that the supreme court of the District had no jurisdiction or control over the money in the Treasury of the United States. It was dealing only with the parties before it, of whom the United States was not one. The order referred to doubtless did relieve Price from the existing injunction of that court, and left him free, so far as that injunction was concerned, to urge his claim against the United States; but it did not, and could not, relieve Price from the injunction and decree of the New Jersey court. Nor could such order operate as a legal adjudication which would permit the Treasurer of the United States to disregard the decree of the courts of New Jersey and the title of the receiver thereunder, of which the Department had full notice. In point of fact, inspection shows that this order was not intended as an adjudication. It was merely *ex parte*, and its only purpose or effect was to permit Price to push elsewhere his claim against the government. Such an order could not have been the subject of an appeal, even if an opportunity had been afforded to the receiver to take an appeal.

When analyzed, this contention will be perceived to be only a renewal of the one already considered; namely, that a ministerial officer having no judicial or statutory powers in the premises, in a case wherein the government was the debtor, could arbitrarily, without notice to the legal holder of the claim, pay the money in dispute in this case over to Price. This, we have seen, he had no power under the law to do, and such a disposition of the money could not be successfully pleaded in the court of claims as a lawful discharge of the United States.

[236] For these reasons, and referring, for a fuller discussion of the questions involved, to the opinion of the court of claims, we think the conclusions of that court were correct, and its judgment is accordingly affirmed.

Mr. Justice **White** dissented.

Mr. Justice **Harlan** took no part in the decision of this case.

UNITED STATES, *Appt.*,
v.

JOSEPH C. FINNELL.

(See S. C. Reporter's ed. 236-254.)

*Clerks of court—per diem compensation—
statutes—departmental construction.*

A clerk of a district and circuit court of the United States must be deemed entitled to the *per diem* compensation recognized as his right by the act of March 3, 1887, chap. 362 (24 Stat. at L. 509, 541), "when the court is open for business or business is actually transacted in court," for those days on which, in the absence of any judge, he entered on the journal certain orders, decrees, and other proceedings transmitted to him for that purpose by the different judges composing the courts of such district, since to decide otherwise would be to overrule a uniform construction given to this statute by the Treasury Department, which is not obviously or clearly wrong, but is, at the most, subject to a doubt of its soundness.

[No. 523.]

*Submitted February 28, 1902. Decided
April 21, 1902.*

A PPEAL from the Court of Claims to review a judgment allowing *per diem* compensation to a clerk of a District and Circuit Court of the United States. *Affirmed.*

The facts are stated in the opinion.

Assistant Attorney General **Pradt** submitted the cause for appellant. *Mr. Philip M. Ashford* was with him on the brief.

Mr. Charles C. Lancaster submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **Harlan** delivered the opinion of the court:

The appellee was clerk of the district and circuit courts for the Kentucky district from July 1st, 1894, to June 30th, 1898, his office, during that period and previously, being in the city of Covington, one of the [237] places at which those courts were held. The district judge resided in the city of Louisville, while the circuit judges resided in other states.

The clerk presented to the proper officers of the Treasury for payment his account for certain services rendered during the above period, amounting to \$995.

The account was sworn to and approved as required by the act of February 22d, 1875, which provides, among other things, that before "any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to

the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law and just." 18 Stat. at L. 333, chap. 95, § 1.

Payment of the account having been refused, this suit was brought against the United States, the petitioner averring that "his whole compensation, if said fees were added, would not exceed the maximum compensation of \$7,000 for any one year."

Judgment having been entered in favor of the plaintiff for the amount sued for, the government has prosecuted this appeal.

The findings of fact upon which the judgment below was based were as follows:

"1. The claimant, Joseph C. Finnell, was clerk of the district and circuit courts of the United States for the district of Kentucky from July 1st, 1894, to June 30th, 1898, duly qualified and acting.

[238] "2. During said period he entered orders, decrees, and other proceedings of the court on 199 days, extending through said time. None of the judges of said courts were personally *present at the time of the entry of such orders, decrees, and proceedings, but said orders, decrees, and proceedings were transmitted to the claimant by mail by the different judges composing the courts of said district. Said orders, decrees, and proceedings were indorsed: 'Enter this order' (signed by the judge); or, 'Enter this' (signed by the judge); or, 'Enter' (signed by the judge). For the purpose of entering said orders, decrees, and other proceedings the claimant made the following entries on the journal for opening and adjourning court on the dates for which attendance is claimed: 'Court met: Present, Hon. John W. Barr, sitting as circuit judge' (or Judge Taft, or Judge Lurton, or whoever may have been the judge sending the order. Then follows the entry of the order or other proceedings of the court for that day), and, 'It is now ordered that the court stand adjourned until . . . ' The date to which adjournment was had was left blank, and when another such order, decree, or other proceeding was received to be entered said blank was filled by entering therein the date on which the same was received, and another entry, similar to the above, opening and adjourning the court to a blank date, was made. The record containing the entries of the opening and adjourning of court, the certified presence of the judge, and the orders, decrees, and other proceedings of the court, was afterwards signed by the judge sending such orders, decrees, and other proceedings, to be entered as the record of the court for the days on which the same were respectively entered. The Exhibits A, B, and C, attached to and made a part of these findings, are illustrative copies of the record of the court upon such days.

185 U. S.

"The nature and character of business transacted on the days on which court was opened and adjourned, as aforesaid, is best shown by the following statement of the subject-matter of said orders, decrees, and other proceedings entered as aforesaid on the days actually claimed for:

"Entry of order granting additional time to plead, four days.

"Entry of order directing drawing of jury by jury commissioners, eighteen days.

"Entry of order granting restraining order, five days.

"Entering orders disposing of sundry demurrers and motions, twenty-one days.

*"Entry of orders granting rule, ten days. [239]

"Entry of orders granting application for writ of certiorari, four days.

"Entry of orders granting petition for witnesses on behalf of the defendant at the cost of the United States, seven days.

"Entry of orders approving report of receivers, authorizing compromise by receiver, instructions issued to receiver, and various other orders pertaining to the appointment and conduct of receivers, thirty-three days.

"Entry of orders, and decrees finally disposing of cases, seventeen days.

"Sundry entries of orders granting writs of possession, approving bond of clerk of court, granting leave to withdraw exhibits, granting leave to file intervening petition, ordering sale of property, confirming sale of property, determining the priorities of liens, continuing cases, and granting appeals, eighty days.

"3. Claimant made his account for said services as attendance on court when the same was opened and adjourned by order of the judge, and while the same was actually in session and business actually transacted, which was verified and presented to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment, and payment of fees as *per diems* in finding 4 was refused.

"4. Item 1. *Per diems* for attendance on court on the days on which said orders, decrees, and other proceedings were entered, 199 days, at \$5 per day, \$995.

"5. Charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed and paid by the accounting officers of the Treasury up to June 30th, 1893."

By § 828 of the Revised Statutes, a clerk of a circuit or district court of the United States was allowed "\$5 a day for his attendance on the court while actually in session."

*This section was similar to one in the act [240] of February 26th, 1853, chap. 80 (10 Stat. at L. 161, 163). Under that act clerks were allowed \$5 a day for attendance only, whether business was transacted or not by the court. After many years had expired, Comptroller of the Treasury Durham held that interpretation of the statute to be erroneous, and ruled that the transaction of business was a condition precedent to the right to a

per diem compensation for attendance, although the court may have been, in fact, regularly opened for business, and awaited the coming of suitors. But the court of claims held, in 1885, that the Comptroller was in error, and adjudged that within the meaning of § 828 the clerk was entitled to \$5 a day for his attendance on court, even when no business was transacted. *Jones v. United States*, 21 Ct. Cl. 1.

The judgment of that court did not, however, put the matter at rest; for, by the sundry civil appropriations act of August 4th, 1886, chap. 902, it was provided that no part of the money appropriated by that act should "be used in payment of a *per diem* compensation to any clerk or marshal for attendance in court, except for days when business is actually transacted in court, and when they attend under §§ 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts." 24 Stat. at L. 222, 253. That act, by its terms, was temporary.

At the subsequent session of Congress the subject was again considered, and resulted in a permanent provision to be found in the sundry civil appropriations act of March 3d, 1887, chap. 362. By that act it was provided "that hereafter no part of the appropriations made for the payment of fees for United States marshals or clerks shall be used, . . . nor shall any part of any money appropriated be used in payment of a *per diem* compensation to any attorney, clerk, or marshal for attendance in court, except for days when the court is opened by the judge for business, or business is actually transacted in court, and when they attend under §§ 583, 584, 671, 672, and 2013 of the Revised Statutes, which facts shall be certified in the approval of their accounts." 24 Stat. at L. 509, 541.

The sections of the Revised Statutes referred to in the act of 1887 are as follows: [24.] *§ 583. If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

"§ 584. If the judge of any district court, in Alabama, California, Georgia, Indiana, Iowa, Kentucky, North Carolina, Tennessee, or West Virginia is not present at the time for opening the court, the clerk may open and adjourn the court from day to day for four days; and if the judge does not appear by 2 o'clock after noon of the fourth day, the clerk shall adjourn the court to the next regular term. But this section is subject to the provisions of the preceding and next sections."

"§ 671. If neither of the judges of a circuit court is present to open any session, the marshal may adjourn the court from day to day until a judge is present: *Provided*, that if neither of them attends before the close of the fourth day after the time appointed for the commencement of the session, the marshal may adjourn the court to the next regular term.

"§ 672. If neither of the judges of a circuit court be present to open and adjourn any regular or adjourned or special session, either of them may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term."

"§ 2013. The circuit court, when opened by the judge as required in the two preceding sections, shall, therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this title, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court."

Section 2013 had reference to the functions of the circuit court in election matters, and has been repealed.

The account here in suit is not for the attendance of the *clerk under §§ 583, 584 [242] 671, and 672, but for attendance under §§ 574 and 638, which are hereafter given in this opinion.

It will be observed that the act of 1887 recognizes the right of the clerk to a *per diem* compensation in two states of case, namely, "when the court is opened for business, or business is actually transacted in court."

What do those words mean? We are informed by the representatives of the government that for nearly forty years prior to 1886 it had been the practice of its accounting officers to allow a *per diem* compensation to clerks for attendance, when court was opened by the judge and adjourned without transacting any business; and that such practice had been sanctioned by an unbroken line of decisions in the Federal courts. And it is suggested that the purpose of the act of 1886 was to break up that practice. All this only serves to prove that Congress used the words found in the act of 1887 with full knowledge of the former practice, and of the change made, or supposed to be made, by the act of 1886. It is clear that the words used, reasonably interpreted, indicate a purpose to allow the *per diem* compensation for attendance as well when the court was opened for business, whether any business was actually transacted or not, as when business was actually transacted in court. It is said that no business could be lawfully transacted "in court" unless the judge was personally present. We do not assent to that view. It rests upon a construction which is too literal. The services for which Finnell's account was rendered constituted business actually transacted in court, unless it be that a clerk could never enter any order unless the judge was, at the time, in the place, room, or building where his court was ordinarily held. But we cannot so adjudge. There are many things that may be legally done by a clerk pursuant to the written order of a judge sent to him, and which, being done, may be fairly held to constitute business "actually

transacted in court." This much is to be implied from §§ 574 and 638 of the Revised Statutes, which are as follows:

[243] "§ 574. The district courts, as courts of admiralty and as courts of equity, so far as equity jurisdiction has been conferred *upon them, shall be deemed always open, for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing upon their merits of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation, as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

"§ 638. The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing upon their merits of all causes pending therein. And any judge of a circuit court may, upon reasonable notice to the parties, make, and direct and award, at chambers or in the clerk's office, and in vacation, as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

As will be seen from those sections, the district and circuit courts of the United States are always open for the transaction of certain kinds of business which, we think, may be transacted under the orders of the judge, who may at the time be absent from the place, room, or building in which the court is held. The business transacted by the appellee was such as could be transacted by the clerk under the orders of the judge. It is too narrow an interpretation of the statute to hold that such business was not actually transacted in court. This whole subject was carefully considered, and the statutes relating to it fully analyzed, by Judge Baker in *Butler v. United States*, 87 Fed. 655.

[244] These views are justified by long practice in the Department, and upon that we may properly rest our affirmance of the judgment of the court of claims. It is found as a fact that the present appellee, in every account rendered by him since 1882,*has charged for services similar to those set out in the account here in suit, and such accounts were uniformly allowed and paid up to June 30th, 1893. And on his account for the period from January 1st, 1892, to June 30th, 1894, he obtained judgment in the court of claims, which judgment was paid,—no appeal having been prosecuted by the United States. *Finnell v. United States*, 32 Ct. Cl. 634. It thus appears that the government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and

185 U. S.

closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States v. Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *Wisconsin C. R. Co. v. United States*, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45. But if there simply be doubt as to the soundness of that construction,—and that is the utmost that can be asserted by the government,—the action during many years of the Department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. ed. 603, 604; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306. Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests.

The judgment of the Court of Claims is affirmed.

Mr. Justice **Gray** took no part in this decision.

Mr. Justice **Brown** dissenting:

From the passage of the act of 1791, fixing the compensation of officers of the courts of the United States, the subject of *fees for[245] attendance upon the circuit and district courts appears to have been one of constant dispute between the officers on one hand, who naturally seek a construction of the fee bill favorable to them, and the Treasury officials upon the other, whose duty it is to supervise and pass upon the accounts of these officers. A statement of some, although by no means all, the acts of Congress upon this subject, may aid in the solution of these difficulties. The earliest is that of March 3, 1791 (1 Stat. at L. 216, chap. 22), wherein there was allowed "to the clerk of the district court, for attending in the district or circuit court, \$5 per day." The act, however, was made temporary, and at the next session, May 8, 1792 (1 Stat. at L. 277, chap. 36), certain changes were made, though none in the matter of attendance.

The law upon the subject of attendance was apparently not changed until April 18, 1814 (3 Stat. at L. 133, chap. 79), when it was provided, under "an act to lessen the compensation" of such officers, that there should not be allowed or paid to the clerk of the circuit or district courts of the United States in Massachusetts, Rhode Island, Connecticut, the southern district of New York, or Pennsylvania, "any daily compensation for attending on the said courts." Why this discrimination was made we have no means of knowing, but the act was repealed March 8, 1824 (4 Stat. at L. 8, chap. 26). No im-

893

portant change was made in the law until 1842, when in the civil and diplomatic bill of May 18 (5 Stat. at L. 475, 484, chap. 29), it was provided that no *per diem* compensation should be paid to clerks for attendance upon the circuit or district courts "while sitting for the transaction of business under the bankrupt law merely, or for any portion of the time during which either of the said courts may be held open, or in session, by the authority conferred in that law. . . . And no *per diem* or other allowance shall be made to any such officer for attendance at rule days of the circuit or district courts," or for more than one *per diem* while both courts are in session.

[246] But even before this act of 1842 was passed, it had been held by Mr. Justice Story in *United States v. Cogswell*, 3 Sumn. 204, Fed. Cas. No. 14,825, which involved the validity of marshal's charges for attendance upon rule days, that as the marshal did not either *travel to or attend these rule days at the clerk's office, his claim was for a constructive travel and attendance; "but we are of opinion that this charge, whatever might be its validity if the marshal had actually traveled and attended at these rules, is, under the circumstances, wholly inadmissible. To justify the charge, an actual travel and attendance are, in our judgment, indispensable."

By act of February 26, 1853 (10 Stat. at L. 161, chap. 80), Rev. Stat. § 828, the whole subject of fees was revised, and an attendance fee allowed to the clerk of \$5 per day for his attendance on the court "while actually in session." By that act the words "while actually in session" were first introduced into the law. It is evident that some change was contemplated by the use of these words. For some purposes, notably in admiralty and equity cases (Rev. Stat. §§ 574, 638), the court may be deemed to be sitting when a judge is present upon a rule day, or makes an order which can only be made by the court; but, as we shall show hereafter, no attendance was contemplated on these days,—at least in the absence of the judge.

The words "actually in session," found in the act of 1853, are emphasized by the sundry civil appropriation act of March 3, 1887 (24 Stat. at L. 509, 541, chap. 362), wherein it is enacted as follows: That hereafter no part "of any money appropriated [shall] be used in payment of a *per diem* compensation to any attorney, clerk, or marshal for attendance in court, except for days when the court is open [opened] by the judge for business, or business is actually transacted in court, and when they attend under §§ 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts." The special sections here mentioned and reproduced in full in the opinion of the court may be dismissed from consideration, as, with the exception of § 2013, since repealed, they relate to cases where there is no judge present at the opening of the term, when special authority is given to the clerk or marshal to adjourn the court from day to day until a judge is present. As no claim is made in the case under

consideration for attendance under these sections, they are only important here as indicating the will of Congress that neither the clerk nor the *marshal should have an unlimited discretion in opening the court in the absence of the judge, and requiring a special authority for that purpose. These sections undoubtedly contemplate a special exigency, to prevent a lapse of the term, which might follow from the absence of the judge, and to allow the court to be adjourned for a limited number of days. In two of these sections (584 and 671) there is a provision that if the judge does not attend before the close of the fourth day, the court shall be adjourned until the next regular term. We have already held in the case of *United States v. Pitman*, 147 U. S. 669, 37 L. ed. 324, 13 Sup. Ct. Rep. 425, that the officers are entitled to *per diem* fees for attendance under these sections, the same as if the judge were present and business were transacted.

By Rev. Stat. § 828, under which this claim is made by the petitioner, the court must have been "actually in session;" and by the act of 1887 the court must have been opened by the judge for business, or business must have been actually transacted in court. There is no conflict between these acts, since, in order that the court be opened *by the judge* for business, it must be "actually in session," and if business be actually transacted *in court*, the court must be open for the transaction of such business. In either case the court must have been actually opened *by the judge* or actually in session, which amounts to the same thing. As the petitioner bases his claim upon § 828, we shall inquire, first, when the court is *actually in session*. It is certainly not in session upon rule days, since, by Rev. Stat. § 831, "no *per diem* or other allowance shall be made . . . for attendance at rule days of a district or circuit court." We are then remitted to the real question in this case: When is a court actually in session, for we agree entirely in the opinion of the court that if the court be opened by the judge in person, and no business is transacted, the *per diem* compensation is still payable.

We had supposed the law to be that no court could be in session without the presence of a judge, and that the sections above cited from the opinion of the court in this case (583, 584, 671, 672) allow an attendance to be charged, not because the court is actually in session, but to prevent a lapse of the term, when *the officers are supposed to be present and in readiness should the judge appear. Bouvier says (Law Diet.) in giving a definition of the word "court" and the different styles of court, "that the one common and essential feature in all courts is a judge or judges,—so essential, indeed, that they are even called *the court*, as distinguished from the accessory and subordinate officers." So, too, in Bacon's Abridgment a court is defined as an incorporeal political being, which requires for its existence the presence of the judges.

Thus, in *State ex rel. De Buys v. Orleans Civil Dist. Judges*, 32 La. Ann. 1261, it is said: "The court is an incorporeal political

being, which requires for its existence *the presence of the judges*, or of a competent number of them, and a clerk or a prothonotary, at the time during which and at the place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court." A similar definition is given in the *Lawyers' Tax Cases*, 8 Heisk. 650. So, in *Shoultz v. McPheeters*, 79 Ind. 376, discussing the powers of a master commissioner, the court is said to be "a tribunal organized for the purpose of administering justice, and presided over by a judge or judges." So, a court is defined in *Mason v. Woerner*, 18 Mo. 570, to be a tribunal established for the public administration of justice, and composed of *one or more judges*, who sit for that purpose at fixed times and places, attended by the proper officers. And in *White County v. Gwin*, 136 Ind. 562, 22 L. R. A. 402, 36 N. E. 237, a court is defined as consisting of persons officially assembled at a time and place fixed by law for the administration of justice, although a judge alone does not constitute a court. *Gold v. Vermont Central R. Co.* 19 Vt. 478. But the presence of a judge is indispensable. *Hobart v. Hobart*, 45 Iowa, 503; *Levey v. Bigelow*, 6 Ind. App. 677, 34 N. E. 128; *Michigan C. R. Co. v. Northern Indiana R. Co.* 3 Ind. 245.

In *State, Davis, Prosecutor, v. Delaware Twp.* 41 N. J. L. 55, where the question arose as to the validity of a verdict taken by a jury in the absence of the judge and clerk, it was held that the verdict so taken was entirely invalid. "It seems a profitless labor to discuss so obvious a proposition." [249] "No verdict therefore is valid unless given openly in court." It was held, however, *in that case, that the record of the court, showing the verdict of the jury to have been returned into the court, imported absolute verity.

So, too, in *Re Terrill*, 52 Kan. 29, 34 Pac. 457. This was a writ of habeas corpus in which the prisoner, convicted of murder, claimed his release, because his trial was had at a time not authorized by law. It appears that the judge was not present at the time and place when the term should have begun, nor for several days afterwards, and after several adjournments the clerk attempted to adjourn the court until a later day, when the judge appeared and the prisoner was tried. It was held that the failure of the judge to appear and open court upon the day appointed resulted in the loss of the term, and that the proceedings were absolutely void. Said the court: "There is ample power in a court which has been regularly convened to adjourn to a future time, provided it be not beyond the term; but in the absence of a statute authorizing it, the clerk or other ministerial officer cannot act for the judge in either opening or adjourning court. The clerk is a ministerial officer, and, without statutory authority, can exercise no judicial function. The opening, holding, and adjournment of court are the exercise of judicial power to be performed by the court. To perform the functions of a

185 U. S.

court the presence of the officers constituting the court is necessary, and they must be present at the time and place appointed by law. . . . "To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law." *Hobart v. Hobart*, 45 Iowa, 503. There being no authority in law for the clerk to open and adjourn the court, the consequence of the failure of the judge to appear upon the day appointed for holding the court was the loss of the term."

The citation of these authorities, however, appears to be quite unnecessary in view of the express provision of the act of 1887, that no fees for attendance in court shall be payable except for days when the court is opened by the judge for business.

The exhibits to which reference was made in the findings of fact are in the following form:

*EXHIBIT A.

[250]

United States Circuit Court, District of Kentucky.

May term, Monday, October 15th, A. D. 1894. Court met. Present: Hon. _____,

Circuit (or District) Judge.

Julius C. Lang, Admr.,

vs.

The Ches. & Ohio R. R. Co. et al. }

This cause coming on to be heard upon the motion of the Chesapeake & Ohio Railway Company for writ of certiorari and for a rehearing upon the motion to remand, the court having considered said motion and the affidavit filed herein, and the original petition for removal herein having been exhibited to the court, and being now duly advised, it is ordered that the clerk of the Kenton circuit court at Independence, Kentucky, be, and he hereby is, directed and ordered to make and transmit to the clerk of the United States circuit court for the district of Kentucky, at Covington, Kentucky, a true and correct transcript of the papers and proceedings in this case. The order remanding the case is now set aside, and a rehearing of the motion to remand is hereby granted, and is set for Saturday, October 20th, A. D. 1894, at 10 o'clock A. M. in chambers, at Cincinnati, Ohio.

It is now ordered that court stand adjourned until Friday, November 2d, A. D. 1894.

(The others are in form like unto this.)

It will thus be seen that, while the form of the journal entry showed an exact compliance with the law, the findings of fact show that it was a mere form, and that the facts found by the court were wholly inconsistent with the proceedings as they appear upon the journal and were presented to the accounting officers. The form shows that the court met. It did not meet. That the circuit or district judge was present. He was not present. That a certain cause in each case came on to be heard, and that an order was made in such cause, none of which took place at the time or place indicated; but the order was made *and transmitted by mail to [251] the clerk. The final entry is that the court

stands adjourned until a definite day, when the actual fact was that the day to which adjournment was made was left blank, and when another such order, decree, or proceeding was received to be entered, such blank was filled with the date on which it was received, and another entry similar to the above, opening and adjourning the court to a blank day, was made. From the nature and character of business transacted on the days on which the court was opened and adjourned as aforesaid, it appears that with scarcely an exception they were orders which might have been made, and which in fact were made, in chambers. While the judge in each case directed the order to be entered, he did not direct the court to be opened for that purpose.

Now, while, as before stated, if the court be properly opened, no business need be done to entitle the officers to their attendance fees, and when authority to do so is given by statute the clerk or marshal may open the court and adjourn it, we know of no authority under which a clerk may open court at his own will, when he may have some order to enter; nor do we know of any authority under which even a judge may open court without his personal presence, unless specially authorized to do so by statute. Under the practice pursued in this case the court might be opened every day in the year, provided some excuse be found in the shape of an order signed by a judge, though the work actually done in court might not have occupied ten days during the entire year.

The opening of a court is a solemn judicial act, and must be performed by the judge in person, unless special authority is given by statute for its performance by a subordinate officer. No such authority is found in this case. It is true that in *United States v. Pitman*, 147 U. S. 669, 37 L. ed. 324, 13 Sup. Ct. Rep. 425, it was held that the officers were entitled to their attendance while waiting for the judge to appear. We said in that case that "the court should be deemed actually in session within the meaning of the law, not only when the judge is present in person, but when, in obedience to an order of the judge directing its adjournment to a certain day, the officers are present upon [252] that day, and the *journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge." This, however, was said with particular reference to the case under consideration, and is no authority for the practice pursued in this case, since the court was not opened in obedience to any order from the judge.

Great stress is laid in the opinion of the court upon the practice of the departments in this connection, and upon the finding that the present appellee in every account rendered by him since 1882 has charged for services similar to those set out in the account here in suit, and that such accounts were uniformly allowed and paid up to June 30, 1893. An inspection of the entries in this case will show the weight to be attached to this practice of the departments. When it appears upon the journal that the court met, that the judge was present, that an or-

der was made in court, and that the court adjourned to a specific date, how are the accounting officers of the Treasury to know that such was not the fact? The practice of the departments to pay these bills might have continued for a century without anything to show that they were apprised of the actual facts appearing in the findings, and no inference can be drawn from such practice. Had it appeared that in such cases the facts set forth in these findings had been called to the attention of the accounting officers, the rule would be different; but we fail to see how the practice could afford any justification for these charges. A practice like this is liable to throw one's notions of differences of form and substance into sad confusion. Fictions in pleading were long, and still are, tolerated in many cases; but we know of no definition of the word "fiction" which authorizes journal entries like this, based upon the findings shown in this case. Had the facts been actually stated in connection with these entries, we imagine the practice of the Department would have been so quickly changed that no argument based upon it could have been made.

Petitioner in his brief claims his attendance under §§ 574 and 638, fully set forth in the opinion of the court, which, construed together, declare that courts of admiralty and equity "shall be deemed always open" for the purpose of filing any *pleading, issu- [253] ing and returning process, and making and directing interlocutory motions, orders, etc., preparatory to the hearing upon their merits of all cases pending therein. No claim under these sections, however, is made in the petition, wherein the petitioner relies alone upon § 828 for attendance when the court is "actually in session."

There are, however, so many other answers to his claim under §§ 574 and 638, that no elaborate discussion of them is necessary. (1) These three sections—574, 638, and 828—are all taken from the Revised Statutes, and must be construed together, as if they constituted parts of one act, as they really do. Nothing is said about attendance in the first two of these sections, and all the orders are such as are usually made at chambers. Both sections provide upon their face that the proceedings therein authorized may be made at chambers, or in the clerk's office, and in vacation as well as in term; but in a separate and distinct section,—828,—providing for clerk's fees, his fees for attendance are limited to such as are earned while the court "is actually in session." Of course, if there be any conflict between these sections the later rules, but in addition to that it is inconceivable that Congress, while providing specially for attendance while the court is in actual session, should throw the door wide open in §§ 574 and 638 to a charge for attendance upon every day when the judge may happen to make an order, whether the court be actually in session or not. All that is meant by §§ 574 and 638 is a recognition of the old custom that courts of admiralty and equity are presumed to be always open for incidental purposes,—a custom as old as the very existence of these courts. (2) The list

of the orders actually made by the judge, for the entry of which the clerk claims attendance in this case, shows that none of them were in admiralty cases, and comparatively few in equity cases. The great bulk were in common-law cases. The claim under these sections was evidently an after-thought. (3) If these sections be construed as opening the door for an attendance fee each time an order was made, then they were clearly repealed by the act of 1887, under which the clerk has a right to compensation only when the court is opened *by the judge* [254] for business, or *business is actually transacted in court, and when they attend under certain sections, in which §§ 574 and 638 are not included.

For these reasons I am compelled to dissent from the opinion of the court in this case.

I am instructed to say that Mr. Justice **White** and Mr. Justice **Peckham** concur in this dissent.

STATE OF WASHINGTON, *Complainant*,
v.
NORTHERN SECURITIES COMPANY *et al.*

(See S. C. Reporter's ed. 254-256.)

Original jurisdiction of Supreme Court—leave to file original bill—matter of course.

Leave to file an original bill in the Supreme Court of the United States is ordinarily a matter of course, and may be granted without intimating any opinion upon a question raised as to want of jurisdiction.

[No. —, Original.]

Argued April 14, 1902. Decided April 21, 1902.

APPPLICATION by the State of Washington for leave to file an original bill against the Northern Securities Company, the Great Northern Railway Company, and the Northern Pacific Railway Company. *Leave granted.*

Mr. **W. B. Stratton** argued the cause, and, with Mr. **Wallace B. Douglas**, filed a brief for complainant.

Mr. **C. W. Bunn** argued the cause, and, with Messrs. **George B. Young** and **M. D. Grover**, filed a brief for defendants.

Mr. **John W. Griggs** also argued the cause and filed a brief for defendants.

THE CHIEF JUSTICE: This is an application by the state of Washington for leave to [255] file *an original bill in this court against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; and the Northern Pacific Railway Company, a corporation of Wisconsin. Notice was given 185 U. S.

to the proposed defendants, and argument had in support of and against the motion.

The usual practice in equity cases has been to hear such applications *ex parte* (*Georgia v. Grant*, 6 Wall. 241, 18 L. ed. 848). although under special circumstances a different course has been pursued. *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437. Ordinarily, as stated by the chief justice in the latter case, the motion for leave to file is granted as matter of course. 4 Wall. 478, 18 L. ed. 438.

In *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721, a bill in equity was filed by the state of Georgia to enjoin the Secretary of War and other officers representing the executive authority from carrying into execution certain acts of Congress, on the ground that such execution would overthrow the existing state government of the state and establish another and different one in its place; and a motion was made to dismiss for want of jurisdiction over the parties and over the subject-matter, on which full argument was had. It was held that the bill called for the judgment of the court on political grounds and on rights of a political character, and that therefore the court had no jurisdiction over the subject-matter.

In *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251, the case stated shows that "argument was had on objections to granting leave, but it appearing to the court the better course in this instance, leave was granted, and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs."

In *Minnesota v. Northern Securities Co.* (decided at this term) 184 U. S. 199, ante, 499, 22 Sup. Ct. Rep. 308, application to file a similar bill to that before us, and seeking similar relief, was made, and after examining the bill we directed notice to be given, and heard argument on both sides. The result was that leave to file was denied because of the want of certain indispensable parties, who could not be brought in without defeating our constitutional jurisdiction. That insuperable difficulty does not meet us on *the [256] threshold here, but, among other objections to granting leave, it is urged that the court would have no jurisdiction over the subject-matter because, as contended, the bill does not present the case of a controversy of a civil nature which is justiciable under the Constitution and laws of the United States, in that the suit is purely a suit for the enforcement of "the local law and policy of a sovereign and independent state, whose right to make laws and to enforce them exists only within itself and by means of its own agencies, and is limited to its own territory."

In the exercise of original jurisdiction the court has always necessarily proceeded with the utmost care and deliberation, and, in respect of all contested questions, on the fullest argument; and in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case on those which may succeed it. In view of this it seems to us advisable to take the same course on the pending applica-

tion as was pursued in *Louisiana v. Texas*; that is, without intimating any opinion whatever on the questions suggested, to grant leave to file in accordance with the usual practice. Our rules require service sixty days before the return day of process, but as the final adjournment of the term will have taken place within that time, process will be made returnable on the first day of next term.

Leave is granted and process will issue accordingly.

UNITED STATES, *Appt.*,

v.

A. A. GREEN *et al.*

HARVEY L. CHRISTIE and Colin Cameron,
on, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 256-270.)

Private land claims—imperfect claim—when asserted in time—validity of grant—power of intendant and commissary general—due location and record—lawful area—confirmation of title to overplus—res judicata.

1. Claims asserted by defendants during the pendency of a proceeding instituted in due time in the court of private land claims to confirm an imperfect title are not barred because such defendants were made parties or filed their claims for affirmative relief after the expiration of the period prescribed by the act establishing that court within which petitions in respect to imperfect claims must be filed in order to preserve such claims.
2. A grant initiated by proceedings approved by the intendant *ad interim* of Sonora and Sinaloa, in which a sale was made in 1822, and the purchase price thereupon paid into the public treasury, and completed by title issued by the commissary general of Sonora in 1825, should be recognized as valid by the court of private land claims.
3. Due location of a Mexican grant to the extent of the 4 sitios, which, by the laws in force at the time of the sale in the proceedings to obtain such grant, it could not exceed, is sufficiently established by evidence from which the court of private land claims is able to determine the true boundaries of the tract as so limited.
4. A Mexican grant will be deemed to have been duly recorded in the archives of Mexico prior to September 25, 1853, as required by the Gadsden treaty, where the final title, which states that entry thereof is made in a specified book in the commissariat general, was admitted in evidence without objection, as was also a letter dated in 1831, from the provincial secretary of Sonora on behalf of the commissariat general, alluding to the existence of the title to such grant, and the expediente on file in the Mexican archives contains thereon a memorandum of the issue of a grant, since under such circumstances it may properly be presumed that any ministerial duty imposed on the Mexican officials, of registering the making of the grant, was duly performed, and that such record was in fact made.

5. A Mexican grant can be confirmed only to the extent of the 4 sitios which, under the laws in force at the time of the sale in the proceedings to obtain the grant, it could not exceed, and which was the quantity denounced, appraised, paid for, and purported to have been granted.
6. No confirmation of title to overplus within a Mexican land grant, for which the Mexican government had a right to compel payment or to resell such surplus to a third party, can be had in the court of private land claims upon payment of the asserted value of such excess.
7. Nothing decided in a suit for an unlawful inclosure of public lands, in which the Supreme Court of the United States on appeal reversed the judgment of the court below in favor of the government, and remanded the case, with instructions to dismiss the petition on the ground that there was color of title in the defendant sufficient to take the case outside of the operation of the statute, is *res judicata* in a suit to confirm title under a Mexican grant, in which defendant in the prior suit claims a valid title to such land as being within the exterior boundaries of the grant.

[Nos. 109, 129.]

Argued January 27, 28, 1902. Decided April 28, 1902.

A PPEAL from the Court of Private Land Claims to review a decree confirming in part title to a tract of land claimed under a Mexican grant. *Affirmed.*

Statement by Mr. Justice **White**:

*These appeals concern the title to a tract [257] of land situated in the county of Pima, territory of Arizona. The litigation was begun by the filing in the court of private land claims, on February 27, 1893, on behalf of Alfred A. Green, of a petition by which the court was asked to declare the validity of the title of Green to the tract. It was alleged that Green had become invested with the title by mesne conveyances from one Ramon Romero and others, to whom the land had been granted on May 15, 1825, by the State of the West in the Republic of Mexico.

While the original documents constituting the grant were averred to be in the official custody of the surveyor general of the United States for the territory of Arizona, it was alleged that the claim had not theretofore been considered or acted upon by Congress, or any other authority of the United States. A map was annexed to the petition, which it was asserted showed the boundaries of the land, and established that the quantity thereof was 16 square leagues. Not only the United States, but also Colin Cameron, and others whom it was averred claimed some interest in the land, were made parties defendant to the cause.

The United States filed a general denial. Thereafter, on March 20, 1895, upon the application of the United States, Harvey L. Christie was made a party defendant, on the ground that he asserted title to the land under the grant to Romero.

On March 25, 1895, Colin Cameron filed

[258] an answer, in which he denied that petitioner had any interest in whole or in part *in the land, and it was also averred that he (Cameron) was the owner in fee simple, and that he was in possession of the tract under the grant of May 15, 1825, referred to in the petition. The land claimed by Cameron was delineated on a map annexed to the answer, and the land was averred to be embraced within the original survey of the grant. The proceedings which it was claimed culminated in the grant were detailed at length. It was also alleged that as the result of proceedings instituted on February 28, 1880, by the successors in interest to the original grantees the surveyor general of the United States for the territory of Arizona, on April 28, 1880, recommended the confirmation by Congress of said grant to the legal representatives of the original grantees to the extent of 4 square leagues, but that no action had been taken thereon by Congress.

Defendant also pleaded that on September 6, 1886, the United States, under the act of Congress approved February 25, 1885, entitled "An Act to Prevent Unlawful Occupancy of the Public Lands," brought suit against him for an alleged unlawful inclosure of public lands, a part of the tract in question, and that the trial court had adjudicated that the map attached to Cameron's answer in this case correctly represented the land included within the boundaries described in the original title papers of said grant, and that such map correctly represented the location of each monument called for and described in said title papers. Such findings of fact as to the monuments and location of the said grant were thereupon averred to be *res judicata* herein. The answer concluded as follows:

[259] "Defendant further avers, in order to save every right belonging to him, that he in no wise invokes the jurisdiction of this court or submits himself to it voluntarily, and that he answers herein only because he has been made a party defendant. Defendant avers that he claims the lands of the said San Rafael de la Zanja grant under a title derived from the Mexican government that was complete and perfect when the United States acquired sovereignty over such lands; that all the steps and proceedings in the matter of the petition, survey, appraisalment offers, auctions, and sale of said grant and payment therefor were regular, complete, and lawful, and vested a perfect and *valid title in fee thereto in the said grantees of said grant, and that said grantees at the time went into the actual possession, use, and occupation of said grant and erected the proper monuments, and that said grantees and their descendants and legal representatives have continued ever since and until the present time in the actual possession, use, and occupation of the same, and are now seised and possessed in fee thereof; that said grant document is a complete, definite grant in fee by way of sale, coupled with the condition subsequent not to abandon the same for a longer period than three years without good reason, which abandonment would subject

the tract to adjudication to third parties who might apply for or denounce the same; but that no forfeiture of said grant was ever claimed.

"Defendant avers that by reason of the premises he is in nowise bound by the act of Congress establishing this court to apply to this court for a confirmation of said title, and that he is unwilling to submit himself to the conditions, or any of them, imposed by the act establishing this court upon petitioners applying to said court for confirmation of their title, and that he does not by this answer, or in any other way, so apply."

On February 4, 1899, Cameron filed what was termed a "separate answer," in which were repeated the averments in the prior answer as to the petitioner not possessing any interest in the tract, the ownership thereof in the defendant, the proceedings which culminated in the grant to Romero, and the proceedings had before the surveyor general of Arizona. An averment was made that the map filed with the answer, as a part thereof, was a correct map of the grant in question, and showed the area of the grant to be 152,889.62 acres. It was next alleged that the grant to Romero was not a grant by quantity, but was a sale by metes and bounds and natural landmarks established by the Spanish survey, and that the grant vested in the grantees a true and valid title in fee to the whole of the surveyed land; and it was further alleged that each and every person in the occupancy of any portion of the tract were unlawfully occupying, and that any patents issued by the United States [260] for land within the grant were null and void. The answer next contained the following averments:

"Defendant further avers that prior to said treaty, known as the Gadsden treaty, no resurvey of said grant had ever been applied for or ordered by anyone, and that none of the grantees or their successors in interest had prior to said treaty any knowledge or notice that within the said monuments there was any excess of land over the area stated in said title papers, and defendant avers that the grantees under said grant were, under the laws of Mexico and the state of Sonora existing at the date of said treaty, and for a long time prior thereto had been, holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as owners even after such overplus is shown, without other obligations than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and defendant further avers that if this honorable court should decide that said sale as recited in said title papers did not, as defendant avers it did, convey to the grantees therein all of the said tract of land to the monuments described in said title papers without further payment therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from him for such overplus, and also the costs for ascertaining the same, as soon as the amount

of the same and the sum due therefor is ascertained."

The answer concluded with a tender of \$1,359 as payment for any overplus, and the further sum of \$200 for the costs of ascertaining and determining the existence or nonexistence of such overplus, and concluded with the prayer "that upon said payment this honorable court decree that defendant is entitled to and is the owner of all of said tract of land as originally surveyed, including said overplus or surplus, and that by said decree he be secured in the ownership and possession of the whole of said tract, and defendant, answering herein by reason of the fact that he has been made a party defendant, prays that the validity of his said title may be inquired into and decided, and that his title to all of said lands be declared valid, and that the said grant be adjudged to be and [261] always to have been a complete *and perfect and unconditional title in fee, and the defendant be adjudged to be the owner in fee thereof, and for such other and further relief as to the court may seem meet and proper in the premises."

On February 4, 1899, an answer of defendant Christie was filed, in which it was averred that Christie was the owner of the land granted to Romero. In other respects the answer reiterated the allegations contained in the separate answer of Cameron just stated.

In a supplemental answer filed by leave on May 19, 1899, Cameron reiterated the plea of *res judicata* contained in his original answer.

From time to time various other defendants filed answers, setting up title by adverse possession, and otherwise, to sundry portions of the land in controversy. The cause was heard on the theory that the pleadings of Cameron and Christie just referred to were cross complaints, demanding affirmative relief against the United States. On behalf of the two defendants named, there was introduced in evidence a certified copy of the expediente of the grant, as also the original titulo. This titulo shows the following as the original proceedings upon which the title was based:

On July 19, 1821, Don Manuel Bustillo, a resident of the presidio of Santa Cruz, applied to the intendant of the province of Sonora and Sinaloa, Antonio Codero, at Arispe, for 4 sitios of land at a place to which was afterwards given the name of San Rafael de la Zanja. Three of these sitios were to be north of and adjoining the lands of said presidio, and the other at the place called Cajoncito to the east. The application was granted on the same day without prejudice to third parties, and the commandant of Santa Cruz was ordered to make the survey, appraisalment, and publication of the land for thirty consecutive days in solicitation of bidders. Gonzales, the commandant of Santa Cruz, accepted the commission October 4, 1821, and ordered the survey to be commenced on the next day, after summoning the party in interest and the owners of contiguous lands. An assistant was appoint-

ed, and the survey made on October 5 and 6, 1821. After a waxed and twisted hempen cord *of 50 varas had been measured, the ap-[262] plicant (Bustillo) requested that, inasmuch as the place called Cajoncito was inside of the presidio lands, the 1 sitio he had asked for there be given to him in one tract with the other 3, which request was granted. In substance it appeared that the survey was made by running or estimating the lines from the central point 200 cords east, west, north, and south, the ends of the lines being extended to form a square. The recitals of the survey concluded as follows: "with which measurements was formed the square of the 4 sitios registered by Don Manuel Bustillo for raising cattle, and as such he accepted them; being informed that in due time he was to establish his boundaries with monuments of lime and rough stone as required by law."

Appraisers were appointed, and 4 sitios were appraised as follows: Three sitios at \$60 each, because they had permanent water, and 1 sitio at \$30, because it was dry. Publication was then made for thirty consecutive days, soliciting bidders. None appeared. Affidavits were taken to show that Bustillo was able to stock 4 sitios. The expediente was then forwarded to the intendant, who, in December, 1821, referred it to the attorney general for his opinion. The latter official submitted a written opinion December 20, 1821, approving the proceedings, and recommending that the three usual public offers be made and the land sold to the highest bidder upon payment of the price and the usual fees. The intendant approved the recommendation, and ordered the three public offers made. The first offer was made January, 1822. The proclamation made by the crier, as recited in the account of the proceedings of the first auction, was as follows:

"There are going to be sold for this commission of auctions 4 sitios of public lands for cattle raising, comprised in the place named San Rafael de la Zanja, situated within the jurisdiction of the presidio of San Cruz, surveyed in favor of the one who denounced them, Don Manuel Bustillo, and appraised in the sum of \$210, being at the rate of \$60 each for 3 of said sitios, and the remaining one at \$30."

*The bidders at the sale were Bustillo and [263] one Romero. The latter, on behalf of himself and the residents of the presidio of Santa Cruz, became the purchasers for the sum of \$1,200. Romero was notified of the result, with which he expressed satisfaction, and asked the grant to be made. On January 11, 1822, the intendant *ad interim*, Ignacio de Bustamante, approved all the proceedings, and ordered Romero to be notified and to pay into the treasury the price of the land and the usual fees, and, as soon as that was done and a voucher for the payment was attached to the expediente, it be sent to the superior board of the treasury in Mexico for such action as it might see fit to take. Romero made the payment, and a certificate was given him for the amount thereof. At this point the proceedings were suspended, and so remained until May 15, 1825, when the re-

cently created commissary general of the state of Sonora, Juan Miguel Riesgo, issued a title to "Don Ramon Romero and the other residents in interest," for "the 4 sitios of land for breeding cattle, comprising the place called San Rafael de la Zanja," under article 81, ordinance of intendants, and the royal instructions of October 15, 1754, at Fuerte, the then capital of the United States of Sonora and Sinaloa.

The following appears at the end of the titulo, viz.: "Entry of this title is made at folio 3 of book No. 2 that exists in this commissariat general."

The expediente, which was on file in the archives of the state of Sonora, Mexico, at the city of Hermosillo, the capital, contained, following the certificate of the payments made by Romero, the following recital:

"The title on this expediente was issued on May 15, 1825, in favor of the interested parties, Don Ramon Romero and other residents of Santa Cruz. (Rubricas E. R. Pa. 7 a. Notification. Vale.)"

The court found (two members dissenting) that a valid grant had been made, that the evidence established the central point of the original survey, and confirmation was made and decreed "of the said title of the said Ramon Romero, and of his co-owners and of their heirs, successors in interest, and assigns" to 4 sitios of the tract, measured in a square from the center *established by the Mexican surveyor, as shown on the map of a certain survey made in 1895, and in evidence in the cause. The claim of plaintiff and of defendants Cameron and Christie to all other land not so confirmed was rejected.

Appeals were prosecuted by the United States and by Cameron and Christie.

Messrs. John W. Griggs and Francis J. Heney argued the cause and filed a brief for appellants in No. 129 and appellees in No. 109:

The same principles of law and equity in regard to mere irregularities were applied by the land officers in Mexico when acting as judges in proceedings to annul or reform titles to lands, as are applied by the courts in this country in similar proceedings.

Hornsby v. United States, 10 Wall. 237, 19 L. ed. 903.

The intent of the parties in a conveyance between a state and an individual must be construed according to the principles of law which are applied to conveyances between individuals.

Huidekoper v. Douglass, 3 Cranch, 1, 2 L. ed. 347.

A grant is complete and perfect notwithstanding the fact that it contains a large excess within its boundaries, even if this excess is due to fraud or mistake on the part of the surveyor, and it is voidable merely, and not void; and it therefore vests the title to the entire tract in the grantee.

White v. Burnley, 20 How. 235, 15 L. ed. 886; *Taylor v. Brown*, 5 Cranch, 234, 3 L. ed. 88; *Arivaca Land & Cattle Co. v. United States*, 184 U. S. 649, ante, 731, 22 Sup. Ct. Rep. 525; *Sturgeon v. Floyd*, 3 Rich. L. 80; **185 U. S.**

Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840.

The grant was complete and perfect when the title paper was issued, and the grantee could not be divested of his title to any part of the land so granted, except by a judicial proceeding.

White v. Burnley, 20 How. 235, 15 L. ed. 886.

The divestiture of title once legally vested is a judicial proceeding.

Cameron v. United States, 171 U. S. 277, 43 L. ed. 163, 18 Sup. Ct. Rep. 855.

This court has no power to reform the title or to forfeit any part of the grant in this proceeding. It can proceed only in accordance with the Constitution and laws of this country in enforcing any affirmative relief to which the United States claims it is entitled, and it is only in determining what rights of property were vested in the grantee at the date of the Gadsden treaty that it may inquire into the laws, customs, and usages of Mexico.

White v. Burnley, 20 How. 235, 15 L. ed. 886.

The grant was sufficiently recorded in the archives of Mexico.

Ely v. United States, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840.

Mr. John W. Griggs also filed a separate brief for appellants in No. 129 and appellees in No. 109.

The failure of the government of Mexico to question the validity of this grant, either on account of mistake in measurement, or of *ultra vires*, is very persuasive of the belief that the grant was authorized and was intended to cover a tract 4 leagues square, as the papers showed.

Ely v. United States, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840.

The title of the grantee could not be divested except by judicial proceedings, and then only on failure to perform the equitable duty of payment of the sum which he ought to have paid and would have been compelled to pay, provided the true area was known when the grant was made.

Noble v. Goochins, 99 Mass. 231; *Thredgill v. Pintard*, 12 How. 35, 13 L. ed. 881; *Tarbell v. Bowman*, 103 Mass. 343.

The proceedings of officers of the government in surveying and establishing the boundaries of tracts of land for purposes of segregation from the public domain are in the nature of a judicial proceeding, and have all the force and effect of judicial determination binding upon the government.

Graham v. United States, 4 Wall. 259, 18 L. ed. 334; *United States v. Pico*, 5 Wall. 536, 18 L. ed. 695; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 640, 26 L. ed. 876; *Taylor v. Brown*, 5 Cranch, 234, 3 L. ed. 88; *Vanderslice v. Hanks*, 3 Cal. 28.

The fact that the surveyor included more land than was called for does not avoid the grant. Whatever the state might do to annul it, third parties have no right to consider it void.

White v. Burnley, 20 How. 235, 15 L. ed. 886.

Mr. Rochester Ford also filed a brief for appellants in No. 129 and appellees in No. 109:

Grants in Sonora were not like the grants by quantity, or floating grants, of California, but were located tracts of land identified and segregated by the survey preceding the sale. The object of the survey was to mark the boundaries of the land sold, and the purchasers acquired title to the specific tract so designated. The delivery of the title in pursuance of the survey was the investiture of a complete title to the specified tract, with no future act to be performed.

Spaulding, Public Lands, § 511.

The quantity of land within the natural boundaries of Mexican grants often far exceeded the estimate of the surveyor, but this circumstance does not restrict the language of the grant or change the boundaries or the intention of the parties.

White v. Burnley, 20 How. 247, 15 L. ed. 886.

The title papers of this grant and the documents set out in the record herein show that the purchasers did not wait for the delivery of the title papers before going into possession, but went into possession of the whole of the surveyed tract immediately after and by virtue of the survey, and at least nine years before the delivery of the title. This was an official or juridical delivery of possession of the tract, and established its boundaries as those marked by the survey.

United States v. Pico, 5 Wall. 536, 18 L. ed. 695; *Graham v. United States*, 4 Wall. 259, 18 L. ed. 334; *Maxwell Land-Grant Case*, 121 U. S. 325, *sub nom. United States v. Maxwell Land-Grant Co.* 30 L. ed. 949, 7 Sup. Ct. Rep. 1015.

This court stated, when this title was before it in a former case, that "the limits of this grant were to be designated by monuments of lime and stone; that such designation was actually made; and that juridical possession of the land was delivered in pursuance thereof."

Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595.

The testimony shows that the purchasers at the time went into possession of and occupied the whole of the tract embraced within the original monuments, claiming title and ownership of all the land. The practical construction thus given to the grant at the time is evidence that the intent of the parties was to acquire the whole tract.

Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057.

The grant was duly recorded in pursuance of the Mexican laws and customs.

Applegate v. Lexington & C. County Min. Co. 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742; *Stebbins v. Duncan*, 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313.

Messrs. **Matthew G. Reynolds** and **William H. Pope** argued the cause, and, with *Solicitor General Richards*, filed a brief for the United States:

Intendants and, subsequently, governors of the provinces, were charged only with a superintendence of the incipient and mediate states of the title, but the power of completely severing the subject of the grant from other Crown lands was uniformly retained by superior authority.

Reynolds, Spanish & Mexican Land Laws, pp. 59, 62, 63, 65, 73; *United States v. Moore*, 12 How. 209, 13 L. ed. 958.

Assuming that the intendant was vested with power to make this grant, the power to grant was absolutely limited to 4 sitios, and therefore this grant, so far as it exceeds 4 sitios, is void for lack of power in the granting officers, just as it was so frequently held in California that a grant of more than 11 leagues in the territories under the national colonization law of 1824 was *pro tanto* void.

United States v. Hartnell, 22 How. 286, 16 L. ed. 340; *Roland v. United States*, 7 Wall. 743, 19 L. ed. 184; *United States v. Cleveland & C. Cattle Co.* 33 Fed. 323.

The cedula of February 14, 1805, in force in 1821, limited a grantee to a maximum of 4 sitios.

Reynolds, Spanish & Mexican Land Laws, p. 72.

The amount of land granted under the papers in this cause was the amount paid for, to wit, 4 sitios, and no more.

Ainsa v. United States, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544.

No duty rests on this government to recognize the validity of a grant to any area of greater extent than was recognized by the government of Mexico.

Ely v. United States, 171 U. S. 239, 43 L. ed. 149, 18 Sup. Ct. Rep. 840.

The character of title document here presented conveys only the quantity named.

Ainsa v. United States, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544; *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840; *United States v. Maish*, 171 U. S. 242, 43 L. ed. 150, 18 Sup. Ct. Rep. 948; *Perrin v. United States*, 171 U. S. 292, 43 L. ed. 169, 18 Sup. Ct. Rep. 861.

Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.

Pollard v. Hagan, 3 How. 219, 11 L. ed. 569.

A Mexican grant of quantity, located within exterior boundaries containing a greater quantity, does not, until located, take precedence over a grant made subsequently within the same out boundaries, but located first.

United States v. McLaughlin, 127 U. S. 428, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177; *Fremont v. United States*, 17 How. 542, 15 L. ed. 241; *Cameron v. United States*, 148 U. S. 309, 37 L. ed. 462, 13 Sup. Ct. Rep. 595; *United States v. Armijo*, 5 Wall. 445, 18 L. ed. 492; *Miller v. Dale*, 92 U. S. 473, 23 L. ed. 735; *Carpentier v. Montgomery*, 13 Wall. 480, 20 L. ed. 698; *Hornsby v.*

United States, 10 Wall. 232, 19 L. ed. 902; *Snyder v. Sickles*, 98 U. S. 203, 25 L. ed. 97.

This grant is within the class of claims denounced by the treaty as not "duly recorded in the archives of Mexico."

Fuentes v. United States, 22 How. 443, 16 L. ed. 376; *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221; *Luco v. United States*, 23 How. 515, 16 L. ed. 545; *United States v. Bolton*, 23 How. 347, 16 L. ed. 571; *United States v. Vallejo*, 1 Black, 541, 17 L. ed. 232; *United States v. Teschmaker*, 22 How. 405, 16 L. ed. 357; *United States v. Pico*, 22 How. 406, 16 L. ed. 357; *United States v. Castro*, 24 How. 346, 16 L. ed. 659; *United States v. Knight*, 1 Black, 228, sub nom. *United States v. Moorhead*, 17 L. ed. 76; *United States v. Neleigh*, 1 Black, 298, 17 L. ed. 144; *Romero v. United States*, 1 Wall. 743, 17 L. ed. 633; *White v. United States*, 1 Wall. 660, 17 L. ed. 698; *Berreyesa v. United States*, 154 U. S. 623, and 23 L. ed. 913, 14 Sup. Ct. Rep. 1179; *United States v. Ortiz*, 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466; *United States v. Elder*, 177 U. S. 104, 44 L. ed. 690, 20 Sup. Ct. Rep. 537; *Whitney v. United States*, 181 U. S. 109, 45 L. ed. 773, 21 Sup. Ct. Rep. 565.

A recital that the prerequisites for a grant had been complied with is not sufficient ground for the presumption that such prerequisites had been observed.

Fuentes v. United States, 22 How. 443, 16 L. ed. 376.

Even if the unauthenticated indorsement on the titulo prove that a *toma de razon* was made in such a book, the case still lacks the proof of loss necessary to bring it within the rule laid down in *Peralta v. United States*, 3 Wall. 434, 18 L. ed. 221.

A title derived from the Mexican government is not perfect while any further act was required on the part of the government, or that of the United States as its successor, in order to invest the claimant with the entire legal title to and the absolute possession of the specific lands granted.

Steinbach v. Moore, 30 Cal. 508; *Paschal v. Perez*, 7 Tex. 348; *Hancock v. McKinney*, 7 Tex. 384; *Stevenson v. Bennett*, 35 Cal. 432.

The right of a person asking affirmative relief must be tested as of the date of the filing of his petition. This latter was filed six years after the date fixed by law for the presentation of imperfect claims, and his suit must be held to be too late, and his claim "to be abandoned and forever barred."

United States v. Patterson, 15 How. 11, 14 L. ed. 578; *McMicken v. United States*, 97 U. S. 208, 24 L. ed. 948.

Substantial equities in property may in some instances exist within the terms of the treaty, and yet the court of private land claims be, under the act of its creation, entirely without jurisdiction to recognize or confirm them.

United States v. Santa Fé, 165 U. S. 675, 41 L. ed. 874, 17 Sup. Ct. Rep. 472; *United States v. Sandoval*, 167 U. S. 290, 42 L. ed. 172, 17 Sup. Ct. Rep. 868; *Zia v. United States*, 185 U. S.

United States, 168 U. S. 198, 42 L. ed. 434, 18 Sup. Ct. Rep. 42.

This is a claim whose status became fixed in 1853, when the treaty was concluded; that status included the nonperformance at that date of a necessary condition; and claims in which there is a nonperformance of condition or requirement are excepted from the jurisdiction of the court.

Cessna v. United States, 169 U. S. 188, 42 L. ed. 711, 18 Sup. Ct. Rep. 314.

The United States is under no obligation, as a matter of public law, to recognize a grant as valid whose conditions remained unfulfilled at the date of the treaty.

United States v. Sibbald, 10 Pet. 321, 9 L. ed. 440; *Cessna v. United States*, 169 U. S. 186, 42 L. ed. 710, 18 Sup. Ct. Rep. 314; *Ely v. United States*, 171 U. S. 241, 43 L. ed. 150, 18 Sup. Ct. Rep. 840.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

We will first dispose of the questions presented by the appeal of the United States. In substance, it is asserted that the grant should have been rejected *in toto*, instead of being confirmed to the extent of 4 sitios, upon the following grounds: 1. That the claim was barred by § 12 of the act establishing the court of private land claims, because not asserted until after the expiration of two years from the passage of the act. True, it is said, the claim of Green was presented in time, but as he was not represented at the trial, and Cameron and Christie were treated as the sole claimants, and they had not by their cross complaints asked for affirmative relief within the statutory limitation, the bar of the statute was operative as to them. 2. The intendant *ad interim* Bustamente, through whom the sale to Romero and others purported to have been effected, and the commissary general of Sonora who ultimately extended the title, did not possess the power in the premises which they assumed to exercise. 3. The grant in question was not duly located prior to September 25, 1853, as required by article 6 of the Gadsden treaty. 4. The grant was not duly recorded in the archives of Mexico prior to September 25, 1853, which was *made a condition precedent to the recognition of an alleged grant, by the article of the treaty just referred to.

As respects the bar of the statute, we think the contention is clearly without merit, even upon the hypothesis that the grant to Romero constituted, at the date of the treaty, but an imperfect title to the extent to which the court below confirmed the same. The provision of the act establishing the court of private land claims, relied upon, is as follows:

"Sec. 12. That all claims mentioned in § 6 of this act which are by the provisions of this act authorized to be prosecuted shall, at the end of two years from the taking effect of this act, if no petition in respect to the same shall have then been filed as hereinbefore provided, be deemed and taken, in all courts and elsewhere, to be abandoned, and

shall be forever barred." [26 Stat. at L. 858, chap. 539.]

By the filing of the petition on behalf of Green the court below was vested with jurisdiction to determine the validity of the grant upon which the proceeding was based, and to pass upon the question as to whether or not the lands embraced therein were at the date of the treaty public land of the United States. The terms of the act establishing the court of private land claims, with reference to a proceeding thus instituted, in our opinion leaves no room for doubt that it was the intention of Congress to require that before a decision by the court in the premises all those asserting claims in the land adverse to the United States, under the grant relied upon, should be made parties and be heard in support of its validity. The provisions of § 6 of the act, which relate to claims for confirmation of imperfect and incomplete titles, manifestly import that every adverse possessor or claimant should be made a party defendant, and the section prohibits the entry of a decree "otherwise than upon full legal proof and hearing." By § 7 "all proceedings subsequent to the filing of said petition" are required to "be conducted as near as may be according to the practice of the courts of equity of the United States;" and, in addition, it is provided as follows:

"The said court shall have full power and authority to hear and determine all questions arising in cases before it relative to the [266] title *to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title, and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico, at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord eighteen hundred and forty-eight, or the treaty concluded between the same powers at the city of Mexico on the thirtieth day of December, in the year of our Lord eighteen hundred and fifty-three, and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States, which decree shall in all cases refer to the treaty, law, or ordinance under which such claim is confirmed or rejected."

The fact also that by § 8 the United States may, without limitation as to time, voluntarily institute a proceeding for the determination of the validity or invalidity of any claim or title deemed by it "open to question," affords further support for the construction that Congress intended that in a proceeding brought in due time to settle the validity of an alleged Spanish or Mexican grant, the United States might, at any stage of such pending litigation, apply to the court of private land claims—as was done by the United States with respect to the defendant Christie—to have brought into the

case adverse claimants who had not been made parties defendant by the petitioner, in order that such parties might be afforded an opportunity to be heard, and the court of private land claims be aided in reaching a just decision. As further establishing the fact that it was not the purpose of Congress to deprive the court of private land claims of power to adjudicate upon claims asserted by defendants during the pendency of a lawful proceeding to obtain an adjudication respecting the validity of an alleged Mexican grant, even though such defendants were made parties or filed claims for affirmative relief after the period *limited for the institu- [267] tion of an original proceeding to obtain confirmation of a claim of title, we excerpt the following proviso to the portion of § 12 heretofore quoted:

"Provided, That in any case where it shall come to the knowledge of the court that minors, married women, or persons *non compos mentis* are interested in any land claim or matter brought before the court, it shall be its duty to appoint a guardian *ad litem* for such persons under disability, and require a petition to be filed in their behalf, as in other cases, and if necessary to appoint counsel for the protection of their rights."

The second and third grounds relied upon by the government, as above stated, to defeat the claim in its entirety, do not require extended consideration, as they are foreclosed by recent decisions of this court. By the law in force at the time of the sale under consideration a grant initiated in the manner in which the one in question is claimed to have been could not exceed, in the aggregate, 4 sitios. The evidence clearly showed that the quantity of land denounced, appraised, paid for, and purported to have been granted was only 4 sitios. Under these circumstances, the court below properly sustained the grant to the extent of 4 sitios only. As said by the court of private land claims: "The cause is founded on the proceeding initiated in 1821 and concluded in 1825. In its essential features it is like *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840. The proceedings under which the grant was made are precisely like those upon which the grant in that case was made, and were had under the same laws, and the two grants were made by the same officer." The case in the particular stated is, therefore, ruled by *Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840; *United States v. Maish*, 171 U. S. 242, 43 L. ed. 150, 18 Sup. Ct. Rep. 948; *Perrin v. United States*, 171 U. S. 292, 43 L. ed. 169, 18 Sup. Ct. Rep. 861; and *United States v. Camou*, 184 U. S. 572, ante, p. 694, 22 Sup. Ct. Rep. 505, and *Reloj Cattle Co. v. United States* (decided at this term), 184 U. S. 624, ante, p. 721, 22 Sup. Ct. Rep. 499.

As from the evidence the court of private land claims was able to determine the true boundaries of the tract as limited, the cases just cited are also authority for deciding that the grant was duly located to that extent, and hence that the court rightfully confirmed the grant for the lawful extent thereof.

[268] The remaining ground upon which the United States contends *that the claim should have been rejected, is that it was not established that a record of the grant was made. As respects the evidence of a due recording of the grant, the case at bar is similar to the *Ely Case*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840, where, however, no question was raised by the government as to the want of a proper record. In the Sonoita grant, passed on in the *Ely Case*, the final title was issued on the same day on which the final title in the case at bar purports to have been issued, and contained a like notation that "note of this title is taken on page 3 of book No. 2 in this general commissariat." A memorandum of this character appears to have been customarily indorsed on the titulo.

The evidence in the case at bar showed that there are only two books of Toma de Razon in the records at the capital of the state of Sonora, Mexico. One book has the figure 1 written on the first page of the first leaf, and contains entries of grants up to and including May 13, 1825. The first entry on the other book bears date of 1831. In the case at bar the final title or titulo, of date prior to the regulations of 1828, was admitted in evidence without objection or question as to its genuineness, nor was any objection interposed by the government to the introduction in evidence of a letter, dated some time in 1831, written by the provincial secretary of Sonora, on behalf of the commissariat general of that state, alluding to the existence of the title to this San Rafael grant. The expediente is also on file in the Mexican archives, and contains thereon a memorandum of the issue of a grant. In view of all these circumstances it may properly be presumed that the ministerial duty which it is claimed was imposed on the Mexican officials of registering the fact of the making of a grant of public lands was duly performed, and that such record was in fact made. Whether, as held by the court below, the mere retention in the Mexican archives of the expediente constituted the record of the grant, within the meaning of the treaty of 1853, need not be determined.

We come then to consider the contentions relied upon by the claimants to sustain their appeals. Those contentions are, in substance, that the grant to Romero and his associates constituted *a complete and perfect title to the full quantity of land embraced within the original survey, which it was asserted by witnesses for the claimants aggregated, not merely 4 sitios, but nearly 160,000 acres of land. It is manifest, however, from the authorities which we have previously cited, that as the grant was lawful to the extent of only 4 sitios, the claimants cannot be heard successfully to assert that it embraced and could be confirmed for the larger quantity.

The previous decisions of this court also preclude the claim for a confirmation of the 185 U. S. U. S., Book 46.

grant as to the overplus upon payment of the asserted value of such excess. In *Ainsa v. United States* (decided at this term) 184 U. S. 639, ante, p. 727, 22 Sup. Ct. Rep. 507, discussing the contention of the claimant that he was entitled to an award of the demasias or overplus beyond the cabida legal or real quantity granted, upon payment of such amount as might be found due, the court concluded as follows:

"It is obvious that this contention cannot be sustained for the reasons indicated, and we repeat what we said in *Ely's Case*, 171 U. S. 239, 43 L. ed. 149, 18 Sup. Ct. Rep. 848: "This government promised to inviolably respect the property of Mexicans. That means the property as it then was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after. That which was subject to challenge before did not become a vested right after. No duty rests on this government to recognize the validity of a grant to any area of greater extent than was recognized by the government of Mexico. If that government had a right, as we have seen in *Ainsa v. United States* it had, to compel payment for an overplus or resell such overplus to a third party, then this government is under no moral or legal obligations to consider such overplus as granted, but may justly and equitably treat the grant as limited to the area purchased and paid for.'"

Counsel for claimants in their brief call attention to the plea of *res judicata* interposed by the claimant Cameron, though they do not discuss the same. The action in which the judgment thus pleaded was rendered related to land within the asserted exterior bounds of the grant, near the alleged north and northeast monuments, as said boundaries were recited and *measured in [270] the expediente. The courts of the territory had held that the lands inclosed were public lands of the United States, that Cameron had unlawfully inclosed the same, and the removal of the fence inclosing the land was ordered. On appeal, however, this court, while expressly disclaiming any intention to pass upon the validity of the asserted title of Cameron, held that there was color of title sufficient to take the case outside of the operation of the statute, reversed the judgment against Cameron, and remanded the case with directions to dismiss the petition. 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595. It is clear that, irrespective of the question of parties, the matter passed upon in the fence case was not the same as that which is present in the case at bar. The fence case did not involve, as does the case at bar, the question whether or not the claimant had a valid title to land within the boundaries of the alleged grant, and hence nothing decided in that case was conclusive in this.

Decree affirmed.

CITY OF COVINGTON, KENTUCKY, and
John N. Middendorf, Assessor, of the City
of Covington, *Appts.*,
v.
FIRST NATIONAL BANK OF COVING-
TON, KENTUCKY.

(See S. C. Reporter's ed. 270-277.)

*Appeal from circuit court—final decree for
purpose of review—decree on the merits.*

1. A decree of a circuit court of the United States upon the merits can be reviewed in the Supreme Court of the United States only by appeal, which cannot be taken until after a final decree has been made disposing of the whole cause.
2. A decree of a circuit court of the United States in a suit to enjoin the threatened assessment and collection of municipal taxes on shares of stock in a national bank, under Ky. act March 21, 1900, as discriminating and impairing the obligation of a contract which was *res judicata*, by which decree the collection of such taxes for the years prior to the passage of that act was enjoined for discrimination, and the cause was expressly retained for future determination as to the right to enjoin the collection of any assessment on such shares for 1900 and subsequent years,—is not a final decree for the purpose of an appeal to the Supreme Court.

[No. 255.]

*Argued March 6, 7, 1902. Decided April 28,
1902.*

APPEAL from the Circuit Court of the United States for the District of Kentucky to review a decree permanently enjoining the assessment and collection of municipal taxes on shares of stock in a national bank. *Dismissed.*

See same case below, on motion for preliminary injunction, 103 Fed. 523.

Statement by Mr. Justice **White**:

On July 23, 1900, the appellee herein filed a bill seeking to enjoin the threatened assessment and collection by the defendants below (appellants here) of municipal taxes under the assumed authority of an act of the general assembly of the state of Kentucky approved March 21, 1900, a copy of which is excerpted in the margin.†

NOTE.—On direct review of circuit and district court judgments and decrees in the United States Supreme Court—see note to *Gwin v. United States*, ante, p. 741.

As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

†“Whereas the Supreme Court of the United States has lately decided that article 3, chapter 103, of the acts 1891, 1892, 1893, is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article, in 1892, any adequate mode of tax-

*In substance, it was averred in the original bill and in an amendment thereto that the complainant was chartered on *November 17, 1884, for a term of twenty years; that in 1886, by the acceptance of the provisions of an act of the general assembly of Kentucky, approved May 17, 1886, known as the Hewitt act, a contract was entered into with the state of Kentucky, irrevocable during the existence of the charter of the bank, whereby the complainant became obligated to pay to the state taxes upon the shares of its stock, surplus and undivided profits at a designated rate, such taxes to be in full of all other taxes (state, county, or municipal), except those levied upon its real property; that complainant had regularly made the payments stipulated in said contract up to and including the payment due July 1, 1900; that the taxes thus paid much exceeded the regular taxes imposed by the state during said period upon other real and personal property; and that the fact of the existence of an irrevocable contract had been conclusively determined by the judgment and decree of the court of appeals of Kentucky in a litigation between the bank and the state and the city of Covington, growing out of an attempt to collect state and city taxes upon the franchise of the bank, under the authority of an act of the general assembly of Kentucky, approved November 11, 1892. It was also averred that, notwithstanding the foregoing, the general assembly of Kentucky enacted the statute of March 21, 1900, already referred to, and that the defendants were attempting, under the assumed authority of said act, to compel complainant to list for taxation its shares of stock, and that the defendants designed and intended to assess said shares, and to collect municipal taxes thereon for the benefit of the city of Covington for the years 1893 to 1900, both inclusive.

At much length facts were detailed in the bill and amendment regarding a reduction of the capital stock of the complainant *made in July, 1897, as to the regular payments of dividends to stockholders during the years for which the tax was sought to be assessed and collected, and as to changes in the ownership of the stock during said period. The unconstitutionality of the statute and the illegality of the threatened proceedings

ing national banks, while state banks are now, and have been ever since 1892, taxable for all purposes, state and local; therefore

“Be it enacted by the general assembly of the commonwealth of Kentucky:

“Sec. 1. That the shares of stock in each national bank of this state shall be subject to taxation for all state purposes, and shall be subject to taxation for the purposes of each county, city, town, and taxing district in which the bank is located.

“Sec. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the state, county, city, town, and district for the taxes upon said shares of stock.

thereunder were asserted upon various grounds.

The defendants filed a plea to the jurisdiction, and also demurred for want of equity. A motion for a temporary injunction was heard and granted, the court embodying its views in an elaborate opinion. 103 Fed. 523. The order for the temporary injunction concluded as follows:

"It is ordered, adjudged, and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent."

The complainant thereupon moved that the injunction be made permanent, and by stipulation the cause was submitted to the court "upon said motion, and also upon the plea of the defendants to the jurisdiction of the court, and also upon their demurrer to the bill of complaint," it being agreed that "if the said plea and said demurrer are both disallowed and overruled, then the cause is submitted for the judgment of the court as upon a final hearing, the bill then to be taken for confessed, and further delay thereon being waived."

On December 17, 1900, the following decree was entered:

[274] "This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof and of the stipulation filed herein, it is or-

"Sec. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of 1892, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article 3 of the revenue law of 1892, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid state taxes under the Hewitt bill in excess of the state taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its state taxes required by this act.

"Sec. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by 185 U. S.

dered, adjudged, and decreed as follows, namely:

"First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

"Second. That the bill of complaint, as amended and to which the demurrer and plea were considered as applying, is sufficient and contains matters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

"Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged, and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of the capital stock, any taxes upon any of said shares, upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendants elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

*An application for the allowance of an [275] appeal was filed by the city of Covington and Middendorf; and an assignment of errors

the assessing officers as assessments of real estate are entered, certified, and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"Sec. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

"Sec. 6. The purpose of this act is to place national banks of this state, with respect to taxation, upon the same footing as state banks as nearly as may be consistently with said article 3 of the revenue law and said decision of the Supreme Court.

"Sec. 7. Whereas, It is important that state banks and national banks should be taxed equally for all purposes, and emergency exists, and this act shall take effect and be in force from and after its passage."

[278] *UNITED STATES, *Appt.*,
v.
ALONZO J. VAN DUZEE.

(See S. C. Reporter's ed. 278-281.)

Clerk of circuit court—fees for filing—papers deposited by commissioners on abolition of office.

A clerk of a circuit court of the United States is not entitled to any fee for filing the various papers surrendered to his custody by the circuit court commissioners in compliance with the act of May 28, 1896 (29 Stat. at L. 184, chap. 252) abolishing their office and requiring them to "deposit" the official documents in their possession with the "clerk of the circuit court by which they were appointed," as such filing was authorized neither by this requirement nor by a standing court rule directing the clerk to file papers and transcripts of proceedings before a commissioner upon their receipt by him, which rule plainly had reference only to the current business of such commissioner.

[No. 604.]

Submitted March 24, 1902. Decided April 28, 1902.

A PPEAL from the Court of Claims to review a decree awarding certain fees to a clerk of a circuit court of the United States. *Reversed* and remanded, with instructions to render judgment for the United States.

See same case below, 35 Ct. Cl. 214.

Statement by Mr. Justice White:

This is an appeal from a judgment of the court of claims entered in favor of the appellee (claimant below) for the sum of \$993. 35 Ct. Cl. 214. The conclusion of law by which the court determined that judgment ought to be entered against the United States was based upon the following:

"Finding of Facts.

"I. The claimant, Alonzo J. Van Duzee, was clerk of the circuit court of the United States for the northern district of Iowa from August, 1882, to December 31, 1897, duly qualified and acting.

"II. During said period he made up his accounts for services rendered on behalf of the United States, and presented the same, duly verified, to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment. In the settlement of the account from July 1, 1897, to September 30, 1897, part was paid, but payment of services embraced in Finding III. was refused.

[279] "III. Item 1. For filing and entering 930 separate and distinct *records and other official papers appertaining to the offices of commissioners of the circuit court of the United States for the northern district of Iowa, which were deposited by said commissioners under the act of May 28, 1896, in the 185 U. S.

office of the clerk of the circuit court for said district, at 10 cents each as follows:

(a) Dockets and records, 16.....	\$1 60
(b) Information or complaints, 2,997.....	299 76
(c) Warrants, 1,984.....	198 40
(d) Subpœnas, 1,899.....	189 90
(e) Documentary testimony, 446...	44 60
(f) Bonds, 649.....	64 90
(g) Affidavits, 445.....	44 50
(h) Mittimus, 446.....	44 60
(i) Search Warrants, 22.....	2 20
(j) Applications for discharge of poor convicts, 587.....	58 70
(k) Oaths for discharge as poor convicts, 232.....	23 20
(l) Mandates to jailer for discharge as poor convicts, 169.....	16 90
(m) Applications for seaman's wages, 24.....	2 40
(n) Summons on applications for seaman's wages, 13.....	1 30
(o) Præcipe, 1.....	10

\$993 00

"IV. During the period when the aforesaid services were rendered, it was the settled practice under the verbal orders of the court for the clerk to file all papers sent up by the commissioners in said district; and by a written rule of court entered of record, it was made the duty of the clerk in cases wherein the commissioner held the defendant to appear at court to file the papers and transcripts sent up by the commissioner, and to forthwith enter the case on the docket, which rule is as follows:

"Commissioner's papers.

"Upon receipt by the clerk of the papers and transcript of proceedings before a commissioner, wherein the party is held to appear at court, the same shall be properly filed and the same entered upon the docket."

"The aforesaid services were performed [280] in compliance with said practice and rule of court."

Assistant Attorney General **Pradt** submitted the cause for appellant. *Mr. Philip M. Ashford* was with him on the brief:

The use of the word "deposit" in the act forbids the idea that the clerk should receive any compensation.

9 Am. & Eng. Enc. Law, 2d ed. p. 285.

Fees are of exclusive statutory origin.

United States v. Shields, 153 U. S. 88, 38 L. ed. 645, 14 Sup. Ct. Rep. 735.

It does not follow, because the appellee was put to some trouble, inconvenience, or labor on account of the papers deposited in his office, that he must be compensated therefor.

United States v. Patterson, 150 U. S. 65, 37 L. ed. 999, 14 Sup. Ct. Rep. 20.

Mr. Charles C. Lancaster submitted the cause for appellee:

The approval of court "is prima facie evidence of the correctness of the items of an account, and, in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive."

United States v. Jones, 134 U. S. 483. 32 L. ed. 1007, 10 Sup. Ct. Rep. 515.

The clerk of the circuit court for the northern district of Florida brought suit in the district court of the United States for similar services, and that court entered judgment for the claimant, which was affirmed by the circuit court of appeals.

Marsh v. United States, 88 Fed. 890, 45 C. C. A. 436, 106 Fed. 483.

When the clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services.

United States v. Van Duzee, 140 U. S. 169, 35 L. ed. 399, 11 Sup. Ct. Rep. 758; *United States v. Taylor*, 147 U. S. 697, 37 L. ed. 336, 13 Sup. Ct. Rep. 479; *United States v. Kurtz*, 164 U. S. 53, 41 L. ed. 348, 17 Sup. Ct. Rep. 15; *United States v. Dundy*, 22 C. C. A. 221, 40 U. S. App. 375, 76 Fed. 357.

Mr Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The question involves the construction of a portion of § 19 of the act of Congress of May 28, 1896 (29 Stat. at L. 184, chap. 252), which reads as follows:

"That the terms of office of all commissioners of the circuit courts heretofore appointed shall expire on the thirtieth day of June, eighteen hundred and ninety-seven; and such office shall on that day cease to exist, and said commissioners shall then deposit all the records and other official papers appertaining to their offices in the office of the clerk of the circuit court by which they were appointed. All proceedings pending, returnable, unexecuted, or unfinished at said date before any such commissioner shall be continued and disposed of according to law by such commissioner appointed as herein provided, as may be designated by the district court for that purpose.

Upon the assumption that the government had not appealed from a judgment rendered against it, in *Marsh v. United States*, 88 Fed. 879, 890, item 57, upon a claim similar to that now being considered, the court of claims, in the case at bar, adopted the decision in the case referred to, and held that the provision of the act of 1896, above quoted, authorized the filing by the claimant of all papers deposited with him in accordance with the requirements of the act, and that by such deposit they became part of the records and files of the court of which he was clerk. The United States, however, on a motion for a new trial directed attention to the fact that the court had mistakenly supposed that the decision in the *Marsh Case* had been acquiesced in, since proceedings to review the judgment in that case were then pending in the proper circuit court of appeals.

[281] *We are unable to concur in the construction of the statute thus adopted by the court below. As said by Mr. Justice Jackson, in *United States v. Shields*, 153 U. S. 88, 91, 38 L. ed. 646, 14 Sup. Ct. Rep. 735, 736: "Fees allowed to public officers are matters of strict law, depending upon the very provi-

sions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials." Now, the act of 1896 did not expressly provide that the papers to be surrendered by the commissioners to the custody of the clerk should be *filed* by the latter, and we are unable to infer from the language employed that such a direction was given. Congress, having abolished the office of circuit court commissioner, naturally deemed it expedient to provide for the safe-keeping of the dockets, records, and official papers of those officers. It therefore directed that upon the cessation of such offices, the commissioners should "deposit" the official documents in their possession with the "clerk of the circuit court by which they were appointed." No good purpose would have been subserved by the formal filing of these dockets and writings, which, in the ordinary course, never would have been forwarded to the clerk for filing, and, hence, the construction which attributes to the word "deposit," as used in the statute, a meaning synonymous with "filing," is strained.

So, also, the legal conclusion embodied in the fourth finding, to the effect that the services of the claimant were performed in compliance with a rule of court promulgated prior to May 28, 1896, was erroneous. The documents in question were not covered by the rule, which plainly had relation only to the current business of the circuit court commissioners.

The statute which directed the deposit not having authorized the filing of the writings in question, and no provision having been made for compensating the clerk for the service of receiving and retaining them in his custody, the court of claims erred in awarding judgment in favor of the claimant. *United States v. Patterson*, 150 U. S. 65, 69, 37 L. ed. 999, 1000, 14 Sup. Ct. Rep. 20; Rev. Stat. § 1764.

The decree of the Court of Claims is reversed, and the cause is remanded to that court, with instructions to render judgment for the United States.

*EXCELSIOR WOODEN PIPE COMPANY, [282]
Appt.,
v.

PACIFIC BRIDGE COMPANY *et al.*

(See S. C. Reporter's ed. 282-295.)

Direct appeal from circuit court—jurisdiction of circuit court—averments in answer—case arising under the patent laws.

1. A recital in an order allowing an appeal from a decree of a circuit court, that the ap-

NOTE.—On direct review in Supreme Court of circuit and district court judgments—see note to *Gwin v. United States*, ante, p. 741.

As to Federal jurisdiction of cases involving patent rights—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7, and *Bailey v. Mosher*, 11 C. C. A. 308.

peal was allowed "from the final order and decree dismissing said suit for want of jurisdiction," is a sufficient certificate of the circuit court that the jurisdiction of that court was in issue to warrant a direct appeal to the Supreme Court.

2. A consideration of the averments of an answer in determining whether the circuit court has jurisdiction of a suit commenced therein is necessitated by the jurisdictional act of 1875, § 5 (18 Stat. at L. 470, 472, chap. 137), which requires the circuit court to dismiss the cause whenever "at any time after such suit has been brought" it shall appear that its jurisdiction has been improperly invoked.
3. A suit by a licensee against his patentee and a third person, in which the bill sets up title under the license and alleges the validity of the patent and infringement, is a case arising under the patent laws, of which, under U. S. Rev. Stat. § 629, subsec. 9, the circuit court has original jurisdiction, and not a suit on a contract, although the answer raises no issue as to the validity of the patent or as to the infringement, and admits the license, but denies that it is a subsisting one, and pleads abandonment, forfeiture, and revocation.

[No. 375.]

Submitted February 3, 1902. Decided May 5, 1902.

ON APPEAL from the Circuit Court of the United States for the District of Washington to review a decree dismissing a bill for want of jurisdiction. *Reversed.*

Statement by Mr. Justice **Brown**:

This was a bill in equity filed by the Excelsior Wooden Pipe Company, a California corporation, against the Pacific Bridge Company, also a California corporation, but having a branch in the city of Seattle, Washington, and Charles P. Allen, for the infringement of a patent issued to Allen, one of the defendants, for a wooden pipe.

Beside the usual allegations of a bill for the infringement of a patent, the plaintiff averred that, prior to the acts charged against the respondents, the said Charles P. Allen, one of the defendants, had granted, December 20, 1892, unto the Excelsior Redwood Company, a California corporation, the exclusive right within the Pacific states of manufacturing and selling wooden pipe under his patent to the full end of its term; [283] but the Excelsior *Redwood Company had, with the written consent of Allen the patentee, on December 22, 1892, transferred up to the Excelsior Wooden Pipe Company, plaintiff, the said exclusive license to it, from Allen, with all rights and privileges thereunder, and that Allen had been, and still was, the exclusive owner of the patent, and the plaintiff the sole and exclusive licensee; that the plaintiff has ever since and still is engaged in the manufacture and sale of the patented articles, and has filled all orders therefor, and is well known as the exclusive licensee, and that Allen has joined with the plaintiff in suits against infringers of his patent, all of which have resulted in his favor. The gravamen of the bill lies in the allegation that, notwithstanding all

185 U. S.

this, the defendant, the Pacific Bridge Company, and the said Allen, have since such license conspired to make and sell, and without the license and consent of your orator, exclusive licensee as aforesaid, have made and sold, within one year last past, within the state of Washington, wooden pipe substantially the same as that described in the patent and embodying the invention; and therefore it brought this bill to recover damages for this infringement and for an injunction.

The answer, which was a joint one of both defendants, admitted the issue and validity of the patent and its ownership by defendant Allen. It also admitted a license by defendant Allen to plaintiff's assignor, whereby the latter obtained the exclusive right to make and sell the patented articles in the territory described, and set out the license in full; but it denied that this license was a subsisting one, and alleged an abandonment of the same by the plaintiff, a forfeiture of all rights thereunder by failure and refusal to comply with its terms and conditions, and by acts of bad faith toward the patentee by seeking to defeat the patent and destroy its monopoly; and a revocation of the license by Allen for cause in pursuance of the terms of the contract. It also set up that after the alleged revocation of the license the defendant Allen granted a license to his joint defendant, the Pacific Bridge Company. In short, the only defense was a denial of the license which lies at the basis of plaintiff's suit, and constitutes its title to the patent.

The usual replication was filed, and, pending an application *on the part of de-[284] fendants for an extension of time to take proofs, the plaintiff, apparently at the suggestion of the court, moved for a decree in its favor upon the pleadings and affidavits on file. Upon argument, which was upon the question of jurisdiction alone, the court held that the suit was not one arising under the patent laws, but solely out of a contract; that the court had no jurisdiction, and a decree was entered to that effect. Plaintiff thereupon appealed to the circuit court of appeals, which dismissed the case upon the ground that it had no jurisdiction itself over the appeal, and that, as such appeal was prosecuted from an order dismissing the bill solely for want of jurisdiction, it should have been taken to this court. 48 C. C. A. 349, 109 Fed. 497. Whereupon, the mandate of the circuit court of appeals being filed in the circuit court, an appeal from the final decree of that court, which had been entered November 5, 1900, was taken to this court.

Messrs. **L. S. Bacon, N. A. Acker**, and **W. W. Wilshire** submitted the cause for appellant. Messrs. *William F. Booth* and *A. H. Kenaga* were with them on the brief:

Where the bill is a plain suit for infringement of a patent, and neither suggests nor asks for other or additional relief than is usual in such cases, the court has jurisdiction.

White v. Rankin, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768.

There are three essentials to the statement of a patent suit: First, the patent; second, the title; and third, the infringement.

Robinson, Patents, § 857.

A denial of title, the answer admitting both the validity of the patent and the infringement, will not divest the court of jurisdiction.

Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; *Atherton Mach. Co. v. Atwood-Morrison Co.* 43 C. C. A. 72, 102 Fed. 949; *Waterman v. Shipman*, 5 C. C. A. 371, 14 U. S. App. 312, 55 Fed. 982.

The answer of the Pacific Bridge Company, that it has a license subsequent to complainant's license, will not oust the court of jurisdiction.

White v. Rankin, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768.

In fact, it is difficult to see that the answer, in regard to the forfeiture and revocation of complainant's admittedly once-existing exclusive license, is material, or that it can be considered at all, in the absence of any allegation of mutual agreement to terminate said license, or of its rescission by a competent court of equity.

Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357; *Standard Dental Mfg. Co. v. National Tooth Co.* 95 Fed. 291; *Hanifen v. Lupton*, 95 Fed. 465.

Messrs. N. A. Aecker, L. S. Baeon, and W. W. Wilshire also filed a brief for appellant in opposition to motion to dismiss:

Where the decree appealed from shows on its face that the sole question decided is one of jurisdiction, and where the record on appeal shows that the only question presented to this court for determination is one of jurisdiction, these are held to be the equivalent of a certificate, and no certificate is needed.

Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Van Wagenen v. Sewall*, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229.

Mr. James B. Howe submitted the cause for appellees. *Messrs. W. H. Bogle and A. R. Titlow* were with him on the brief:

In order to maintain the appellate jurisdiction of this court under the 5th section of the act of March 3, 1891, there must be, in addition to the terms of the order appealed from, some further act of the trial court, either in the form of a formal certificate, or of an order authorizing or allowing the appeal, and which is equivalent to a formal certificate, whereby the question of jurisdiction alone is distinctly sent by the trial court to this court for decision.

912

Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185; *Merritt v. Bowdoin College*, 167 U. S. 745, 42 L. ed. 1207, 17 Sup. Ct. Rep. 991; *Merritt v. Bowdoin College*, 169 U. S. 551, 42 L. ed. 850, 18 Sup. Ct. Rep. 415; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Davis v. Geissler*, 162 U. S. 290, 40 L. ed. 972, 16 Sup. Ct. Rep. 796; *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526.

This certificate of the trial court, whether in the form of a certificate or of an order approving and allowing an appeal, must be granted by the trial court during the term at which the order appealed from is rendered.

Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185; *Reed v. Stanley*, 38 C. C. A. 331, 97 Fed. 523.

The question in dispute between complainant and Allen depends entirely upon the construction of the contract between them, and the effect upon the rights of the parties, under the contract, of the matters set up in the answer; and these questions depend altogether upon general principles of common law, and not upon the patent laws.

Wilson v. Sandford, 10 How. 99, 13 L. ed. 344; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357.

The court of appeals of New York, in a case brought by a licensee against an assignee of the patentee, seeking to enjoin the assignee from manufacturing and selling the improvements in violation of the rights granted to the licensee by the contract, and for damages, maintained the jurisdiction of the state court upon the ground that the case did not arise under the patent laws.

Mayer v. Hardy, 127 N. Y. 125, 27 N. E. 837.

If a contract governing the rights of the parties is pleaded by defendant and denied by plaintiff, the court should proceed to determine the fact, and, if its existence is established as a fact, dismiss the case as one not properly within its jurisdiction.

McMullen v. Bowers, 42 C. C. A. 470, 102 Fed. 494; *McCarty & H. Trading Co. v. Glaenzer*, 30 Fed. 387.

The trial court is to determine its jurisdiction from a consideration of the nature and character of the dispute or controversy disclosed during the progress of the case by the entire pleadings.

Robinson v. Anderson, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011.

Mr. Justice Brown delivered the opinion of the court:

1. Motion is made by defendants to dismiss this appeal upon the ground that no appeal was taken, and no certificate of the trial court upon the question of jurisdiction was made by such court during the term at which the decree was rendered, and that no such certificate has since or ever been made.

185 U. S.

As the appeal was taken directly to this court, it must appear, under the 5th section of the court of appeals act, either that the question of jurisdiction was certified to this court, or that the decree appealed from shows upon its face that the sole question decided was one of jurisdiction. Plaintiff evidently supposed that the case was a proper one to carry to the court of appeals, but, its appeal having been there dismissed, [285] it took this *appeal May 27, 1901, from the original decree of the circuit court made November 5, 1900. This decree, after reciting "that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction." An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed "from the final order and decree dismissing said suit for want of jurisdiction." This is clearly a sufficient certificate of the circuit court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that court. *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526.

The case being thus in proper condition for appeal, such appeal could be taken at any time within two years. *Allen v. Southern P. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518; *Holt v. Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272.

2. The most important question is whether this is a suit under the patent laws of the United States within the meaning of Rev. Stat. § 629, subsec. 9, which grants original jurisdiction to the circuit courts "of all suits at law or in equity arising under the patent or copyright laws of the United States." The rule is well settled that, if the suit be brought to enforce or set aside a contract, though such contract be connected with a patent, it is not a suit under the patent laws, and jurisdiction of the circuit court can only be maintained upon the ground of diversity of citizenship. But difficulties sometimes arise in determining whether the action be upon a contract or upon the patent. The first case involving this question was *Wilson v. Sandford*, 10 How. 99, 13 L. ed. 344, in which a bill filed on the equity side of the circuit court by the assignee of a patentee, to set aside a contract in the nature of a license upon the ground that the licensee had not complied with the terms of the contract, was held not to be a case under the patent laws. The object of the bill was to have the license set aside and forfeited, and plaintiff's title reinvested in him. Such [286] was also the case in *Brown v. Shannon*, *20 How. 55, 15 L. ed. 826, which was a bill to enforce the specific execution of certain con-

tracts respecting the use of the patent; and in *Albright v. Teas*, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550, which was a suit brought by the plaintiff for moneys alleged to be due under a contract whereby certain letters patent granted to him were transferred to the defendant. This was clearly a bill to recover royalties, and no question under the patent laws was involved. *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756, was an action in a state court by the owner of the patent upon an agreement by which such owner granted an exclusive license to make and sell the patented articles within a certain territory. Defendant expressly acknowledged the validity of the patent. This we held to be clearly within the jurisdiction of the state court. A like ruling was made in the next case of *Felix v. Scharnweber*, 125 U. S. 54, 31 L. ed. 687, 8 Sup. Ct. Rep. 759. In the same line of cases are those of *Marsh v. Nichols*, 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798, to enforce the specific performance of a contract to transfer an interest in a patent to the plaintiff; *Wade v. Lawder*, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425, and *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62, which was an action by patentees in a state court upon the common counts to recover of the defendant the stipulated price for manufacturing and setting up an apparatus for the manufacture of water gas. Defendant pleaded that the plaintiff had agreed to save it harmless against any suit which might be brought against it for infringement, and to defend such suits at their own expense, and averred, among other things, that the patents were void and an infringement upon prior patents; that defendant had not kept plaintiffs harmless against such suits, but had refused to defend a certain suit brought against it; and that the defendant had rightfully rescinded the contract. It was held that the action was not one arising under the patent laws of the United States, and that to constitute such a cause the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of those laws. That "§ 711 does not deprive the state courts of the power to determine questions arising under the patent laws, but only of assuming jurisdiction of 'cases' arising under those laws. There is a clear *distinction between a case [287] and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint, or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals."

Now, as the bill in this case differs from an ordinary bill for infringement only in the

fact that the suit is by a licensee against two defendants, one of whom is the licensor and owner of the patent, and the license is set forth only for the purpose of showing title, there would be no difficulty whatever in sustaining it were it not for the question whether we are not also bound to consider the averments of the answer. We think this difficulty is practically settled by a reference to § 5 of the jurisdictional statute of 1875 (18 Stat. at L. 470, 472, chap. 137), which provides "that if, in any suit commenced in a circuit court, . . . it shall appear to the satisfaction of the said circuit court, *at any time after such suit has been brought*, . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, . . . the said circuit court shall proceed no further therein, but shall dismiss the suit," etc. While it seems reasonable to say that a jurisdiction once acquired by the filing of a proper bill ought not to be taken away by any subsequent pleading, the statute is peremptory in this particular, and requires the court to dismiss the case whenever *at any time* it shall appear that its jurisdiction has been improperly invoked. We are by no means without authority upon this question. In *Robinson v. Anderson*, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011, it was held that when it appeared, after all the pleadings were filed, that the averments in the declaration, which alone gave the court jurisdiction, were immaterial and made for the purpose of creating a case cognizable by the court, it was the duty of the circuit court to dismiss the bill for want of jurisdiction. Said the Chief Justice: "Even if the complaint, standing by itself, made out a case of jurisdiction, which we [288] do *not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on." In *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719, this court went so far as to dismiss a case in which judgment had been rendered for the plaintiff in the circuit court, because it appeared from the testimony of the plaintiff that certain bonds were put in his hands for collection in which he had no real interest. It was held that it was the duty of the circuit court, on its own motion, as soon as the evidence was in and the collusive character of the case shown, to stop all further proceedings and dismiss the suit, the Chief Justice further remarking that this proviso of the act 1875 was a salutary one, and that it was the duty of the circuit courts to exercise their power under it in proper cases. See also *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Lake County v. Dudley*, 173 U. S. 243, 43 L. ed. 684, 19 Sup. Ct. Rep. 398.

Is there anything in the answer to show that the court was bound to dismiss the bill for want of jurisdiction?

The bill makes the usual allegations of a bill for infringement, and puts in issue (1) the title of the plaintiff, which in this case was a license from one of the defendants, fully set forth in the margin;† (2) the validity of the patent; and (3) *the infringement [289] ment. The answer raises no issue as to the validity of the patent, or as to the acts

†*License and Agreement.*

This agreement, made this 11th day of March, 1893, by and between Charles P. Allen, of Denver, Colorado, party of the first part, and the Excelsior Redwood Company, a corporation duly organized and existing under and by virtue of the laws of the state of California, and having its principal place of business in the city and county of San Francisco in said state, party of the second part:

Witnesseth: That, whereas the party of the first part is the owner and holder for, to, and in the states and territories hereinafter mentioned, of the whole right, title, and interest in and to letters patent of the United States No. 359,590, dated March 22, 1887, for "wooden pipe."

And, whereas the party of the second part is desirous of obtaining for, to, and within the said states and territories hereinafter mentioned an exclusive right, license, and privilege to manufacture and sell wooden pipe under and in accordance with said letters patent:

Now, therefore, the parties have agreed as follows: The party of the first part hereby grants, subject to the conditions hereinafter stated, unto the party of the second part, its successors and assigns, the exclusive right, license, and privilege, within the states of northern California, Oregon, Washington, Nevada, Montana, and Idaho, and territories of Arizona and Utah, of manufacturing and selling wooden pipe under and in accordance with the said letters patent, to the full end of the term of said letters patent.

The party of the second part agrees to pay unto the party of the first part, as a license fee or royalty under this license and agreement, the following sums, to wit: One dollar (\$1) on every 1,000 feet, board measure, of lumber employed in the manufacture of said pipe, and two and one-half per cent (2½ per cent) on the cost at factory of all steel and iron used in said manufacture.

The said license or royalty is to be paid by the said party of the second part to the said party of the first part upon the final payment to the party of the second part of the contract price on each and every contract taken by said party of the second part, involving the manufacture and sale of said patented wooden pipe. The right, license, and privilege hereby granted is not transferable or assignable, either in whole or part, by the party of the second part, without the consent of the party of the first part. It is agreed that in case the party of the second part shall fail to use the above-described patent in any pipe constructed by them, of twelve (12) inches diameter and upwards, or from any cause the said party of the second part shall cease the manufacture of wooden pipe, then and in that event all rights and privileges granted by this agreement and license to the said party of the second part shall at once be revoked.

It is understood and agreed that this agreement is binding upon the heirs, legal representatives and assigns of the party of the first part, and upon the successors and assigns of the party of the second part.

charged as infringement. It admits the license, but denies that it is a subsisting one, and pleads abandonment of the same by plaintiff, a forfeiture of all rights thereunder by failure to comply with its terms and conditions, and by acts of gross bad faith towards the patentee by seeking to defeat the patent, and a revocation of the license by Allen. It will be observed that the answer raises no question of the construction of the license, but merely of its existence,—that is, of the title of the plaintiff to sue. Before deciding that these allegations oust the jurisdiction of the court it must at least appear that the plaintiff has another remedy by an action in a state court. But [290] what remedy has it? All the *agreements and conditions of the license are such as are made by the plaintiff's assignor, the Excelsior Redwood Company. This company, the party of the second part, agrees, *first*, to pay a license fee or royalty, the time of payment being fixed in a subsequent sentence; *second*, that it will neither transfer nor assign the license without the consent of the patentee (it was admitted that the patentee consented to the assignment to plaintiff); *third*, that in case the licensee should fail to use the patent in any pipe constructed by them, or from any cause it should cease to manufacture a wooden pipe, the license shall be at once revoked. The only clause in the license in which the patentee appears as promisor is that wherein "he hereby grants, subject to the conditions hereinafter stated, unto the party of the second part, its successors and assigns, the exclusive right, license, and privilege, within" certain states, "of manufacturing and selling wooden pipe under and in accordance with the said letters patent, to the full end of the term of said letters patent."

Now, it may be freely conceded that if the licensee had failed to observe any one of the three conditions of the license, the licensor would have been obliged to resort to the state courts either to recover the royalties or to procure a revocation of the license. Such suit would not involve any question under the patent law.

But the same does not hold good with respect to the licensee. There were practically but two ways in which the patentee could impair the grant he made to the licensee, and those were by a revocation of the license by a bill in equity, or by treating it as abandoned and revoked, and granting a license to another party. He elected the latter remedy, and made a contract with the Pacific Bridge Company to make and sell wooden pipe within the same territory. A suit in a state court would either be inadequate or would involve questions under the patent law. If the licensee sued at law he would be obliged to establish the fact that the patent had been infringed, which the patentee might have denied and in any case could only recover damages for past infringements. If he sued in equity he could only pray an injunction against future in- [291] fringements; but this is exactly *what he prays in this case, and thereby raises a question under the patent laws. In either

case the patentee could defeat the action by showing that he did not infringe,—in either case the defendant could so frame his answer as to put in issue the title, the validity, or the infringement of the patent.

The natural and practically the only remedy, as it seems to us, was for the plaintiff to assert his title under the license, and to prosecute the defendants as infringers. In doing this he does what every plaintiff is bound to do; namely, set forth his title either as patentee, assignee, or licensee, and thereby puts that title in issue. The defendant is at liberty in such a case to deny the title of the plaintiff by declaring that the license no longer exists, but in our opinion this does not make it a suit upon the license or contract, but it still remains a suit for the infringement of a patent, the only question being as to the validity of plaintiff's title. There can be no doubt whatever that if the plaintiff sued some third person for an infringement of his patent, the defendant might attack the validity of his license in the same way, but it would not oust the jurisdiction of the court. Why should it do so in this case?

Much reliance is placed upon the case of *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357, which was a bill by a patentee against one with whom he had made a contract in the nature of a license, alleging that defendants, after paying the royalty for several months, refused to do certain other things which he charged to have been a part of the contract, and thereupon he forbade them further to use his patented process, and charged them as infringers. Defendants pleaded the contract as they understood it, and the tender of all that was due plaintiff under it, and their readiness to perform it.

Plaintiff's case was that there was a verbal agreement that he should prepare and put up his patented mechanism in defendants' workshop, and that after this was done defendants should take a license for the use of the invention. The machinery was put up, but defendants refused to sign the license, apparently upon the ground that the patentee claimed the right to visit the works of the defendants, and inspect their books with a view to ascertaining the amount of work done. The dispute was as [292] to the terms of the agreement, defendants insisting that they had never proposed to accept the license with the conditions mentioned. It was held that the patentee could not sue the defendants for an infringement, and in answer to the objection that he had no other remedy Mr. Justice Miller observed that he could establish his royalty once every year, and sue at law and recover every month or every year for what was due, and that, if he desired to assert his right of examining the works of the defendants, he could in a proper case compel them to submit to the examination. The case is the converse of the one under consideration, inasmuch as it was a suit by the patentee against the licensee for a violation of his contract, and, as the court observed, the plaintiff might have brought suit for royalties. As already said, the patentee might

have done the same in this case, if he had sought to enforce his contract.

Much more nearly analogous to the case under consideration, and practically upon all fours with it, is that of *Littlefield v. Perry*, 21 Wall. 205, 22 L. ed. 577. This was a suit by an assignee against the patentee, who had made a conveyance to the plaintiff of his patent with all improvements thereon, within certain states, for which plaintiff had agreed to pay royalty upon all articles sold, with a clause of forfeiture in case of nonpayment or neglect, after due notice, to make and sell the patented articles to the extent of a reasonable demand therefor. There was by supplementary document an agreement reserving to the patentee the right to apply the principle of his invention to one special purpose. It was held that, whether the plaintiff was an assignee or a licensee, he had a right to maintain a suit for infringement in his own name in a Federal court against the *patentee*. Said the Chief Justice: "They," the plaintiffs, "certainly had the exclusive right to the use of the patent for certain purposes within their territory. They thus held a right under the patent. The claim is that this right has been infringed. To determine the suit, therefore, it is necessary to inquire whether there has been an infringement, and that involves a construction of the patents. . . . Such a suit may involve the construction of a contract as well as of a patent, but that will not oust the court of its jurisdiction. If a patent is involved, it carries with it the whole case."

[293] *Upon the subject of a licensee suing his own patentee the Chief Justice observed: "A mere licensee cannot sue strangers who infringe. In such cases redress is obtained through or in the name of the patentee or his assignee. Here, however, the patentee is the infringer, and, as he cannot sue himself, the licensee is powerless, so far as the courts of the United States are concerned, unless he can sue in his own name. A court of equity looks to substance rather than form. When it has jurisdiction of parties it grants the appropriate relief without regard to whether they come as plaintiff or defendant. In this case the person who should have protected the plaintiff against all infringements has become himself the infringer."

White v. Rankin, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768, was a bill by a patentee for infringement, to which there was answer setting up an agreement between the plaintiff and one of the defendants to assign to him an interest in the patent on certain conditions which it was alleged were performed, and certain other matters which it was alleged gave the defendants the right to make, use, and sell the patented invention. The case was tried upon a stipulation admitting that defendants had made and sold the patented inventions, and that a certain written agreement between the plaintiff and one of the defendants had been made as above stated. The circuit court entered a decree dismissing the bill, which was reversed

by this court. "It" (the court) "appears," said Mr. Justice Blatchford, "to have dismissed the bill on the simple ground that the defendants set up a contract of license from White. The bill being purely a bill for infringement, founded upon patents, what was set up by the defendants was set up as a defense, and as showing the lawful right in them to do what they had done, and as a ground for the dismissal of the bill because they had not infringed the patents." The decree was not one upon the facts of the case, but was simply a decree that the court had no jurisdiction to try the case. The subject-matter of the action, as set forth in the bill, gave the court jurisdiction, and exclusive jurisdiction, to try it. All of the parties to the suit were citizens of California, and if jurisdiction did not exist under the patent laws it did not exist at all. "The circuit court found nothing as to the existence or *validity of [294] the contract, decree, or deed mentioned in the stipulation. The stipulation provides that at the hearing the contract, complaint, answer, decree, and deed set forth in the stipulation may be offered in evidence, subject to such objections as might be urged against the originals thereof. The stipulation further states that the defendants do not admit that anything is due to the plaintiff from Thompson, and that they do admit that nothing had been paid by Thompson to the plaintiff under the decree of the state court of August 26, 1884, and since the making thereof. All these matters and questions ought to have been adjudicated by the circuit court before it could find ground to determine whether or not it should dismiss the bill. Until it had so adjudicated those questions the decision in the case of *Hartell v. Tilghman* could not apply."

The cases in the circuit courts and courts of appeal are too numerous to be analyzed, or even cited. One of the most recent and satisfactory is that of the *Atherton Mach. Co. v. Atwood-Harrison Co.* 43 C. C. A. 72, 102 Fed. 949, in which it was broadly held that a suit in which the relief sought is an injunction and a recovery of damages for the infringement of a patent is one arising under the patent laws of the United States, although it incidentally involves a determination of the question of the ownership of the patent, which was claimed by both complainant and defendant under separate assignments from the patentee. All the cases cited herein are reviewed and the jurisdiction sustained.

The difficulty with the defendant's position in the case under consideration is that it apparently leaves the plaintiff without an adequate remedy. Defendant has broken no express covenant of the contract, since it has made no covenant. It has simply ignored the existence of the contract and granted a license to another party. It is difficult to see what remedy is available to the plaintiff in a state court that would not involve the right of the defendant to use the patent. In other words, it would be an ordinary suit for infringement in which the Federal courts would alone have jurisdic-

[295] tion. Whether it sued at law or in equity, its damages would be such as are *usual in cases of infringement, and the only injunction it could obtain would be against the further use of the invention.

In any suit that could be brought the title of the plaintiff to sue must be put in issue, and, that being the title to the patent, is put in issue in every suit for infringement. We held in *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62, with respect to an action in a state court, which involved the question whether the patents were void and an infringement upon prior patents, that this did not necessarily oust the state court of its jurisdiction; and by parity of reasoning we hold in this case that the mere fact that the suit may involve the existence of the license does not oust the court of jurisdiction of a suit for the infringement of a patent.

While we do not intend to allow the jurisdiction of the Federal courts to be invoked primarily for the determination of the respective rights of parties to a contract concerning patents, yet when the bill is an ordinary one for an infringement and the answer puts in issue the title of the plaintiff to sue, we think the jurisdiction is not ousted by the mere allegation that the license has been revoked, and that the court is at liberty to go on and determine that fact. We regard this question as conclusively settled in *Littlefield v. Perry*, 21 Wall. 205, 22 L. ed. 577; and *White v. Rankin*, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768, and have no disposition to disturb it.

The decree of the Circuit Court is therefore reversed, and the case remanded to that court for further proceedings consistent with this opinion.

Mr. Justice **Gray** did not sit in this case or participate in the decision.

[296] *FOK YOUNG YO, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 296-305.)

Aliens—Chinese exclusion—privilege of transit—executive regulation authorized by treaty—review of decision of collector of customs—habeas corpus.

1. The regulations of the Treasury Depart-

NOTE.—On the construction and operation of treaties—see note to *United States v. The Amistad*, 10 L. ed. U. S. 826.

On the jurisdiction of United States courts on habeas corpus—see *Re Reinitz* (C. C. S. D. N. Y.) 4 L. R. A. 236, and note. See also notes to *State ex rel. Cochran v. Winters* (Kan.) 10 L. R. A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to *State v. Jackson* (C. C. E. D. Tenn.) 1 L. R. A. 373; *Bion's Appeal* (Conn.) 11 L. R. A. 694; *United States v. Hamilton*, 1 L. ed. U. S. 490; *Ex parte Carll*, 27 L. ed. U. S. 288; *Cortes v. Jacobus*, 34 L. ed. U. S. 464; and *Pearce v. Texas*, 39 L. ed. U. S. 164.
185 U. S.

ment of December 8, 1900, governing the privilege of transit by Chinese laborers across the territory of the United States, which require that evidence be produced which shall satisfy the collector of customs "that a bona fide transit only was intended," were authorized by the provision of the treaty with China of March 17, 1894 (28 Stat. at L. 1211), that Chinese laborers shall continue to enjoy such privilege of transit, subject to such regulations by the government of the United States as may be necessary to prevent abuse of the privilege.

2. The decision of the collector of customs denying the privilege of transit across the territory of the United States to a Chinese citizen possessing a through ticket to a point in foreign territory cannot be reviewed by habeas corpus, since by the regulations of the Treasury Department of the United States, authorized by the treaty of March 17, 1894 (28 Stat. at L. 1211), with China, the final decision as to permitting such transit was devolved on that officer, with no provision for a review of such decision.

[No. 478.]

Argued January 7, 1902. Decided May 5, 1902.

APPEAL from the District Court of the United States for the Northern District of California to review an order dismissing a petition for a writ of habeas corpus. *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

This was a petition to the district court of the United States for the northern district of California for a writ of habeas corpus. The petition represented that the petitioner was a citizen of the Empire of China, and a resident of Guatemala in the Republic of Mexico, and was traveling to that place when interrupted in his journey as afterwards described; that on August 24, 1901, he purchased, for the sum of 183 Mexican dollars, from the agent of the Japanese steamship company of the Toyo Kisen Kaisha at Hong Kong in China, passage thence to San Jose de Guatemala in Mexico, and received from said agent a ticket for passage on the steamship Nippon Maru to the port of San Francisco, and an order upon the San Francisco agent of said company for a steerage ticket from San Francisco to San Jose de Guatemala; that upon arriving in the port of San Francisco he was, on September 19, 1901, examined by a customs inspector, his baggage and private papers opened, and his *person searched; that, after [297] the examination of the petitioner, the collector of customs at the port made an order of deportation, denying him the privilege of transit, and he was, by virtue of that order, detained by the agent of the steamship company in a frame building on the Pacific Mail dock at San Francisco, and, unless released by the court, would be deported and sent back to China; that the petitioner was not making application to enter the United States, or to pass in transit through the territory thereof, but was merely a passenger en route for a foreign port, and

touching at the port of San Francisco while on his journey along the usual course of travel, and for the purpose of transshipping to another vessel; that the order under which he was held was illegal and void, and not authorized by any law of the United States, or by any treaty between the United States and the Empire of China; and that the collector of customs had no authority under the law to examine or to confine the petitioner.

The district attorney, by leave of court, intervened in behalf of the United States, and suggested that the petitioner was a native of the Empire of China, and a laborer by occupation, and before the filing of his petition arrived at San Francisco from Hong Kong in transit, through the territory of the United States, for the Republic of Mexico; that the collector of customs for the port of San Francisco, after careful and due investigation, had decided that he was satisfied that the petitioner did not intend in good faith to continue his voyage through the territory of the United States to the Republic of Mexico, and had for that reason denied him the privilege further to continue his journey through the territory of the United States, and had ordered him deported to China; and that the court had no jurisdiction over the person of the petitioner, or over the subject-matter of this proceeding.

[298] The parties submitted the case to the decision of the court upon the following facts: "The petitioner is a subject of the Empire of China. He arrived at the port of San Francisco on the Japanese steamship *Nippon Maru*, the manifest of which vessel states that he intended to go to San Jose de Guatemala. Petitioner herein also alleges that that was his intended destination. *The collector of customs at the port of San Francisco did, on September 23, 1901, deny the petitioner the privilege of further pursuing his journey to his alleged point of destination. The petitioner has a ticket, or an order for a ticket, for a through passage from Hong Kong, China, to San Jose de Guatemala by steamer. The petitioner is now held by W. H. Avery, agent for the Japanese steamship company, by virtue of an order issued by the collector of customs for the port of San Francisco, directing him to retain the person of the petitioner in his custody, and deport him to China."

The court ordered the petition and the writ of habeas corpus to be dismissed, and the petitioner remanded to custody; and he appealed to this court.

Mr. Maxwell Evarts argued the cause and filed a brief for appellant:

The obvious meaning of the words used in the treaty should be adopted.

Bale Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508.

In the absence of any statute upon the subject the Secretary of the Treasury has not the authority to place the rulings of his subordinates beyond the power of the courts to review.

United States v. Jung Ah Lung, 124 U. S. 621, 31 L. ed. 591, 8 Sup. Ct. Rep. 663; *Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967.

Assistant Attorney General **Hoyt** argued the cause and filed a brief for appellee:

Every state is free to admit foreigners to its territory, or exclude them in case of necessity from motives of public order.

1 Kent, Com. 9th ed. p. 37; *Le Droit International*, Paris, 1896, tome II. § 700.

The power to exclude or expel aliens is an essential attribute of sovereignty, which this nation possesses.

Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Chinese Exclusion Case*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623.

If it is complained that there has been an infraction of treaty provisions, the remedy must be sought through international reclamation or negotiation; it is not a matter for judicial cognizance.

Head Money Cases, 112 U. S. 580. *sub nom. Edey v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Chinese Exclusion Case*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623.

The determination of the status of aliens within our jurisdiction is final with Congress, and this court will not pass "upon the wisdom, policy, or justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

Li Sing v. United States, 180 U. S. 486, 45 L. ed. 634, 21 Sup. Ct. Rep. 449.

A treaty is the supreme law of the land, and is immediately operative where it deals with a subject finally and specifically, and the aid of Congress is not required to carry it into effect.

Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; 1 Wharton, International Law, § 138, p. 73; 6 Ops. Atty. Gen. 748.

A regulation made in pursuance of an act of Congress has the force of law.

Gratiot v. United States, 4 How. 80, 11 L. ed. 884; *United States v. Eliason*, 16 Pet. 291, 10 L. ed. 968; *Ex parte Recd.*, 100 U. S. 13, 25 L. ed. 538; 22 Ops. Atty. Gen. 568.

And if made in pursuance of the provisions of a treaty should have equal force; for a treaty is the supreme law of the land and binds the courts as much as an act of Congress.

United States v. The Peggy, 1 Cranch, 103, 2 L. ed. 49; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Re Cooper*, 143 U. S. 472, 36 L. ed. 232, 12 Sup. Ct. Rep. 453.

Where the final determination of facts is intrusted to an executive officer, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence under which he acted.

Lee Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The facts upon which the parties submitted the case to the decision of the court below do not include, on the one hand, the statement of the petition that the petitioner was examined by a customs inspector, his baggage and papers opened, and his person searched; nor, on the other hand, the statements in the intervention of the United States, that the petitioner was a laborer by occupation, and that the decision of the collector for his detention and deportation was made after due and careful investigation, and for the reason that he was satisfied that the petitioner did not intend in good faith to continue his voyage through the territory of the United States to the Republic of Mexico. But the facts agreed are simply that the petitioner was a subject of the Empire of China, arriving at the port of San Francisco, whose intended destination, as appeared by the manifest of the vessel in which he arrived, and by his own allegation, was San Jose de Guatemala in the Republic of Mexico, and who had a ticket, or an order for a ticket, for a through passage from Hong Kong, China, to San [299] Jose de Guatemala by *steamer; and that the collector of customs at San Francisco denied him the privilege of further pursuing his journey to his alleged point of destination, and issued an order directing him to be detained and deported to China.

The whole question in the case, therefore, is whether this denial and order of the collector were authorized by law.

Before the treaty of 1894 between the United States and China, the privilege of transit of Chinese persons across the territory of the United States was not specifically mentioned in any treaty or statute, except in the last clause of § 8 of the act of September 13, 1888, chap. 1015, by which the Secretary of the Treasury was authorized to make, and from time to time to change, "such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles 2d and 3d of" a treaty between the United States and China, signed March 12, 1888, but not then ratified, "the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles." 25 Stat. at L. 478. As that treaty was never ratified, it may be doubtful whether that section ever took effect. See *Li Sing v. United States*. 180 U. S. 486, 490, 45 L. ed. 634, 636, 21 Sup. Ct. Rep. 449: 185 U. S.

United States v. Gee Lee, 50 Fed. 271, 1 C. C. A. 516, 7 U. S. App. 183.

But such privilege of transit was recognized by successive Attorneys General from 1882 to January, 1894 (17 Ops. Atty. Gen. 416, 485; 18 Ops. Atty. Gen. 388; 19 Ops. Atty. Gen. 369; 20 Ops. Atty. Gen. 693), and it was regulated by orders of the Treasury Department.

By regulations of Secretary Folger of January 23, 1883, it was provided that "where a Chinese consul resides at the port of landing or entrance into the United States by any Chinese laborer claiming to be merely in transit through the territory of the United States in the course of a journey to or from other countries, the certificate of such Chinese consul, identifying the bearer by name, height, age, etc., so far as practicable, and showing the place and date of his arrival, the place at which he is to leave the United States, the date when his journey is to begin, and that it is to be continuous and direct, shall be accepted as *prima facie evidence;" that, "in the absence [300] of such certificate, other competent evidence to show the identity of the person, and the fact that a bona fide transit only is intended, may be received;" and that "the production of a through ticket across the whole territory of the United States intended to be traversed may be received as competent proof, and should be exhibited to the collector and verified by him. Such tickets and all other evidence presented must be so stamped or marked and dated by the customs officer as to prevent their use a second time."

By regulations of Secretary McCulloch of January 14, 1885, the regulations of January 23, 1883, "relative to the transit of Chinese laborers through the territory of the United States, will be applied to all Chinese persons intending to so go in transit through the United States;" and "Chinese persons who may be compelled to touch at the ports of the United States in transit to foreign countries may be permitted to land under the regulations of January 23, 1883, so far as the same may be applicable, such persons to take passage by the next vessel leaving for their destination, or the voyage of which may form part of the route necessary to carry them to their destination."

By regulations of Secretary Windom of September 28, 1889, "any Chinese laborer claiming to be in transit through the territory of the United States, in the course of a journey from and to other countries, shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States intended to be traversed, and such other proof as he may be able to adduce, to satisfy the collector of the fact that a bona fide transit only is intended, and such ticket and other evidence presented must be so stamped, or marked, and dated by the customs officer, as to prevent their use the second time;" a bond in the penal sum of \$200 was required for each Chinese laborer, "conditioned for his

transit and actual departure from the United States within a reasonable time, not exceeding twenty days from the date of arrival; and previous regulations on the subject were rescinded.

[301] By article 3 of the treaty between the United States and China* of March 17, 1894, it is "agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the government of the United States as may be necessary to prevent said privilege of transit from being abused." 28 Stat. at L. 1211. That article was also in the unratified treaty of 1888.

On December 8, 1900, Secretary Gage issued regulations amendatory of the regulations of September 28, 1889, and addressed "to collectors of customs and all other officers charged with the enforcement of the Chinese exclusion laws," the material parts of which were as follows:

"Complaints having reached the Department of attempted violations of the laws enacted for the exclusion of Chinese by those who have been allowed to pass through the United States to foreign territory, the following rules are hereby adopted for your guidance in granting permission for such transit:

"Any Chinese person arriving at your port, claiming to be destined to some foreign country, and seeking permission to pass through the United States, or any portion thereof, to reach such alleged foreign destination, shall be granted permission for such transit only upon complying with the following conditions:

"1. The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said collector that a bona fide transit only is intended; and such ticket and other evidence presented must be so stamped, or marked, and dated by the said collector, or such officer as he shall designate for that purpose, as to prevent their use a second time; but no such applicant shall be considered as intending bona fide to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States.

[302] "2. The applicant in each case, or some responsible person on his (or her) behalf, or the transportation company whose through ticket he (or she) holds, shall furnish to the said collector of customs a bond in a penal sum of not less than \$500, conditioned for applicant's continuous transit through, and actual departure from, the United States within a reasonable time, not exceeding twenty days from the date of arrival at said port."

These regulations repeat the requirements of those of 1889 (which took the

place of previous regulations), that evidence must be produced to satisfy the collector "that a bona fide transit only is intended." Clearly, in the absence of provision for review, his decision is final.

The doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations, except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene. *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Lee Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Li Sing v. United States*, 180 U. S. 486, 45 L. ed. 634, 21 Sup. Ct. Rep. 449.

And as a general proposition this must be true of the privilege of transit. The underlying principle is thus stated by Kent (vol. 1, p. 35): "Every nation is bound, in time of peace, to grant a passage, for lawful purposes, over their lands, rivers, and seas, to the people of other states, whenever it can be permitted without inconvenience; and burthensome conditions ought not to be annexed to the transit of persons and property. If, however, any government deems the introduction of foreigners or their merchandise injurious to the interests of their own people [which they are bound to protect and promote], they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it."

In short, the privilege of transit, although it is one that should not be withheld without good cause, is nevertheless conceded only on such terms as the particular government prescribes in view of the well-being of its own people. If, then, these regulations have the force of law, they bind the courts. [303]

The 1st article of the treaty of December 8, 1894, provides that "the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States, shall be absolutely prohibited." The 2d paragraph of article 3 reads: "It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the government of the United States as may be necessary to prevent said privilege of transit from being abused."

We regard this as explicitly recognizing existing regulations, and as assenting to their continuance, and to such modification of them as might be found necessary to prevent abuse. It dealt with the subject specifically, and was operative without an act of Congress to carry it into effect.

The treaty of 1880 (22 Stat. at L. 826), in declaring in respect of the coming of Chinese laborers into this country that the gov-

ernment of the United States might "regulate, limit, or suspend such coming or residence," did not refer to the privilege of transit, and, as it was not self-executing, the act of May 6, 1882, was passed to carry the stipulation into effect. But the provision of this treaty applicable here, in recognizing the privilege of transit and providing that it should continue, proceeded on the ground of its existence and continuance under governmental regulations, and no act of Congress was required. *Re Lee Gon Yung*, 111 Fed. 998.

Nor is the provision open to the ingenious construction suggested, that it is only after transit has commenced that the privilege may be abused. The abuse of the privilege might consist in the use of passage across the country to reach a point from which to effect an entrance into it, contrary to law. The journey contemplated would in effect be continuous, and the intermediate destination could not absolve from the guilt involved in the effort to attain that forbidden ulterior destination. Such an abuse of the privilege could only be prevented by arresting the journey on the threshold.

[304] *Necessarily the collector's decision could not be controlled by the bare production of a through ticket to a point in foreign territory. The very question to be determined is good faith in the transit, and good faith would be lacking if that transit were merely a means of effecting admission into the United States. And the decision of the Treasury Department as to the right of admission is made final by statute.

For instance, it is difficult, if not impossible, to police effectively the long frontier between the United States and Mexico, and if, in a given case, a Chinese laborer arrives at San Francisco ostensibly bound to a port in Mexico, but going there for the purpose of crossing thence into this country, this would be an abuse of the privilege, and denial of transit would be justified. And this, in cases where such is the intent and purpose, is in accordance with the terms of the treaty, and not in the exercise of a general power to prohibit that which the treaty permits.

By the act of August 18, 1894 (28 Stat. at L. 390, chap. 301), the decision of the proper executive officer, if adverse to an alien's admission, was made final unless reversed on appeal to the Secretary of the Treasury.

That act came under consideration in *Lee Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1032, 15 Sup. Ct. Rep. 967. Petitioner contended that while the immigration officers had authority to exclude aliens from coming into the United States, yet if an alien was entitled of right to enter the country, and was nevertheless excluded by such officers, the latter exceeded their jurisdiction, and the courts might intervene; but Mr. Justice Harlan, speaking for the court, said: "That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by 185 U. S. U. S., Book 46.

the executive branch of the government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. *Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value."

So in the case before us, the treaty manifestly operated to commit the subject of transit to executive regulation and determination; and by the then, as well as the present, regulations, the final decision as to permitting transit was devolved on the collector of customs, and no appeal to the Secretary was provided for. It appears from the official documents referred to on the argument that the Treasury Department has "held that neither the treaty nor the laws relating to the exclusion of Chinese, either expressly or by implication, give to Chinese persons refused the privilege of transit the right of appeal;" but possession of the power to grant an appeal, or to supervise the action of the collector in some other appropriate way, in circumstances demanding intervention, has not been disavowed.

This case is an attempt to transfer the inquiry from the collector to the courts. Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country. The regulations to prevent abuse of the privilege of transit have been and are intended to effectuate the same policy, and recourse to the courts by habeas corpus to determine the existence of such abuse appears to us equally inadmissible.

The record does not present a case of regulation or action in contravention of the Constitution, and we think that, upon the admitted facts, the orders of the collector cannot be held to have been invalid.

Order affirmed.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

*LEE GON YUNG, *Appt.*,
v.
UNITED STATES.

[306]

(See S. C. Reporter's ed. 306, 307.)

Aliens—Chinese exclusion—privilege of transit—executive regulation authorized by treaty—review of decision of collector of customs—habeas corpus.

This case is governed by the decision in *Fok Young Yo v. United States*, ante, 917.

[No. 482.]

921

Argued January 7, 1902. Decided May 5, 1902.

APPPEAL from the Circuit Court of the United States for the Northern District of California to review an order dismissing a petition for a writ of habeas corpus. *Affirmed.*

See same case below, 111 Fed. 998.

The facts are stated in the opinion.

Mr. **Maxwell Evarts** argued the cause and filed a brief for appellant.

Assistant Attorney General **Hoyt** argued the cause and filed a brief for appellee.

For contentions of counsel see their brief as reported in *Fok Young Yo v. United States*, ante, 917.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This case was a writ of habeas corpus substantially like the preceding case of *Fok Young Yo v. United States*, 185 U. S. 296, ante, 917, 22 Sup. Ct. Rep. 686. The petition was addressed to the circuit court of the United States for the northern district of California; and alleged that the petitioner had taken passage from the agent of the Pacific Mail Steamship Company at Hong Kong to the city of Mexico, and received from him a ticket for passage on one of its steamships to the port of San Francisco, and an order upon the agent of the company at that port for passage by rail thence to the city of Mexico; that upon arriving at San Francisco the petitioner was, on September 28, 1901, examined by a customs inspector, his baggage and private papers opened, and his person searched; and that he was held in custody under an order of deportation by the collector of the port. The agent of the steamship company at San Francisco made a return to the writ, stating that he detained the petitioner under the collector's order of deportation. The district attorney of the United States, in an intervention filed [307] by leave of court, suggested "that the United States collector of customs at the port of San Francisco, after a careful and due investigation, has decided that he is not satisfied that the said Chinese person, the petitioner herein, does intend in good faith to continue his voyage, if permitted so to do, through the territory of the United States to the Republic of Mexico, and has denied the said Chinese person for that reason the privilege to further continue his journey through the territory of the United States, and has ordered the said person deported to China, the country whence he came;" and that the court had no jurisdiction of the person of the petitioner, or of the subject-matter of the proceeding.

The petitioner filed a demurrer to the return and to the intervention. The court overruled the demurrers, and ordered the writ of habeas corpus to be discharged and the petitioner remanded to custody. 111 Fed. 998. The court also allowed a bill of exceptions, stating that it excluded, against the objection and exception of the petitioner, evidence offered by him tending to support

each and all of the allegations of his petition. He appealed to this court.

This case must take the same course as that just decided. The difference between them is that in this case the court sustained the objection to an offer of evidence. But as in our view the authority of the government in prescribing regulations is unqualified, and these regulations are not essentially unreasonable, and do not transgress constitutional limitations, jurisdiction to interfere with the collector's orders was lacking, and the ruling was not erroneous. If petitioner had just cause of complaint of the conduct of the collector's subordinates, the remedy is not to be found in his discharge on habeas corpus.

Order affirmed.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

*FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, *Pf. in Err.*, [308]

v.

JENNIE M. METTLER.

(See S. C. Reporter's ed. 308-336.)

Error to circuit court—life insurance—proof of death—representations in application—instructions—harmless error—condition of doing business in state—equal protection of laws—statute imposing penalty for default in payment of policy.

1. A writ of error may be maintained from the Supreme Court of the United States to a circuit court, in a case in which the validity of a state statute is drawn in question as being in contravention of the Constitution of the United States.
2. It is not necessary, in an action on a policy of life insurance, that the death of the insured be proved beyond a reasonable doubt.
3. An instruction in an action on a policy of life insurance, in which the death of the insured is in issue, that his continued absence without being heard from by his relatives and friends should be given due weight, is

NOTE.—On direct review by the Supreme Court of the United States of circuit or district court judgments—see note to *Gwin v. United States*, ante, p. 741.

As to methods of proving death—see note to *Mutual Ben. L. Ins. Co. v. Tisdale*, 23 L. ed. U. S. 314.

As to the effect of misstatements in application for insurance—see notes to *Equitable Life Assur. Soc. v. Hazlewood* (Tex.) 7 L. R. A. 217; *Cobb v. Covenant Mut. Ben. Asso.* (Mass.) 10 L. R. A. 666; and *Columbian Ins. Co. v. Lawrence*, 7 L. ed. U. S. 335.

On recognition or exclusion of foreign corporations—see note to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 289.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

As to the validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note, and *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

not objectionable where the jury are not left to infer death from the mere fact of disappearance, but are specifically told that that is not in itself sufficient, and that all the facts and circumstances must be considered.

4. An instruction in an action on a policy, that if the jury believe, from the evidence tending to show that the insured had been seen on two occasions and at two places since the date of his alleged disappearance, that he was seen by the witnesses who so testified, they must find for defendant, is not open to the objection that the jury may suppose that they are instructed that they must be satisfied that the insured had been seen by both witnesses or on two occasions.
5. A requested instruction in an action on a policy of life insurance, that unless the jury believe from the evidence that the insured when last seen was in such a position of peril that it is more probable that he then and there lost his life than that he extricated himself from such perilous position alive, they must find for the defendant, is properly refused, where there is no evidence that the insured was in a position of peril when last seen, although there is evidence tending to show that he probably fell into a river and so came in contact with a specific peril, and there is evidence regarding the depth, rapidity, and quicksands of the river.
6. Evidence that the insured in a policy of insurance dated in October, 1896, was behind in his payment on his land, and that forfeitures were entered in February, 1897, and that he was in the employ of a photographer for two or three months in the summer of 1896, does not require the giving of a requested instruction in an action on such policy that if at the time of making the application the insured was not, as stated therein, a farmer and real-estate agent, there can be no recovery.
7. The erroneous admission in evidence in an action on a policy of life insurance, of testimony of a repute in the family of the insured concerning his death and the manner thereof, as tending to establish the contested fact of his death, is not ground for reversal, where it affirmatively appears that if such evidence had any influence on the verdict it was because it tended to rebut any inference of a combination to defraud the insurance company, upon which question the evidence was competent.
8. A state may impose upon life or health insurance companies, as a condition of doing business within the state, the obligation to pay damages and attorneys' fees in case of default in the payment of their policies.
9. The equal protection of the laws is not denied to life or health insurance companies by the provision of Tex. Rev. Stat. art. 3071, imposing on such companies, upon failing to pay a loss within the time specified in the policy, after demand therefor, a liability to the holders of the policy, in addition to the amount of the loss, of 12 per cent damages and reasonable attorneys' fees, although such obligation is not imposed upon other classes of insurance companies or associations.

[No. 165.]

Argued January 31, 1902. Decided May 5, 1902.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment in favor of
185 U. S.

plaintiff in an action on three policies of life insurance. *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

This was an action brought by Jennie M. Mettler in the district court of Dallas county, Texas, December 2, 1897, and removed to the circuit court of the United States for the northern district of Texas, against the Fidelity Mutual Life Insurance Association of Philadelphia, to recover on three policies of insurance upon the life of one William A. Hunter, payable to his widowed sister, Jennie M. Mettler, each stipulating for the payment of \$5,000 in case of Hunter's death. The policies were dated in October, 1896, and Hunter paid at the time of their delivery the sum of \$32.55 on each policy, and agreed to pay on each a like sum semi-annually thereafter, on the 28th day of the *months[309] of April and October, for the period of ten years from October 28, 1896.

At the commencement of the trial "defendant admitted that all matters of proof relating to the death of the insured—all formal proofs—are sufficient, and that the only question to be tried and involved is the question of whether or not W. A. Hunter is dead as claimed in plaintiff's petition, and whether he died in the manner and form as alleged therein."

The evidence tended to show that Hunter left Mrs. Mettler's house on the 3d of December, 1896, announcing his intention to go to Mentone, in Loving county, for the purpose of making proof of a section of land in that county belonging to him, and which he had occupied for three years; that he left with a team consisting of a wagon and two horses, with hay, provisions, camping outfit, cooking utensils, and a gun; and that he expected to be absent a week or ten days, intending, at a later period, after having returned from Mentone, to go back to that place; that shortly before leaving he handed to a lawyer a package of papers sealed in a large envelope, which he asked should be kept in a vault, and which packages contained the policies of insurance; and that Mrs. Mettler did not know that the policies had been taken out in her name.

The evidence further tended to show that Mrs. Mettler, not hearing anything of her brother for fifteen days after his departure, sent twice to ascertain whether he had arrived, but found that he had not; a searching party then went out; this party followed the trail of the wagon, and found it and hay, provisions, harnesses, etc., abandoned where Hunter had camped near the banks of the Pecos river, some miles distant from Pecos; a bed on the ground, which some one had slept in, cooking utensils, remains of a fire, a skillet in which meat had been fried, some bread, some tomatoes were there; and a gun was leaning against the wagon wheel. One of the horses was lying dead; it had been tied to a mesquite bush with an inch rope, and had struggled to get to the hay, but could not reach it; there were signs of the other horse, which was elsewhere seen wandering about with a rope on its neck. Footprints, identified by Mrs. Mettler as those of

[310] her brother, were found leading*to the river, but not returning; two water buckets were near; some of the foot tracks were at the edge of the river; and there were marks of the slipping of one of the feet, and a broken mesquite root in the bank.†

[311] *There was conflicting evidence as to quicksands in the river, its depth, rapidity, and dangerous character. Two of defendant's witnesses gave testimony tending to show that some time after the alleged death they had seen a person whom they identified as Hunter by photographs.

In the course of the examination of plaintiff the following occurred:

"Q. State what is the general reputation in the family—your father, brothers, and sisters—as to the death of your brother, W. A. Hunter." To which defendant objected because it is incompetent and hearsay; (2) family reputation cannot establish or prove death, especially where it is 1,500 miles away; (3) it is competent for no purpose, especially when that reputation has been established since the institution of this cause of action, which objection the court overruled, and said: "I think the question is

one of weight to be given the evidence. It is a question for the jury to say whether or not family belief tends to prove his death." To which ruling defendant then and there excepted for the reasons stated in the objection, and the witness thereupon testified: "My father, brothers, and sisters all believe *my brother to be dead." Witness further[312] testified, over the same objections made by defendant, which objections were overruled by the court, and then and there excepted to by defendant, "that the family believed he was drowned in the Pecos river, out in the West, and that this family belief has existed ever since I wrote them about it." The witness was here handed a letter, which she recognized as written by herself and addressed to her father, dated December 30, 1896. "I think I wrote it the day I came back from the camp, from where we found my brother's camping outfit." "I reported that my brother was dead. I know he wrote to and received some letters from the family. The very best relations existed between my father and brother. Never was any disagreement between them. The very closest of friendship existed between my brother and me; brotherly and sisterly love."

†The county clerk of Reeves county, who headed the searching party which left Pecos on the morning of December 27, testified in respect of the abandoned camp thus: "The wagon was standing with the tongue pointing to the southwest and a little down the river. The harness for two horses was found; two wooden water buckets, with a piece of rope tied in the bail; off to the right of the wagon, about 12 feet from the wagon, was a dead horse, tied to a mesquite bush with a rope about 12 feet long. On the right side of the wagon was a pallet made down. The spring seat had been taken off the wagon and turned upside down, and the wagon sheet laid lengthwise. The sheet was a tarpaulin: this was laid on the ground and spread out full length, with one end resting on the wagon seat. One or two heavy cotton comforts were doubled lengthwise and lay with the end on the wagon seat. Lengthwise of the wagon sheet and on top were two comforts spread out full size, and the wagon sheet had been drawn up over the entire bed. To the left of that, about 4 feet south and away from the edge, was where there had been a little fire, and there was a skillet and lid. The skillet was setting right where the fire had been built, as if in the middle of the fire, and the lid laying against it. The skillet looked like it had been cooked in. Just behind the front wheel of the wagon, leaning against the axle, was a Winchester rifle. In the wagon were two bales of alfalfa hay and some flour, some canned goods, some light bread, and several joints of stove pipe, and I think, maybe, a stove in the wagon, and a few other such things. The bread had been untied, and there was still some of it in the paper. When I first saw the bed the center of the bed had the shape of a man in it; looked so much like it we thought there was a man in it until we got right up; and when George Mansfield started to raise the cover up he dropped it, and turned and looked at me, his face as white as anything could be, and I told him to raise it up; that if there was a man in it, it would not hurt him; and he raised the cover up. The appearance of the bed was as I have described it; there was just the shape of a man there, as if

a man had lay in bed; the print of him was in bed. I think both buckets had a piece of rope tied in the bail 10 or 12 feet long, and on the bottom 2 or 3 inches around; the buckets had the prints of water having been in there and dried up, and a little red sand; they were both dry. The dead horse could not reach the wagon; it had been tied to a mesquite bush with an inch rope, and it appeared that the horse had been struggling to get to the hay in the wagon; he had gone out as far as he could with the rope; there was considerable trail beat around where he was trying to get to the wagon where the hay was. The trail was 2 or 3 inches deep. There had been other stock about the wagon and camp; there was the sign of another horse there, and we trailed that horse away from the wagon and back to the wagon at about a half a dozen places. I think one bale of hay had been eaten and cramped down; there was a great deal of trash on the back end of the wagon and laying on the ground."

The witness then described the tracing of the tracks of a man "to the edge of the river and back to the wagon;" then later other footprints "going toward the bank of the river at a point higher up." "We followed right up to the edge of the bank, and followed that until they went over a little slant: the top of the river bank was a little sloping; these two footprints—last two—were standing right on that slant, left foot a little behind the right. The footprints had been about half facing the river. The left foot seemed to have turned a little and slipped: the print of it was there, and showed that it had slipped; and just in front and just below where this bank dropped off perpendicular there was a mesquite root that had been broken off, and a part of it was sticking out of the ground. We could see none of these tracks were going back and away from the river; we looked to determine whether they did go away from it, and we could not see any going away from there."

Mrs. Mettler, being informed of the discovery, went to the camp with this witness December 29, and she identified the footprints and testified to the same effect.

Plaintiff introduced the depositions of W. A. Hunter, Sr., the father of the insured, Charles E. Hunter, his brother, and five sisters, all residing in Homer, Ohio. The father testified that plaintiff and W. A. Hunter, Jr., lived at Homer until they went to Texas in 1885; that a family correspondence had been kept up with both of them regularly until the fall of 1896, when he disappeared, and was still kept up with her: that the family relationship was happy and affectionate; that his son's habits were good, and that he possessed the confidence of his family and of his friends; that he "seemed thoroughly contented with life, and I know of no reason to cause any change in his disposition. I could not tell exactly when any member of the family at Homer last received a letter from said William A. Hunter, Jr., but a short time before his disappearance. I last heard of him through Jennie M. Mettler, about the time he disappeared, and he was living at Mentone, Texas, I believe."

The following question was propounded to the witness, W. A. Hunter, Sr., and to the other members of the family:

Q. If you know, state what is the general reputation and repute in the family as to whether said William A. Hunter is dead or alive. How do you know the general repute in the family as to whether he is dead or [313] alive? If you know, what *is the general repute in the family as to what has become of said William A. Hunter? As to the "family," who do you mean?

To this question and the answer thereto of each witness defendant then and there objected, which was overruled, and defendant excepted. The answer was:

A. That the general repute in the family is that William A. Hunter, Jr., is dead. He is supposed by the family to have drowned in the Pecos river; that is the general belief. By the "family" is meant the father and the brothers and sisters of William A. Hunter, Jr.

Each of the other witnesses testified in substance as their father, and the same objection was made to their testimony, and the same ruling had and exception preserved. The father testified "in answer to cross interrogatories propounded by defendant, that he never offered any reward or took any steps to find W. A. Hunter, Jr., either dead or alive, after he heard of his disappearance; that he made no inquiry concerning the said W. A. Hunter, Jr., save through his daughter, Mrs. Mettler; that he did not have the Pecos river scined, and made no search either of the river or elsewhere, or any effort to find him or his body. Newark, Licking county, Ohio, is 16 miles from witness's home. When witness saw the articles published in the Newark Advocate about the disappearance of W. A. Hunter, Jr., he did not go there to see the editor of said paper. The town is not connected by rail with witness's residence. The same facts as to failure to offer reward or to make any

search or inquiry for W. A. Hunter, Jr., were elicited by cross interrogatories from Charles E. Hunter, brother of the plaintiff, and W. A. Hunter, Jr."

The jury was charged, among other things: "Reputation in his [insured's] family on the part of his father, sisters, and brothers of his death, is proper evidence for your consideration, but not the opinion of anyone."

The policies were stated to be made in consideration of written application of Hunter therefor, and a copy of the application was attached. Hunter therein agreed "that the truthfulness of the statements above made or contained, by whomsoever *written, is [314] material to the risk, and is the sole basis of the contract with the said association;" "that I will not without the written consent of the president engage in any occupation or employment more hazardous than that above mentioned; and that if any concealment, or untrue statement, or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be *ipso facto* null and void, and all moneys paid hereon shall be forfeited to said association." And the applications showed, among other things, that Hunter in answering questions as to his occupation said: "That my present occupation is real estate and farming; prior was bookkeeping."

There was evidence that Hunter had occupied a section of land in Loving county for three years; that he was in the real estate and farming business; that he planted corn, grain, potatoes, and so on; that the farming was experimental, the land requiring irrigation; that he and Mr. Mettler, then deceased, had been connected with an irrigation company and the construction of a ditch; and that he resided at Mentone, Loving county, "where he engaged in the real estate and farming business, and looked after their irrigation business in Loving county." That he was bookkeeping in 1888 and 1889, and two years deputy clerk, etc. Defendant introduced evidence in reference to forfeitures of Hunter's claims to public lands entered in February, 1897, and the testimony of a photographer that Hunter was in his employ two or three months one summer at Fort Worth, which he thought was in 1896. Defendant's agent who took the application testified that he had known Hunter since 1888, at which time he was keeping books; that Hunter stated when he applied that he was in the real-estate business and farming, and that witness had a talk with him about irrigation matters in connection with his farming.

This witness testified for defendant that when Hunter made the application he said: "That he and his brother-in-law had gotten into an irrigation scheme, and had bought a good deal of Pecos valley land, and owed a good deal of money on the land, and his brother-in-law had afterwards died, and he thought if he should happen to die his sister would lose what they had *paid. For this [315] reason he thought of taking some insurance so that she could pay the land out in the event of his death."

The constitutionality of the statute of Texas allowing 12 per cent damages and reasonable attorneys' fees was denied and duly put in issue by defendant.

The verdict was for plaintiff for "\$15,000 as principal; \$2,250 as interest at rate 6 per cent from December 2nd, 1897, to June 2nd, 1900; \$5,175, the same being 12 per cent damages on the amount of \$15,000 and interest thereon at 6 per cent; \$2,500 as reasonable attorneys' fees." Plaintiff remitted the sum of \$3,375 of said \$5,175, "leaving \$1,800 on the item of 12 per cent damages, on the amount of the loss," and judgment was thereupon entered.

The writ of error was allowed directly from this court, and a motion to dismiss for want of jurisdiction was made, the consideration of which was postponed to the merits.

Mr. John G. Johnson argued the cause, and, with Messrs. T. Elliott Patterson and J. E. Gilbert, filed a brief for plaintiff in error:

The statute of Texas which directs that life and health insurance companies who shall default in payment of their policies, shall pay 12 per cent damages, together with reasonable attorneys' fees, is in violation of the Constitution of the United States.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The court erred in admitting the testimony of repute in the family of Hunter concerning his death and the manner thereof.

Johns v. Northcutt, 49 Tex. 444; *Schwarzhoff v. Necker*, 1 Posey Unrep. Cas. (Tex.) 325; *Re Hurlburt*, 68 Vt. 366, 35 L. R. A. 794, 35 Atl. 77; *Haines v. Guthrie*, L. R. 13 Q. B. Div. 818; *Whittuck v. Waters*, 4 Car. & P. 375.

The court erred in not charging, as requested, that if Hunter at the time of making application for insurance was not a farmer and real-estate agent there could be no recovery.

Lutz v. Metropolitan L. Ins. Co. 186 Pa. 527, 40 Atl. 1104; *Smith v. Northwestern Mut. L. Ins. Co.* 196 Pa. 314, 46 Atl. 426; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Hubbard v. Mutual Reserve Fund Life Assn.* 40 C. C. A. 665, 100 Fed. 719; *Aetna L. Ins. Co. v. France*, 91 U. S. 510, 23 L. ed. 401; *Jeffries v. Economical Mut. L. Ins. Co.* 22 Wall. 47, 22 L. ed. 833; *Kansas Mut. L. Ins. Co. v. Pinson*, 94 Tex. 553, 63 S. W. 531.

Mr. Maurice E. Loeke filed a brief for plaintiff in error upon the constitutional question:

Any state may classify the persons within its jurisdiction, and impose a different burden upon the individuals of each class. But such classification must not be based upon arbitrary or irrelevant distinctions. It "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Magoun v. Illinois Trust & Sav. Bank*, 170

U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

The equal protection of the laws guaranteed by the Constitution includes "the equal right to resort to the appropriate courts for redress."

Missouri v. Lewis, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989.

The "loss" of a life or health insurance company is nothing but a debt, and its failure to pay the same is merely a breach of contract. This is not within the scope of the police power of the states as commonly understood, or a proper subject for classification.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Williamson v. Liverpool, L. & G. Ins. Co.* 105 Fed. 31.

If it were otherwise it would be very difficult to point out a satisfactory reason why the duty to pay a life or health insurance claim was more imperative than the duty to pay other debts.

It is the duty of every person to pay his rightful debts; but it is not the duty of anyone to pay an unjust claim made upon him.

See von Ihering, *Struggle for Law*.

A life insurance company cannot, even by an express promise, bind itself to pay to a man's personal representatives a policy matured by his deliberate suicide.

Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300.

Few courts would tolerate an attempt to make a policy of life insurance absolutely incontestable from its date.

Bunyon, *Life Assurance*, 115.

Yet this statute goes very far towards driving all life and health companies from the courts, and making their policies virtually incontestable.

The statute also unlawfully discriminates among those who sustain life and health insurance losses by exempting individual insurers, mutual benefit associations, mutual relief associations, and accident insurance companies from its operation.

Statutes allowing attorneys' fees to the successful plaintiffs in suits to enforce mechanics' liens have been held unconstitutional.

Davidson v. Jennings, 27 Colo. 187, 48 L. R. A. 340, 60 Pac. 354; *Randolph v. Builders & Painters Supply Co.* 106 Ala. 501, 17 So. 721.

A statute giving to employees of corporations liens and attorneys' fees in suits to enforce the same has also been held invalid.

Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304.

A statute which applies to all kinds of insurance companies, and allows the penalties only in case of their vexatious refusal to pay, has been held unconstitutional.

Williamson v. Liverpool, L. & G. Ins. Co. 105 Fed. 31.

A similar statute which makes no discrimination among insurance companies of different kinds, and punishes them only when they are found to have acted in bad faith, has been held to violate the equal protection clause of the 14th Amendment.

Phenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. 67.

This court has not hesitated, whenever the facts required it, to step across the path of states seeking to deprive foreign corporations of their property without due process of law, or of their right to remove causes to the Federal courts.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931.

The state of Texas had no power to name conditions upon which alone the defendant should be admitted within its borders, "repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

When for reasons of public policy an important right is guaranteed to a person by the Constitution or laws of the United States, he cannot, either expressly or by implication, bind himself to waive that right.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365.

So important is the right of access to the courts, that one cannot bind himself in advance by an agreement not to resist any suits of a particular kind which may be brought against him; or by an agreement to submit to arbitration whatever disputes may grow out of a transaction.

Ibid.; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632; *Thompson v. Charnock*, 8 T. R. 139; *Rowe v. Williams*, 97 Mass. 163; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

Messrs. John G. Johnson and J. E. Gilbert also filed a brief for plaintiff in error in opposition to the motion to dismiss:

A question as to whether or not a statute of the state of Texas was in violation of the Constitution of the United States, having been properly raised in the course of the proceedings by the claim by the defendant, and said question having been ruled 185 U. S.

upon by the circuit court of the United States adversely, the right to appeal directly from such ruling, to this court, follows.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

There can be no doubt that after a foreign corporation has been permitted to do business it is entitled to the protection of the Constitution of the United States, within the foreign state in which the same is done, as fully as though it were a citizen of such state.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Even though the statute has been made applicable to foreign corporations only, it would have been subject to the Constitution of the United States, so far as it came within the purview of the 14th Amendment.

Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44.

Mr. Charles A. Culberson argued the cause, and, with Mr. William H. Clark, filed a brief for defendant in error:

The jurisdiction of the United States circuit court having been acquired solely on the ground of diversity of citizenship, the United States circuit court of appeals, fifth circuit, had final jurisdiction of the cause, and this court is without jurisdiction thereof.

Wauton v. De Wolf, 142 U. S. 138, 35 L. ed. 965, 12 Sup. Ct. Rep. 173; *Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co.* 146 U. S. 54, 36 L. ed. 885, 13 Sup. Ct. Rep. 13; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222.

The plaintiff in error is a mere creation of local law, and can have no legal existence beyond the limits of Pennsylvania, the sovereignty which created it; and the recognition of it in other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274.

A corporation cannot invoke that provision of § 2, art. 4, of the Constitution of the United States, which gives to the citizens of each state the privileges and immunities of the citizens of the several states.

Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972.

The prohibitive words of the 14th Amendment of the Federal Constitution have no broader application in that respect.

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Waters-Pierce Oil Co.*

v. *Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

The right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

The right of the state of Texas to enact the law complained of by plaintiff in error, and to enforce the condition embraced therein upon all life and health insurance companies doing business in Texas, cannot be seriously questioned.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Manchester F. Ins. Co. v. Herriott*, 91 Fed. 711; *Merchants' Life Assn. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251; *Union Cent. L. Ins. Co. v. Chowning*, 86 Tex. 654, 24 L. R. A. 504, 26 S. W. 982; *Fidelity & C. Co. v. Allibone*, 90 Tex. 660, 40 S. W. 399.

When the Federal question arises after the filing of the petition this court is without jurisdiction.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *Loeb v. Columbia Trp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

The statute is a condition upon which plaintiff in error is authorized to do business in Texas, and the fact of its engaging in business constituted an acceptance of the condition.

Mutual L. Ins. Co. v. Walden (Tex. Civ. App.) 26 S. W. 1012; *Fidelity & C. Co. v. Allibone*, 15 Tex. Civ. App. 178, 39 S. W. 632, 90 Tex. 660, 40 S. W. 399; *New York L. Ins. Co. v. Orlopp* (Tex. Civ. App.) 61 S. W. 336; *Manchester F. Ins. Co. v. Herriott*, 91 Fed. 711; *Merchants' Life Assn. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251; *Fire Assn. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535.

The classification of life and health insurance companies, made by the statute, is a valid exercise of legislative power.

Mutual L. Ins. Co. v. Walden (Tex. Civ. App.) 26 S. W. 1012; *New York L. Ins. Co. v. Orlopp* (Tex. Civ. App.) 61 S. W. 336; *Merchants' Life Assn. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251; *United States L. Ins.*
928

Co. v. Ross, 42 C. C. A. 601, 102 Fed. 722; *Fidelity & C. Co. v. Dorough*, 46 C. C. A. 364, 107 Fed. 389; *Union Cent. L. Ins. Co. v. Chowning*, 86 Tex. 654, 24 L. R. A. 504, 26 S. W. 982; *Fidelity & C. Co. v. Allibone*, 90 Tex. 660, 40 S. W. 399; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 39, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535.

Under the circumstances, the court did not err in admitting the testimony of repute in the family of Hunter concerning his death.

1 Taylor, Ev. § 572; 2 Riee, Ev. pp. 1223, 1224; 1 Greenl. Ev. 12th ed. §§ 103, 104; *Jackson ex dem. Miner v. Boncham*, 15 Johns. 226; *Doe ex dem. Banning v. Griffin*, 15 East, 293; *Webb v. Richardson*, 42 Vt. 465; *Cochrane v. Libby*, 18 Me. 39; *Clark v. Owens*, 18 N. Y. 434; *Jackson ex dem. People v. Etz*, 5 Cow. 314; *Norris v. Edwards*, 90 N. C. 382; *Ewing v. Savary*, 3 Bibb. 235; *Mason v. Fuller*, 45 Vt. 29; *Ringhouse v. Kever*, 49 Ill. 470.

The entire charge of the court is not in the record, nor is there anything in the record to show that the subject of warranty was not covered by the general charge. In the absence of such showing this court will presume that, if the evidence demanded a charge on a question, it was given in the general charge.

Reagon v. Aiken, 138 U. S. 109, 34 L. ed. 892, 11 Sup. Ct. Rep. 283.

Taken altogether, the policy and the answers in the application did not constitute a warranty as to the business or calling of Hunter.

Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co. 92 Tex. 297, 49 S. W. 222; *Moulou v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Inasmuch as the validity of the statute of Texas authorizing the recovery of damages and attorneys' fees for failure by life and health insurance companies to pay losses was seasonably drawn in question by defendant below as being in contravention of the Constitution of the United States, we think the case comes within *Loeb v. Columbia Trp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *American Sugar Ref. Co. v.*

New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646, and that the writ of error may be maintained. The motion to dismiss is therefore overruled.

Four propositions are relied on as grounds of reversal, which we will consider in the reverse order in which they are stated in the brief for plaintiff in error.

I. "The court erred in not charging the jury to find a verdict in favor of the defendant because of the failure to offer sufficient evidence from which an inference of Hunter's death could be drawn."

[316] *In our opinion the evidence was sufficient to justify the inference that Hunter was drowned in the Pecos river, on December 4, 1896, and the court below properly refused to peremptorily instruct the jury to find for defendant.

The question of Hunter's death was a question of fact to be determined on all relevant facts and circumstances disclosed by the evidence. The evidence tended to show that he was last seen alive on December 3d, when he parted from his sister and started for Mentone, with the intention of returning in a few days. He did not arrive nor return, but disappeared. He camped on the banks of the Pecos river; and the abandoned wagon, harnesses, and gun, the starved horse, the ashes of the fire, the used cooking utensils, the fragments of food, the bed with its imprint of the sleeper, bore testimony that he cooked, ate, and slept there, and that he went no farther. The footsteps to the river's brink, going but not returning, the water buckets, the mark of slipping, the fractured root, the flowing stream,—indicated what might have happened; and the fact that he was not seen nor heard from thereafter, although his relations with his family were intimate and cordial, and he had always kept up a correspondence with them, so that one or more of them would have been likely to hear from him unless his life had abruptly terminated or its habitual course been suddenly changed, rendered the inference of fatal accident reasonable.

The record does not set forth the general charge of the court in full, but, among others, this instruction was given: "While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead."

Defendant excepted to the giving of this [317] instruction, and *requested the court to instruct that "the circumstances proven must exclude, to a reasonable and moral certainty, the fact that such person is still living, and each fact in the chain of facts from which the death of the party is to be inferred must

be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact in issue; and all the facts proven must be consistent with each other and consistent with the main facts in issue, that is, the death of the party."

The court did not err in giving the one and refusing the other instruction. This was not a criminal case, and it was not necessary that the death should be proven beyond a reasonable doubt. The party on whose side the weight of evidence preponderated was entitled to the verdict. Proof to a "moral certainty" is an equivalent phrase with "beyond a reasonable doubt." *Gray, Ch. J., Com. v. Costley*, 118 Mass. 1. In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis that it is adduced to prove, but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. It has been held in some cases that when a criminal act is alleged, the rule of reasonable doubt is applicable in establishing that act, but this is not such a case. 1 Greenl. Ev. 15th ed. § 13a, note.

The court also instructed the jury as follows: "If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3d, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict." "Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. While the death of Hunter is not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence."

To this defendant excepted, and it is now argued that there was error because the court did not call the attention of the *jury [318] to defendant's contention that Hunter's continued absence might be attributed to the desire to obtain the insurance money. But it nowhere appears that defendant requested the court to modify the instruction in that particular, and as given it was correct.

The jury were not left to infer death from the mere fact of disappearance, but were specifically told that that was not in itself sufficient, and that all the facts and circumstances must be considered.

Defendant asked the court to give this instruction: "If you believe from the evidence that William A. Hunter, Jr., has been seen or heard from by anyone at any time since his disappearance, you will find for the defendant." This the court refused, and gave the following instruction: "The evidence of witnesses is also before you tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged dis-

appearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant."

There was some evidence that Hunter had been seen, but none that he had been otherwise heard from. The request of defendant was rightly rejected, and the instruction given was sufficient. The criticism that the jury may have supposed that they were instructed that they must be satisfied that he had been seen by both witnesses, or on two occasions, is without merit. It was impossible to have misunderstood what the learned judge of the circuit court intended. If, as matter of fact, Hunter was seen alive, whether once or twice, then, of course, he did not die as contended by plaintiff.

It is further argued that the court erred in not instructing the jury as requested by defendant, that "unless the jury believe from the evidence that William A. Hunter, Jr., when last seen was in a position of peril, such as that it is more probable that he then and there lost his life than that he extricated himself from such perilous position alive, you must find for the defendant."

[319] *Such an instruction was uncalled for and calculated to mislead. There was no evidence that Hunter was in a position of peril when last seen. The evidence did, indeed, tend to show that he probably fell into the river, and so came in contact with a specific peril, and there was evidence regarding the depth, the rapidity, and the quicksands of the river; but the instruction was objectionable in that it assumed that he was seen in a perilous position of such a character as to afford the basis for speculation as to the probabilities of his extrication.

In *Davie v. Briggs*, 97 U. S. 634, 24 L. ed. 1088, Mr. Justice Harlan said: "If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years."

But it was not thereby ruled that the inference of death might not arise from disappearance under circumstances inconsistent with a continuation of life, even though exposure to some particular peril was not shown, and the evidence indicated that Hunter came within the range of immediate danger.

II. "The court erred in not charging, as requested, that if Hunter at the time of making application for insurance was not a farmer and real-estate agent, there could be no recovery."

This relates to the refusal to instruct that "the jury must believe from the evidence that W. A. Hunter, Jr., at the time of making application for insurance to defendant, on which policies of insurance were issued and are herein involved, was at the time he made such application both a farmer and

real-estate agent, and unless you so believe, you will find for the defendant."

The entire charge of the court is not in the record, and there is nothing to show that the subject of Hunter's answer as to his occupation was not covered by it. Again, Hunter did not say that he was "a farmer and real-estate agent," but that his occupation when he made the application was "real estate and farming," and the evidence of the truthfulness of that statement was so plenary, and the evidence from which to infer the contrary *was so slight, that we think [320] the refusal was justified on that ground.

Treating the statement of occupation as a warranty, the evidence that Hunter was behind in his payments on the land in Loving county, and that forfeitures were entered in February, 1897, and that he may have been engaged with a photographer for two or three months, even in the summer of 1896, did not so impugn the substantial truth and good faith of his answer as to demand an instruction so worded.

III. "The court erred in admitting the testimony of a repute in the family of Hunter concerning his death and the manner thereof."

Hunter had parted with his sister and started for Mentone December 3, with the intention of returning within a week or ten days. "After he had been gone ten days, and did not come back, and then two weeks and did not come back," his sister sent a man to make inquiry, who reported that Hunter had not been to Mentone. A few days later she sent again, and received a similar reply. The searching party went out, found the abandoned camp, and reported, and Mrs. Mettler then went herself. She described the condition of things at the camp and the brink of the river. This was December 29, and December 30, the day after she returned, she wrote her father in Ohio about it, and that her brother was dead, drowned in the Pecos river, and she testified that her father, brothers, and sisters, all believed that this was so, because of what she had written; while they testified that this was the belief of the family, based on the information she furnished. If this testimony should not have been admitted it is difficult to see that it could have been so prejudicial as to be fatal to the verdict, for it amounted to nothing more than the assertion of Mrs. Mettler's belief and the acceptance by the family of that belief as their own. In other words, it cannot be supposed that the jury regarded the evidence as tending to establish the fact of death when it purported only to state Mrs. Mettler's belief and the family's concurrence.

Moreover, in the aspect of showing the entertainment of such belief in good faith the evidence was admissible, if it had been *of- [321] fered at the proper time. Hunter had suddenly disappeared. Search was made, but was not prosecuted after the discovery of the deserted camp. The father was sharply interrogated as to failure to offer reward, to seine the river, to make "effort to find him or his body." And so was the brother

Charles. The theory of the insurance company was that the disappearance was voluntary, and that the conduct of Mrs. Mettler and the family was consistent with the belief that he was yet alive, and was indicative of a combination to defraud the company. This inference the family were entitled to repel by testifying to their conviction of his death. As to the fact of death, it was mere matter of opinion, but as to their belief it was matter of fact showing innocence of fraud. Reasonable inquiry is frequently a prerequisite to the inference of death from disappearance, as well as other effort, but, no inquiry or effort was made here after discovery of the camp, because the belief of death and lapse of time rendered it useless. Whether that belief was well founded was for the jury, but that there was such belief was a relevant fact. *New York L. Ins. Co. v. Hillmon*, 145 U. S. 285, 296, 36 L. ed. 706, 710, 12 Sup. Ct. Rep. 909; *Wallace v. United States*, 162 U. S. 477, 40 L. ed. 1043, 16 Sup. Ct. Rep. 859.

But we do not think the evidence was competent to establish the fact of death, under the circumstances of the case. To illustrate: In *Scott v. Ratliffe*, 5 Pet. 81, 8 L. ed. 54, it was held that the testimony of a witness that "she was told that Mr. Madison was dead" was admissible; and in *Secrist v. Green*, 3 Wall. 744, 751, 18 L. ed. 153, 155, it was said that "it is competent to prove death and heirship by reputation." But these and similar rulings and expressions in other cases must be taken in connection with the particular facts and circumstances. In this case no question of pedigree; of birth, marriage, or death as bearing on legitimacy, descent, or relationship; of ancient rights; of past events prior to controversy,—was involved; nor was there any pretense that this was evidence of tradition, or historical fact, or general reputation in the community participated in by the family. If evidence of death it would be evidence of the particular fact on which recovery was sought, and inadmissible as such. The ruling was incorrect that: "It is a question for the jury to [322] say *whether or not family belief tends to prove his death," although that was qualified by the learned judge charging the jury: "Reputation in his [insured's] family on the part of his father, sisters, and brothers of his death, is proper evidence for your consideration, but not the opinion of anyone." But, the entire record considered, we are of opinion that it cannot be presumed that the evidence affected the verdict injuriously to defendant, if at all, and, on the contrary, that it affirmatively appears that if it could have had any influence whatever, it was solely from the point of view which rendered it admissible.

IV. "The statute of Texas which directs that life and health insurance companies who shall default in payment of their policies shall pay 12 per cent damages, together with reasonable attorneys' fees, is in violation of the Constitution of the United States."

The statute referred to is article 3071 of 185 U. S.

the Revised Statutes of Texas of 1895, which reads as follows: "In all cases where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss."

Article 3072 provided that if any life or health insurance company failed to pay off and satisfy any execution issued on final judgment against it within thirty days of demand of payment, the commissioner of insurance should declare the company's certificate of authority to do business null and void.

These articles were sections of chap. 3, title 58, *Insurance*, and had been brought forward from the Revised Statutes of 1879, arts. 2953, 2954, chap. 3, title 53, *Insurance*. And the same provisions as to foreign life insurance companies and those incorporated outside of the state of Texas were contained in the first general insurance statute of Texas, which was passed on May 2, 1874. 2 Paschal's Digest, art. 7116o.

Under this title no insurance company was permitted to do business in Texas without first obtaining a permit from the commissioner of insurance, and compliance with the law was required before permission could be granted, while by the terms of article 3060 the commissioner was required to revoke the certificate of authority to do business in the state in case any company failed for thirty days to pay any execution issued against it on any valid judgment.

The provisions of chapter 3 embodied many conditions on which business was permitted to be done. By article 3061 it was made unlawful for any person to act within the state as agent or otherwise for any insurance company for soliciting business, unless the company had procured authority to do it from the commissioner. Article 3062 provided that any life or health insurance company desiring to do business in the state should furnish a sworn statement to the commissioner as prescribed, which by article 3063 was to be accompanied by a copy of its charter or the law creating it. Article 3064 required the company to designate an agent or attorney in fact on whom service might be had in case of suit, and article 3065 declared that no life or health insurance company incorporated in Texas or any other state should transact business in Texas with less capital than \$100,000 actually invested. Article 3066 required insurance companies of other states to make such deposit in Texas as the laws of their home state required of Texas companies doing business there, and article 3067 provided that all foreign companies should deposit \$100,000 with the state treasurer before doing business in Texas; which deposit, by article 3068, was to be applied to the payment of judgments in favor of policy holders;

but article 3069 provided that it should be sufficient if the deposit required by § 3067 was made in any other state. Article 3070 provided that suits might be brought in any county where loss occurred or where the policy holder resided.

By article 3073 it was made unlawful for any life or health insurance company to take any kind of risks or issues any policies of insurance except those of life or health, and the business of life and health insurance in the state was forbidden to be "in anywise conducted or transacted by any company [324] which,*in this or any other state or country, is engaged or concerned in the business of marine, fire, inland, or other insurance."

Articles 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3083, 3084 related to marine, fire, or inland insurance companies.

Articles 3081, 3082, 3086, 3087, 3089 applied to insurance companies generally.

Article 3092 read: "The provisions of this chapter shall in nowise apply to mutual benefit organizations doing business in this state through lodges or councils, such as the Order of Chosen Friends, Knights of Honor, or kindred organizations." Article 3096 read: "Nothing in this title shall be construed to affect or in any way apply to mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other state, which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members of said associations in accordance with their several by-laws and regulations;" but an annual statement under oath to the department of insurance was required, and the article concluded: "And should any such benevolent organization refuse or neglect to make an annual report as above required, it shall be deemed an insurance company conducted for profit to its officers and amenable to the laws governing such companies."

Article 3092 was taken from an act of April 3, 1889, entitled "An Act to Provide for the Admission from Other States of Companies or Associations Carrying on the Business of Life or Casualty Insurance on the Assessment or Natural Premium Plan," and certain conditions were affixed to their right to do business in the state, which should not apply to mutual benefit organizations doing business through lodges or councils. Laws 1889, p. 98.

Article 3096 was taken from an act of March 28, 1885, which amended chap. 3, title 53, of the Revised Statutes of 1879, by adding an article thereto couched in similar terms. Laws 1885, p. 62.

In the revision of 1895 these two laws were assigned to their appropriate place under the title of insurance. Such were the conditions which for many years had been [325] imposed on life insurance *companies doing business in Texas when the policy sued on in this case was issued. But it is now contended that article 3071 is in conflict with the Constitution of the United States, in

that it denies the equal protection of the laws, because the same conditions are not imposed on fire, marine, and inland insurance companies, and on mutual benefit and relief organizations doing business through lodges and mutual relief benevolent associations, more particularly the latter.

In other words, the contention is that the classification is so arbitrary, so destitute of reasonable basis, as to be obnoxious to constitutional objection.

In *Union Cent. L. Ins. Co. v. Chowning*, 86 Tex. 654, 24 L. R. A. 504, 26 S. W. 982, the supreme court of Texas held that the statute, in providing for the recovery of damages and attorneys' fees, was not in violation of the Constitution of Texas or of the United States, and was a valid law. This decision was rendered in May, 1894, but § 2953 of the Revised Statutes of 1879 was the same as § 3071 of the Revised Statutes of 1895, and the acts of March 28, 1885, and April 3, 1889, were in force, which were subsequently brought forward as §§ 3092 and 3096. The supreme court held that as all corporations embraced in the classes named were affected alike by the provision, it did not deny the equal protection of the laws; and the court said that the 12 per cent was given as damages for a failure to comply with the contract by payment, and the attorneys' fees were allowed as compensation for the costs of collecting the debt. The court was further of opinion that even if the 12 per cent was a penalty for failure to pay when due, there was no provision of the Constitution of Texas which forbade such legislation, and that it was for the legislature to determine when the public was so interested in the enforcement of contracts as to justify that enforcement by penalties.

In *Fidelity & C. Co. v. Allibone*, 15 Tex. Civ. App. 178, 39 S. W. 632, this ruling was repeated by the court of civil appeals of Texas, and affirmed by the supreme court in *Fidelity & C. Co. v. Allibone*, 90 Tex. 660, 40 S. W. 399. Both these courts held that the constitutional question involved was distinguishable from that ruled by this court in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

*In *New York L. Ins. Co. v. Orlopp* (Tex. [326] Civ. App.) 61 S. W. 336, the same conclusion was reiterated, on the ground that the state legislature had the right to provide the terms on which foreign corporations of that class might do business in the state, and that, being a valid exercise of such power and right, the statute formed a part of the contract of every life and health insurance company issued and made in Texas since the date of its enactment. The circuit court of appeals for the fifth circuit, in *Merchants' Life Asso. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251, held the section to be valid on full discussion.

It is apparent from the various sections of the title relating to insurance, to which we have before referred, that this particular liability amounted to one of the conditions on which life and health insurance companies were permitted to do business in Texas,

and the power of the state in the matter of the imposition of conditions on its own and foreign corporations has been repeatedly recognized by this court. If, however, notwithstanding the acceptance of these conditions, the constitutionality of the particular condition were nevertheless open to question, we must decline to sustain the objection. The reasoning in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, applies rather than that in *Gulf, C. & S. F. R. Co. v. Ellis*. The ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases, in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured.

[327] *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *New York L. Ins. Co. v. Cravens*, 178 U. S. 394, 44 L. ed. 1118, 20 Sup. Ct. Rep. 962, are in point and are decisive.

In *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535, a section of the Revised Statutes of Ohio provided in effect that no answer to any interrogatory made by the applicant to the policy should bar the right to recovery or be used in evidence on a trial, unless it was clearly proved that such answer was wilfully false and was fraudulently made; that it was material, and induced the company to issue the policy; and that but for such answer the policy would not have been issued; and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer; and this provision was only applicable to life insurance companies. The constitutionality of that act was upheld by the supreme court of Ohio, and this court affirmed its judgment, and in the opinion the language used in *Waters-Pierce Oil Co. v. Texas* was quoted: "A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. The purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations." And we

185 U. S.

added: "It was for the legislature of Ohio to define the public policy of that state in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the state as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events, we cannot say that the Federal Constitution has been violated in the exercise in this regard by the state of its undoubted power over corporations."

Our conclusion is that the record shows no reversible error, and the judgment is therefore affirmed.

*Mr. Justice **Brewer** concurred in the [328] judgment.

Mr. Justice **Harlan** (with whom concurred Mr. Justice **Brown**) dissenting:

I cannot assent to that part of the opinion of the court relating to the constitutionality of the statute of Texas of 1895 which provides that a life or health insurance company, failing to pay a loss within the time specified in the policy, after demand therefor, shall be liable, in addition to the amount of the loss, to pay the holder of the policy "12 per cent damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss."

The operation of the statute is well illustrated in the present case; for the verdict of the jury was for \$15,000 as principal, \$2,250 as interest, \$5,175 as 12 per cent damages (of which the plaintiff remitted \$3,375), and \$2,500 as special attorneys' fees for the plaintiff.

The rule embodied in the statute is not made applicable to fire or marine insurance companies, or to any other companies or corporations doing business in Texas. Does not the state by that statute deny to life and health insurance companies, doing business within its limits, the equal protection of the laws which is secured by the 14th Amendment of the Constitution of the United States?

It seems to me that this question must be answered in the affirmative if any regard whatever be had to the principles announced in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 153, 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255, 256.

In that case we had before us a statute declaring that any person in Texas having "a valid bona fide claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claims for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed \$50,—may present the same, verified by his affidavit, for payment to such corporation, by filing it with any station agent of such *corporation [329]

in any county where suit may be instituted for the same; and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court: and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, *and in addition thereto all reasonable attorneys' fees*, provided he has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the court or jury trying the issue."

That statute being in force, an action was brought to recover \$50 for a colt killed by the railway company. There was a judgment against the company for the amount claimed, and a special attorney's fee of \$10 in favor of the plaintiff was added, as required by the above statute.

The contention in that case was that the statute made such an arbitrary discrimination against railroad companies embraced by its provisions as to bring it within the prohibition of the 14th Amendment. That view was sustained. This court said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law.

[330]*They do not receive its equal protection. All this is obvious from a mere inspection of the statute." Referring to the 14th Amendment of the Constitution, the court said: "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens." Again: "Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to

them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties,—duties which are equally obligatory upon all debtors,—a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this."

I do not perceive how the present decision can be upheld without disregarding the principles of the *Ellis Case*. If a railroad company, sued in Texas upon a claim of less than \$50 for killing or injuring stock, cannot be required, when unsuccessful in its defense, to pay a special attorney's fee,—no such rule being established in reference to other corporations or individuals, sued for a like amount of money,—I cannot understand how life and health insurance companies, alone of all corporations or companies doing business in Texas, can be required to pay special damages and special attorneys' fees when unsuccessful *in defending suits [331] brought against them. The two statutes are alike in this, that the defendant company or corporation, whether a railroad corporation or a life or health insurance company, even if successful in an action brought against it, could not recover special attorneys' fees or special damages against its adversary. Thus the defendant company in a suit brought under either statute is not permitted to appear in court upon terms of equality with the party suing it, and is subjected to special burdens not imposed upon other companies or other corporations refusing to pay money demanded of them.

We are informed by the opinion of this court that the courts in Texas have held that the *Ellis Case* was distinguishable from the present case, and we are referred to *Union Cent. L. Ins. Co. v. Chowning*, 86 Tex. 654, 24 L. R. A. 504, 26 S. W. 982; *Fidelity & C. Co. v. Allibone*, 15 Tex. Civ. App. 178, 39 S. W. 632, Affirmed in 90 Tex. 660, 40 S. W. 399, and *New York L. Ins. Co. v. Orlopp* (Tex. Civ. App.) 61 S. W. 336. The first named of those cases was decided more than two years before the *Ellis Case* was determined by this court. The first case in Texas in which the *Ellis Case* was referred to was that of *Fidelity & C. Co. v. Allibone*. In that case the court of civil appeals of Texas, after referring to certain prior decisions in that state sustaining the constitutionality of the statute here in question, said: "A late decision of the Supreme

Court of the United States, *Gulf, O. & S. F. R. Co. v. Ellis*, construing a somewhat analogous statute of this state, and reversing the decision of our supreme court approving its validity, may be at variance with the cases just cited; but, until it is expressly so held either by our own supreme court or that of the United States, we will adhere to the decisions already made." The judgment in the last case was affirmed, the supreme court of Texas observing nothing more than that the case was "distinguishable" from the *Ellis Case*. Upon what grounds the two cases were distinguishable was not stated. It is a very convenient mode for distinguishing two cases, apparently in conflict, to say nothing more than that they are distinguishable. In *New York L. Ins. Co. v. Orlopp*, the statute was sustained upon the ground that the state could prescribe the terms on which foreign insurance companies might do business within its limits.

[332] *This court says that the particular liability imposed by the statute in question "amounted to one of the conditions on which life and health insurance companies were permitted to do business in Texas, and the power of the state in the matter of the imposition of conditions of its own and foreign corporations has been repeatedly recognized by this court."

Of course, speaking generally, a state may impose conditions on its own and foreign corporations. But will any one say, or has this court ever directly held, that a provision of a state enactment relating to corporations, foreign or domestic, was legally operative or binding if such provision be inconsistent with the Constitution of the United States?

It is one thing for a state to forbid a particular foreign corporation, or a particular class of foreign corporations, from doing business at all within its limits. It is quite another thing for a state to admit or license foreign corporations to do business within its limits, and then subject them to some statutory provision that is repugnant to the Constitution of the United States. If a corporation, doing business in Texas under its license or with its consent, insists that a particular statute or regulation is in violation of the Constitution of the United States and cannot therefore be enforced against it, the state need only reply—such seems to be the logical result of the present decision—that the statute or regulation is a condition of the right of the corporation to do business in the state, and, whether constitutional or not, must be respected by the corporation. Corporations created by the several states are necessary to the conduct of the business of the country; and it is a startling proposition that a state may permit a corporation to do business within its limits, and by that act acquire the right to subject the corporation to regulations that may be inconsistent with the supreme law of the land.

In *Horne Ins. Co. v. Morse*, 20 Wall. 445, 455, 456, 22 L. ed. 365, 369, a statute of Wisconsin, requiring insurance companies of other states to stipulate, as a condition of 185 U. S.

their right to do business in that state, that they would not remove into the Federal court any suit brought against them in the state courts, was held invalid, not only because it tended to oust the courts of the *United States of a jurisdiction conferred [333] upon them by the Constitution, but because it created an obstruction to the exercise of a right granted by that instrument. The court said: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford." The court further said that the right of the insurance company to remove the suit was "denied to it by the state court on the ground that it had made the agreement referred to, and that the statute of the state authorized and required the making of the agreement. We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior, in this respect, to that of a corporation. The state of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitution of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the Constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the status of the two in this respect."

This question was presented in somewhat different form in *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 468, 45 L. ed. 619, 626, 21 Sup. Ct. Rep. 423. That was an action by the state to prevent a Wisconsin corporation from operating a warehouse owned by it until it should have obtained a license from the railroad and warehouse commission of Minnesota, organized under a statute of that state, and relating to elevators and warehouses. That statute provided: "It shall be unlawful to receive, ship, store, or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license therefor from the state railroad and warehouse commission, which license shall be issued for the fee of \$1 per year, and only upon written application under oath, specifying the location of such elevator or *warehouse [334] and the name of the person, firm, or corporation owning and operating such elevator or warehouse, and the names of all the members of the firm, or the names of all the officers of the corporation owning and operating such elevator or warehouse; and all moneys received for such licenses shall be turned over to the state grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the

laws of this state and the rules and regulations prescribed by said commission; and every person, company, or corporation receiving such license shall be held to have accepted the provisions of this act, and thereby to have agreed to comply with the same."

The Wisconsin corporation defended the suit brought against it upon the ground that the statute there involved was repugnant to the Constitution of the United States. This court said: "We cannot question the power of the state, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits,—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation." Again—and this is most pertinent here—the court said: "The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and [in the same words of the statute] 'thereby to have agreed to comply with the same.' . . . The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state railroad and warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions [335] or *with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

In the case before us the defendant company was doing business in Texas under a license issued by the state. By accepting such license, the company did not agree to submit to any local regulation that was repugnant to the Constitution of the United States. It could resist the enforcement of any regulation or statutory provision that was inconsistent with rights secured to it by that instrument.

The court says that the ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious. The only reason assigned for that statement is "the necessity of the prompt payment of the insurance money in very many cases, in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured." But the same reasons exist for prompt payment by a fire insurance company when the house which shelters the insured and his family is destroyed by fire.

And yet, under the statute, a fire, marine, or inland insurance company, if it resists a claim for loss, is not liable, when its defense is unsuccessful, to pay any special damages or special attorneys' fee. It can defend any suit brought against it under the same conditions accorded to individual citizens or to corporate bodies generally. But a different and most arbitrary rule is prescribed for life and health insurance companies. Their good faith in refusing to pay a claim for loss, or in defending an action brought to enforce payment of such a claim, is not taken into account. If, in any case, they do not, within a specified time, pay the amount demanded of them, no matter what may be the reason for its refusal to pay, and if they do not succeed in their defense, they must pay not only the principal sum, with ordinary interest, but, in addition, 12 per cent damages on the amount of the principal, and all reasonable attorneys' fees for the prosecution and collection of the loss. Thus the state, in effect, forbids a life or health insurance company to appear in a court of justice and defend a suit brought [336] against it, except subject to the harsh condition that if the jury does not sustain the defense, the company must pay special damages and special attorneys' fees that are not exacted from any other defendant, corporate or individual, who may be sued for money.

This is such an arbitrary classification of corporations and such a discrimination against life and health insurance companies as brings the statute within the decision in the *Ellis Case*, which has been often referred to by this court with approval. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 294, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 409, 43 L. ed. 748, 19 Sup. Ct. Rep. 419; *Nicol v. Ames*, 173 U. S. 521, 43 L. ed. 793, 19 Sup. Ct. Rep. 522; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

In my opinion, the statute in question comes within the constitutional prohibition of the denial by a state of the equal protection of the laws, and should be held void.

NEW ORLEANS WATERWORKS COMPANY, Plff. in Err., v.

STATE OF LOUISIANA *et al.*

(See S. C. Reporter's ed. 336-354.)

Appeal — error to state court — Federal question—color of foundation.

1. A claim that a forfeiture of the charter of a waterworks company for maintaining illegal rates by a decree of a state court after

NOTE.—On *Federal jurisdiction over state courts; necessity of Federal question*—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a *Federal question; when considered*—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

full hearing by all parties in a proceeding by quo warranto impaired the obligation of a contract, or deprived the company of its property without due process of law, or denied it the equal protection of the laws, because by its charter mandamus was prescribed as the remedy for illegal rates,—is so clearly without color of foundation as to give the Supreme Court of the United States no jurisdiction to review such decree.

2. No Federal question arises from the forfeiture of a charter of a corporation for alleged violation of its terms, by a decree of a state court made after a full hearing by all the parties in a proceeding in the nature of quo warranto instituted in the name of the state by the attorney general, to whom the matter had been referred by the legislature to bring such suit or take such other action as he might think proper.
3. The Supreme Court of the United States cannot review the judgment of a state court solely because that judgment impairs or fails to give effect to a contract.
4. Whether the bondholders of a corporation are indispensable parties to a suit instituted by the attorney general in the name of the state to enforce a forfeiture of the company's charter for an alleged violation of its terms is not a question which the Supreme Court can review on writ of error to a state court.

[No. 590.]

Submitted March 10, 1902. Decided May 5, 1902.

IN ERROR to the Supreme Court of the state of Louisiana to review a decree of forfeiture of the charter of a waterworks company. *Dismissed.*

See same case below, 31 So. 395.

Statement by Mr. Justice **Peckham**:

This is a proceeding in the nature of a quo warranto, brought by the attorney general of the state of Louisiana, in the name [337] of the state, to obtain a forfeiture of the charter of the defendant, the waterworks company. Upon the trial there was judgment in favor of the company, but upon appeal to the supreme court of the state that judgment was reversed, and judgment in favor of the state and against the company was entered, decreeing the forfeiture of the charter and of all the franchises heretofore conferred upon the defendant. The company has brought the case here by writ of error for review.

It appears from the petition filed in behalf of the state, through its attorney general, that in June, 1898, the general assembly of the state adopted a concurrent resolution providing for the appointment of a committee, with instructions to investigate the complaints against the methods of operation of the New Orleans Waterworks Company, and to report back to the general assembly such action as it might deem necessary to the public interests in the premises. The committee was duly appointed, made the investigation, and having submitted two reports thereon, the legislature on July 14, 1898, adopted the following:

"Whereas, the majority and minority reports of the joint committee of the house

and senate, appointed to investigate the affairs, administration, and condition of the New Orleans Waterworks Company, have been submitted to the general assembly, together with the testimony and evidence adduced at the various sessions of the said committee; and

"Whereas, the subject-matter of the said reports involves the consideration and the determination of intricate questions of law and fact; and

"Whereas, it is impossible in view of the limited time at its disposal, for the general assembly to give the matter the examination and consideration necessary for a proper determination thereof:

"Be it therefore resolved by the senate, the house of representatives concurring, that the whole subject-matter of the said report, together with the testimony and evidence upon which they are based, be respectfully referred to the attorney general of the state for such action in the premises as he may deem proper."

*The attorney general after such reference [338] commenced this proceeding, and in the petition it was averred that the water company had been duly incorporated by the state legislature, and that after its incorporation it had been guilty of repeated and continuous violations of the charter, and had thereby forfeited the same and its franchises, and the petition then set forth twelve different causes of forfeiture which were alleged to have been violations of its charter. It was alleged that the company had failed to supply the inhabitants of the city with pure water; that the supply was not only muddy and impure, but also wholly inadequate, either to extinguish fires, to wash yards, alleys, and streets, or to furnish the inhabitants with water for bathing and domestic purposes; that the water furnished was at no time fit for drinking or cooking.

It was also averred that the company had habitually, since 1878 to the time of filing the petition, illegally exacted and collected greater rates than those exacted and collected by the city of New Orleans for the same quantity of water when it was the owner of the plant, and that the company had no right to charge any greater rate than had then been charged by the city. Various other grounds were stated in the petition not necessary to be particularly noticed. The prayer of the petition was for the forfeiture of the charter of the company and all its franchises, and, in the alternative, should that relief not be granted, that then it might be decreed that the company had forfeited all exclusive privileges, and that the city of New Orleans should be adjudged to have the right to contract with anyone else for a supply of water and to expropriate the tangible property of the company if the city should see fit, etc.

Exceptions were filed to this complaint, which were overruled by the court, and the waterworks company then answered, denying the allegations of the petition. The city of New Orleans then filed a petition for leave to intervene and to become a party

plaintiff in the proceeding. The board of liquidation of the city also filed a petition to intervene and be made a party defendant, on the ground that it had an interest in common with the waterworks company to have the complaint against it dismissed. The court allowed both petitions in intervention to be filed, and *the state then answered the petition in intervention of the board of liquidation, and the water company filed its answer to the petition of the city of New Orleans.

The answer of the water company to the complaint on the part of the state, after denying various allegations, averred that the primary reason for the incorporation of the defendant was neither to provide the city with a proper water supply nor to obtain an enlargement of the existing waterworks, because for more than forty years prior thereto the city had works adequate to furnish such a supply, with full power to enlarge the works as occasion required. The answer also averred that in 1833 the Commercial Bank of New Orleans was incorporated for the purpose of providing a waterworks plant and system for the city of New Orleans, and that it immediately complied with the duty of providing the same, and had operated it for many years; that the city, about the time of the incorporation of the bank, had become an owner of 5,000 shares of the stock of the company, and had issued its bonds in payment therefor at the time of the purchase. There was a provision in the charter of the bank that the city might purchase the plant in thirty-five years upon the conditions mentioned in the act. It was further averred that the city had become the owner of the waterworks plant under this provision in 1869, and that it had operated the same up to and including the year 1878. At that time the city was under great financial pressure and almost bankrupt, and had failed to pay most of the bonds it had issued for the 5,000 shares of stock it had owned in the bank corporation, although such bonds were due, and also there were the current obligations of the city to an amount of several million of dollars overdue and unpaid. For the purpose of relieving the city it was averred that the legislature in 1877 passed an act providing for a sale of the plant by the city under the circumstances mentioned in the act, but for some reason subscribers enough were not found who would form a corporation and take the plant upon the terms therein mentioned. Accordingly, in 1878 the act was amended, making the terms more liberal, and thereupon subscribers who were owners of the city bonds and other obligations came together and formed a corporation [340] *with a capital stock of \$2,000,000 divided into 20,000 shares of \$100 each. In accordance with the terms of the act these shares were assigned to the city, and the city, in consideration thereof, sold and assigned to the company the entire waterworks plant of the city, including the franchises and rights granted by the state and sold with the balance of the property, rights, and

franchises so offered for sale by the act of the legislature, amongst which property thus sold was the valuable and indispensable franchise to be a corporation, which, as averred, was a right not severable in law from the balance of the property. The city has since sold all of the 20,000 shares of the stock of the company, excepting 3,927 shares held by the board of liquidation in trust and as security for the extinguishment of the debts of the city. The balance of the 20,000 shares is in other hands, whose title is traceable to the city. In order to raise money to carry out its obligations, having received none for the stock issued to the city for the property purchased, the company has, pursuant to the permission granted it by the act of 1877, twice mortgaged the property, including the franchise to be a corporation, and the bonds secured by those mortgages are in the hands of bona fide purchasers for value, and it is claimed on the part of the defendant that they are indispensable parties to this or any action to destroy the franchise of the defendant to be a corporation. The defendant also avers that the state as plaintiff acts in bad faith in assailing the franchises of the defendant in such an action, and also in violation of the 14th Amendment of the Constitution of the United States, which forbids a state to deprive any person of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws. It was also alleged that the grant of the corporate life to the defendant was not, as is usually the case, a grant of corporate life for the purpose and consideration only of the establishment of public works or improvements of a public character, where the only consideration passing to the state for the grant of corporate life is some supposed increased general public benefit resulting *from the construc-[341] tion and installation of public works; but that, on the contrary, in the case of the defendant corporation, the contract and agreement between the state and the defendant was, and is, an unquestionable contract of bargain and sale of all the property, rights, and franchises described in the acts of 1877 and 1878, for an exact price fixed by the state in its offer of the property for sale, which offer was accepted and price paid by the defendant as the result of a bargaining in which the state was acting, not alone in its character as a sovereign, but as a merchant and trader in commerce; and that in the bargaining and sale of the said property and franchises the state must, in law and by the courts, be considered a trader engaged in driving a hard commercial bargain in its own interest and on its own terms, and for its own benefit and profit. The contract thus set forth, it was averred, was protected from all impairment at the hands of the state by the Constitution of the United States, particularly by § 10 of article 1, acting on the state of Louisiana as a prohibition, while acting or moving, as plaintiff in this action, in impairment of the faith of its

own contract, to the same extent as if such impairment had been attempted through and by means of legislation compassing the same effect and result, that if the joint resolution of the state legislature, referred to in the petition, could be construed as directing the institution and prosecution of this suit, or as directing the attorney general of the state, in the name of the state, to institute and prosecute this action, for the purpose and with the intent to segregate from the mass of the property sold by the state to the defendant its franchise to be a corporation, or if there exist any other statutes of the state authorizing or directing the attorney general to that end and purpose, such joint resolution and statutes are repugnant to the Constitution of the United States, particularly to § 10 of article 1 thereof, which is specially pleaded in defense of this action. The defendant also averred that by virtue of the provisions of § 15 of the charter of defendant (act No. 33 of the Laws of 1877) the remedy for illegal charges for water was confined to an application by the city for a mandamus to [342] compel the *company to desist from such charges. The section is reproduced in the margin.†

The answer further specifically denied all grounds of forfeiture and prayed that the plaintiff's suit might be dismissed. The case came to trial in the city of New Orleans, and after an investigation of the issues raised by the pleadings, including the examination of a large number of witnesses and the hearing of arguments of counsel, the court determined (1) that the two intervening parties, the city of New Orleans and the board of liquidation, should not have been allowed to intervene, and accordingly it was decreed that the intervention of those parties should be dismissed at the cost of the respective interveners. (2) The court then ordered judgment in favor of the water company and against the plaintiff, the state of Louisiana, rejecting its demand for the forfeiture of the defendant's charter. The state appealed from that judgment to the supreme court, and the city of New Orleans also took a separate appeal from the judgment dismissing its intervention. Upon hearing in the supreme

court the judgment in favor of the water company was reversed, and, as already stated, a judgment was entered forfeiting the charter of the water company.

Messrs. Edgar H. Farrar, Ernest B. Kruttschnitt, and Benjamin F. Jonas submitted the cause for plaintiff in error:

The jurisdiction of this court is not defeated because the supreme court of a state did not in terms pass upon the claim, distinctly made there, that the state legislation and the construction which the supreme court was asked to give to it, were in derogation of rights and privileges secured to appellant by the Constitution of the United States.

Chicago L. Ins. Co. v. Needles, 113 U. S. 579, 28 L. ed. 1086, 5 Sup. Ct. Rep. 681.

Where the validity of a statute, or an authority exercised under a statute, is drawn in question on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, if the Federal question appears in the record and was decided, or if such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question in this court.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 14, 45 L. ed. 404, 21 Sup. Ct. Rep. 240.

If a Federal question be raised in a petition for rehearing, be considered, and be decided by the state court, it forms the basis for a writ of error from this court.

Mallett v. North-Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730.

Whether the obligations of a contract be impaired or not, by state legislation, involves a question of contract *vel non* and also of impairing legislation *vel non*.

St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

Even if a state court decides a case under the provisions of a statute or Constitution not open to attack on the ground of repugnance to the Constitution of the United States, and without reference to a legislative act alleged to be repugnant to the Constitution of the United States, still the question remains whether by the decision of the state court any effect was given to the act alleged to be repugnant to the Constitution of the United States, and that question suffices to maintain the jurisdiction of this court, and requires it to exercise its jurisdiction.

Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

The prohibitions of the 14th Amendment refer to all the instrumentalities of the state,—legislative, executive, and judicial; and therefore whoever by virtue of public position under the state government deprives another of any right protected by that amendment against deprivation by the

†Sec. 12. Be it further enacted, etc., That said waterworks company shall have the right to fix the rates of charges for water; provided that the net profits of the company shall not exceed ten per cent per annum, and shall publish sworn annual statements of its business and condition; and that the city council shall have the power to appoint a committee of not less than five, who shall have access to the books of the said company and make such extracts from the same as they may deem necessary, and in case the said profit shall exceed ten per cent, the city council shall have the right to require said company to reduce the price of water in such manner and in such a proportion that the profits shall never exceed the above-named rates; and provided, further, that the rates charged shall never exceed those now paid by the city, and in case said company shall refuse compliance, the demand of said city may be enforced by a writ of mandamus.

state violates the constitutional inhibition contained in that Amendment; and as he acts in the name and for the state and is clothed with the state's power, his act is that of the state.

Chicago, B. & O. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The contention that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared, and was admitted to make defense. The judicial authorities of a state may keep well within the letter of a statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that their action would be inconsistent with that amendment.

Ibid.

A judgment of a state court, even if authorized by statute, whereby private property is taken for public use without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment to the Constitution of the United States.

Ibid.

When a state descends from the plane of her sovereignty and contracts with private persons, she is regarded *pro hac vice* as a private person herself, and she is bound accordingly.

Curran v. Arkansas, 15 How. 304, 14 L. ed. 705; *Von Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302; *Wolff v. New Orleans*, 103 U. S. 358, sub nom. *United States ex rel. Wolff v. New Orleans*, 26 L. ed. 395; *Jeffries v. Mutual L. Ins. Co.* 110 U. S. 305, 28 L. ed. 156, 4 Sup. Ct. Rep. 8; *Missouri ex rel. Walker v. Walker*, 125 U. S. 339, 31 L. ed. 769, 8 Sup. Ct. Rep. 929.

Hence, when a state contracts with private persons, her contract becomes subject to her general laws on contracts; and a refusal by her courts to apply those general laws is a denial of the equal protection of the laws, and therefore a violation of the 14th Amendment to the Constitution of the United States.

Messrs. **Benjamin Rice Forman, Samuel L. Gilmore, and Walter Guion** submitted the cause for defendants in error:

A corporation legally established may be dissolved by forfeiture of the charter when it abuses its franchises or refuses to accomplish the conditions under which said privileges were granted; in which case the corporation becomes extinct by effect of the violation of the conditions of the act of incorporation.

La. Civ. Code, art. 447; *Atchafalaya Bank v. Dawson*, 13 La. 500; *State v. New Orleans Gaslight & Bkg. Co.* 2 Rob. (La.) 529.

The claim that this suit is not due process of law is simply an abuse of the English language, absurd on its face, after the elab-

orate trial that took place on issue joined in a court of competent jurisdiction, and requires no argument or authority to refute it.

Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

The Federal question must necessarily be involved in the decision, so that the state court could not have given the judgment or decree which it passed, without deciding it.

Crowell v. Randell, 10 Pet. 391, 9 L. ed. 467; *Armstrong v. Athens County Treasurer*, 16 Pet. 285, 10 L. ed. 966; *Hoyt v. Sheldon*, 1 Black, 518, sub nom. *Hoyt v. Thompson*, 17 L. ed. 65.

This court cannot entertain jurisdiction of a case from a state court because the judgment of that court impairs or fails to give effect to a contract. The judgment must give effect to some state statute or state constitution which impairs the obligation of a contract.

Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414. See also *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *McManus v. O'Sullivan*, 91 U. S. 578, 23 L. ed. 390; *Bolling v. Lersner*, 91 U. S. 594, 23 L. ed. 366; *Brown v. Atwell*, 92 U. S. 329, 23 L. ed. 512; *New York L. Ins. Co. v. Hendren*, 92 U. S. 286, 23 L. ed. 709; *Crossley v. New Orleans*, 108 U. S. 105, 27 L. ed. 667, 2 Sup. Ct. Rep. 300.

While it is settled that the charter of the New Orleans Waterworks Company is a contract, it is equally well settled that this prohibition of the Federal Constitution is leveled against the exercise of legislative power in arbitrarily repealing a charter, and not against a formal suit in court to annul the contract contained in the charter for a violation of its provisions.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Kentucky v. Louisville Bridge Co.* 42 Fed. 241; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 30, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. Rep. 316, Affirming 34 Fed. 675; *St. Paul, M. & M. R. Co. v. Todd County*, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281; *Blount v. Walker*, 134 U. S. 614, 33 L. ed. 1038, 10 Sup. Ct. Rep. 606; *De Saussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053.

*Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court: [343]

The defendant in error has made a motion to dismiss this writ of error on the ground of a lack of jurisdiction, because no Federal question is disclosed in the record.

The plaintiff in error, on the contrary, claims the existence in the record of several questions of a Federal character, and in the brief prepared to oppose this motion they are set forth as follows:

"(1) The charter of the waterworks company prescribing mandamus as a remedy to maintain a lawful tariff of water rates, is not the substitution by the writs of forfeit-

ure of charter, as a remedy for the maintenance of unlawful rates, a breach of the contract, and a deprivation of the property without due process of law, and a denial of the equal protection of the laws?

"(2) If such remedy be sanctioned by and sought pursuant to a state statute, subsequent in date to the charter of the waterworks company, does not such a statute impair the obligation of the charter contract, divest vested rights, and deny to said company the equal protection of the laws?

"(3) Can the state forfeit such a charter and take back the franchises at the same time that she leaves the corporation in possession of the physical property depleted in value by the loss of the franchise, and at the same time that she keeps the money paid for the property plus the franchise?

"(4) The general law of the state providing a *restitutio in integrum* in all cases where a synallagmatic, commutative contract is dissolved, and the charter containing no special provision taking the state's contract from under general provisions of law, is not a state statute authorizing the attorney general to institute proceedings to forfeit the contract and take back the franchise, at the same time that the state keeps the consideration paid for the same, a statute impairing the obligations of a contract?

[344] "(5) Is not a judicial decision refusing to apply to this contract the general provisions of the law of contracts prevailing in the state a taking by the state through her judiciary of the property of the defendant corporation without due process of law?

"(6) Is not the legislative resolution, the action of the attorney general, and the action of the supreme court of the state the taking by the state of property without due process of law through the instrumentality of her legislative, her executive, and her judicial departments, both jointly and severally?

"(7) Is not the refusal to apply to this case the general provisions of the law of contract prevailing in the state of Louisiana a denial to the plaintiff in error of the equal protection of the laws of the state of Louisiana?"

These questions are, as is said, simply amplifications of the grounds actually taken by plaintiff in error upon the trial and on the argument of the case in the supreme court of the state, and which are plainly set out in the record. This may be assumed, and the point which arises is whether the matters thus set forth do in truth create even a color of a Federal question.

It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit: there must be some fair ground for asserting its existence, and, in the absence thereof, a
185 U. S.

writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus, in *Millinger v. Hartupee*, 6 Wall. 258, 18 L. ed. 829, the Chief Justice (at page 261, L. ed. p. 830) said: "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power." This case arose under the 25th section of the judiciary act, and jurisdiction was sought to be maintained upon the assertion that the validity of "an authority exercised [345] under the United States was drawn in question, and the decision was against its validity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion.

In *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, upon a motion to dismiss the writ of error on the ground that no Federal question was involved, it was said by the court (p. 87, L. ed. p. 946, Sup. Ct. Rep. p. 145):

"While there is in the amended and supplemental answer of the city a formal averment that the ordinance No. 909 impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free of charge, the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

Again, in *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353, upon a like motion to dismiss the writ of error, the court said: "It is doubtful whether there is a Federal question in this case. A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgment of state courts,"—citing the two cases just above referred to.

In *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925, it was said by the court (p. 662, L. ed. p. 316, Sup. Ct. Rep. p. 354):

"We cannot accede to the proposition that, because the acts of Congress which authorized the construction of the bridge in question gave the right to build a railroad and toll bridge, the conceded power of the state to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in the circuit court of the United States. Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real, substantive question, on which the case may be made to turn."

Although the above case relates to the jurisdiction of the circuit court, yet, so far as this question is concerned, the principle is the same as to both courts.

[346] *And in *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435, it was held that there must be a real and substantial Federal question existing in order to give this court jurisdiction to review a judgment of a state court, and if the question raised were so unfounded in substance that the court would be justified in saying there was no fair color for the claim that it was of a Federal nature, the writ would be dismissed.

These cases show the rule and its limitations, and where by the record it appears that although a claim of a Federal question had been plainly made, if it also clearly appear that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised was not sufficient to give this court jurisdiction.

We must look at the question submitted by the plaintiff in error in the light of these decisions for the purpose of determining whether there is any fair foundation for the several claims. It must also be remembered that for years prior to and at the time of the formation of this corporation it was the unquestioned law that all corporations were created by the state subject to its implied power, if not stated in the charter, to dissolve the corporation for a misuse or for a nonuse of its corporate powers or obligations. The contract contained in a charter is always subject to this power residing in the state.

Thus in *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650, it was stated by the court (p. 51, L. ed. p. 653):

"A private corporation created by the legislature may lose its franchises by a misuser or a nonuser of them; and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce a forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation."

It is stated by Chancellor Kent, in his *Commentaries* (vol. 2, p. 378, Comstock's ed.), that there were two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for default or abuse of power; the one by *scire facias*, the other by information in the nature of a quo warranto; both these modes of proceeding against corporations being at the instance and on behalf of the government. The

[347] state must be a party *to the prosecution, for the judgment is that the parties be ousted, and the franchises seized into the hands of the government.

In *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681, the court (at page 579, L. ed. p. 1086, Sup. Ct. Rep. p. 683) said:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the state in its original and amended charter will be impaired, if that company be held subject to the operation of subsequent statutes

regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained consistently with the power which the state has, and, upon every ground of public policy, must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the state in such a way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett v. Taylor*, 9 Cranch, 43, 51, 3 L. ed. 650, 653; Ang. & A. Priv. Corp. 9th ed. § 774, note."

In that case the question was whether the company could be dissolved on account of its insolvency. Here one of the questions is whether this company can be dissolved and its charter forfeited on account of the illegal rates charged for supplying water. Upon the question of insolvency in the *Needles Case*, the court (at page 581, L. ed. p. 1037, Sup. Ct. Rep. p. 684) said:

"It is not competent, under existing laws, for this court to inquire whether the state court correctly interpreted the evidence *as [348] to the company's insolvency; nor whether the facts make a case which, under the statute of 1874, required or permitted a judgment perpetually enjoining it from doing any further business. We are restricted by the settled limits of our jurisdiction to the specific inquiry whether the statutes themselves, upon which the judgment below rests, impair the obligation of any contract which the company or its policyholders had with the state, or infringe any right secured by the national Constitution. . . . Did the company, by its charter, have a contract that it should, without reference to the will of the state or the public interests, exercise the franchises granted by the state after it became insolvent and consequently unable to meet the obligations which, as a corporation, under the sanction of the state, it had assumed to its policyholders? Our answer to these questions is sufficiently indicated by what has been said."

The statute in question in the above case, it will be observed, was passed subsequently to the grant of the charter to the corporation. Even there it was held that such a statute did not impair the obligation of the contract contained in such charter. In the case before us there is no subsequent statute.

And again, at page 584, L. ed. p. 1088, Sup. Ct. Rep. p. 686, of the same case:

"It is further contended that the state enactments in question impair the obligation of the contracts which the company has made with its creditors and policyholders. To this it is sufficient to reply in the language of the court in *Mumma v. Potomac Co.* 8 Pet. 281, 287, 8 L. ed. 945, 948, where it was said: 'A corporation, by the very terms and nature of its political existence, is subject to a dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuse and nonuse. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter.' The contracts of policyholders and creditors are not annihilated by such a judgment as was rendered below; for, to [349] the extent that the *company has any property or assets, their interests can be protected, and are protected, by that judgment. The action of the state may or may not have affected the intrinsic value of the company's policies; that would depend somewhat on the manner in which its affairs have been conducted, upon the amount of profits it has realized from business, and upon its actual condition when this suit was instituted; but the state did not, by granting the original and amended charter, preclude herself from seeking, by proper judicial proceedings, to reclaim the franchises and privileges she has given, when they should be so misused as to defeat the objects of her grant, or when the company had become insolvent so as not to be able to meet the obligations which, under the authority of the state, it had assumed to policyholders and creditors."

That the state has power to forfeit the charter of a corporation for an abuse of its privileges is recognized as the law of Louisiana. The Civil Code of that state, article 447, has for many years authorized a proceeding in the nature of a quo warranto to forfeit the charter for misuse, and it has been held that such article applies to every charter granted since its adoption. *Atchafalaya Bank v. Dawson*, 13 La. 497; *State v. New Orleans Gaslight & Bkg. Co.* 2 Rob. (La.) 529, 532.

Again, the claim that the judgment deprives the plaintiff in error of property without due process of law must be looked at with reference to the cases upon the subject as to what constitutes due process of law. Thus, in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, it was held that a statute which required that before an assessment upon land should become effectual it must be submitted to a court of justice, with notice to the owner of the property and an opportunity given him to appear and contest the assessment, constituted due process of law.

In *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372, the question of what amounted to due process

of law was examined, and the proceeding in that case held valid. Mr. Justice Curtis said, in delivering the opinion of the court:

"To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To *this the answer must be twofold. We must [350] examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

In *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478, cited in *Foster v. Kansas ex rel. Johnston*, 112 U. S. 201, 206, 28 L. ed. 629, 697, 5 Sup. Ct. Rep. 8, 97, it was held that a state statute regulating proceedings for the removal of a person from a state office was valid with regard to the Federal Constitution, if it provided for bringing the party proceeded against into court, notifying him of the case he had to meet, giving him an opportunity to be heard in his defense, and for the deliberation and judgment of the court.

And in *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836, it was held that the essential elements of due process of law were notice and an opportunity to defend, and in determining whether those rights were denied the court will be governed by the substance of things, and not by mere form; that the due process clause in the 14th Amendment of the Constitution did not necessitate that the proceedings in a state court should be by a particular mode, but only that there should be a regular course of proceeding, in which notice was given of the claim asserted and opportunity offered to defend against it.

Regarding the impairment of any alleged contract, it must be borne in mind that the constitutional provision refers to state legislation, or to an enactment of a legislative character, though by a municipal corporation, made subsequent to the contract, and which impairs its obligation. *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 30, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

This court does not obtain jurisdiction to review a judgment of a state court because that judgment impairs or fails to give effect to a contract. The state court must give effect to some subsequent statute or state Constitution which impairs the obligation *of the contract, and the judgment of that [351] court must rest on the statute either expressly or by necessary implication. *Mississippi & M. R. Co. v. Rock*, 4 Wall. 177, 180, 18 L. ed. 381, 382; *Mississippi & M. R. Co. v. McClure*, 10 Wall. 511, 19 L. ed. 997; *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414.

These cases are referred to and applied in *Lehigh Water Co. v. Easton*, 121 U. S. 338, 392, 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916.

With these principles in mind, we come to an examination of the questions raised by the plaintiff in error.

The answer to the first question, as to mandamus being the exclusive remedy for illegal rates, is that the state court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by quo warranto at the suit of the state through its attorney general. The claim that by so proceeding there is any impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of law, or a denial of the equal protection of the laws, has no colorable foundation.

An examination of this question, among others, was made by the state court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no Federal question.

As to the second question, there is no state statute subsequent in date to the charter of the water company under or by virtue of which this proceeding was commenced, or which in any way affects the contract of plaintiff in error. The joint resolution of the legislature of Louisiana referred the whole matter to the attorney general for him to bring suit to forfeit the charter or to take such action as he might think proper. It was a simple authority, if any were needed, to present the question to the court, and neither the contract nor any other rights of the parties were in anywise altered by such resolution. The proceeding herein is based solely upon an alleged violation of the terms of the charter by the corporation; that question has been judicially determined after a full investigation by the state courts, and in a proceeding to which the company [352] was a party, and *after a full hearing has been accorded it in such proceeding. This was due process of law, and no Federal question arises from the decision of the court.

The same answer would seem to fit the other questions submitted by the plaintiff in error. They are all based upon the proposition that the judicial determination of these particular questions by the state tribunal was erroneous, and on account of such error the rights of the plaintiff in error, under the Federal Constitution, have been violated. But mere error in deciding questions of this nature furnishes no ground of jurisdiction for this court to review the judgments of a state court.

Assuming that there was a contract, as is claimed by the plaintiff in error, arising by virtue of the passage of the acts of 1877 and 1878, and their acceptance by the corporation, yet still the erroneous decision by the state court, admitting, *arguendo*, that it was erroneous, raises no Federal question. This court does not and cannot entertain juris-

dition to review the judgment of a state court, solely because that judgment impairs or fails to give effect to a contract. *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513, holds that a statute may even affect a prior contract without always impairing its obligation. The judgment must give effect to some subsequent state statute or state Constitution, or, it may be added, some ordinance of a municipal corporation passed by the authority of the state legislature, which impairs the obligation of a contract, before the constitutional provision regarding the impairment of such contract comes into play. See authorities above cited.

The state in this case has secured the forfeiture of the charter of the defendant by means of a judicial decree obtained in a state court which had jurisdiction to give the relief prayed for, and after a hearing of the defendant in the usual manner pertaining to courts of justice. The facts upon which such forfeiture was based have been judicially declared and found, and the defendant has had full opportunity for its defense upon such hearing. The cause of forfeiture was the fact, which was found by the court, that the corporation had charged illegal rates for the water it furnished, and the right to declare such forfeiture, because of a violation by defendant of the conditions *of its charter, was implied in the very grant [353] of the charter itself. The claim therefore that the forfeiture was a violation of the charter, and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the state by such judgment had denied to defendant the equal protection of the laws,—cannot obtain. Whether defendant had so violated its charter was a fact to be decided by the state court. That court had full jurisdiction over the parties and the subject-matter, and its decision of the question was conclusive in this case so far as this court is concerned.

Neither the legislative resolution, nor the action of the attorney general, nor that of the supreme court of the state, nor all combined can as contended for by plaintiff in error, be in anywise regarded as the taking by the state of property without due process of law through the instrumentality of its legislative, its executive, and its judicial departments, either jointly or severally. When analyzed, the whole claim is reduced to the assertion that in enforcing a condition which is impliedly a part of the charter, the state, through the regular administration of the law by its courts of justice, has by such courts erroneously construed its own laws. This court in such a case has no jurisdiction to review that determination.

The assumption that the state court has refused to apply to the contract herein set up the general provisions of the law of contracts prevailing in the state, and that therefore the state has taken through her judiciary the property of the plaintiff in error without due process of law,—is wholly without foundation. If it were otherwise, then any alleged error in the decision by a

state court, in applying state law to the case in hand, resulting in a judgment against a party, could be reviewed in this court on a claim that on account of such error due process of law had not been given him. This cannot be maintained.

That the bondholders were not made parties is also a question which this court cannot review. As is said in the *Needles Case*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681, the corporation, by the very terms of its existence, is subject to a dissolution at the suit of the state on account of any wilful violation of its charter, and the creditors *of the corporation deal with it subject to this power. They must accept the result of the decision of the state court.

Upon a careful review of all the questions, we are of opinion that, within the authorities cited, the claim that any Federal question exists in this record is so clearly without color of foundation that this court is without jurisdiction in this case, and *the writ of error is therefore dismissed.*

LUCIAN WOODWORTH, Frank D. Brown,
and George N. Clayton, *Plffs. in Err. and*
Appts.,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 354-363.)

Appeal—liability on supersedeas bond in foreclosure proceedings—rents and profits collected by judgment debtor after confirmation of sale.

The obligee in a bond which supersedes an order of a circuit court of the United States confirming a sale on foreclosure of real property in Nebraska and directing the immediate execution of a deed and delivery and possession thereof to the purchaser is entitled, on affirmance of the order and execution of the deed, to recover on such bond the rents and profits which accrued and were collected by the judgment debtor after the confirmation of the sale.

[No. 222.]

Argued April 16, 1902. Decided May 5, 1902.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit presenting a question as to whether a recovery may be had, upon a supersedeas bond given in a judicial foreclosure proceeding pending in a court of the United States, of the rents and profits which accrued and were collected by the judgment debtor after the confirmation of the sale of the mortgaged property. *Answered in the affirmative.*

Statement by Mr. Justice **White**:

The question arising for decision in this cause is embodied in the following certificate
185 U. S.

from the United States circuit court of appeals for the eighth circuit:

"The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 27th day of December, 1900, hereby certifies that upon the record on file in said court in the above-entitled causes, wherein Lucian Woodworth, Frank D. Brown, and George N. Clayton are plaintiffs in error, and the Northwestern Mutual Life Insurance Company is defendant in error, and Lucian Woodworth, Frank D. Brown, and George N. Clayton are appellants, and the Northwestern Mutual Life Insurance Company is appellee, and which *causes are now pending before this court on writ of error to and appeal from the circuit court of the United States for the district of Nebraska, the following facts appear, namely:

"On August 26, 1896, the Northwestern Mutual Life Insurance Company filed its bill of complaint in the circuit court of the United States for the district of Nebraska against Lucian Woodworth and others to foreclose a mortgage given by Woodworth and his wife to said company, upon certain real estate situated in the state of Nebraska. A decree on said bill was entered on December 3, 1896, in said circuit court, foreclosing the mortgage, directing that a master in chancery of the court sell the premises, and upon confirmation of the sale by the court execute a deed to the purchaser, and ordering that the purchaser of the premises at said sale be put in possession thereof, and that any of the parties to said cause who might be in possession of said premises, or any person claiming under them or either of them, should deliver possession to the purchaser on production of the master's deed of said premises and a certified copy of the order confirming the report of said sale, after such order had become absolute. On February 14, 1898, said real estate was sold by the master under said decree, and was purchased at said sale by the Northwestern Mutual Life Insurance Company for \$39,152, a sum less than the amount of the debt secured by the mortgage and the costs in the suit. The master made his report of sale to the court on February 15, 1898. On March 15, 1898, said circuit court confirmed said report of sale, directed that the master convey said real estate to the purchaser at said sale, awarded a writ of possession to put said purchaser in possession thereof, and rendered a deficiency judgment for the sum of \$2,696.90 and interest in favor of the Northwestern Mutual Life Insurance Company and against said Woodworth. On March 30, 1898, said Woodworth was allowed an appeal from this order of confirmation to the United States circuit court of appeals for the eighth circuit, and thereafter, on April 8, 1898, he filed his appeal bond in the sum of \$5,500 with Frank D. Brown and George N. Clayton as sureties thereon, which bond was conditioned for the payment of 'all damages and costs which it (the Northwestern Mutual Life Insurance Company) *may incur by reason or on account of said appeal,' and worked a supersedeas of the order of

confirmation. The United States circuit court of appeals on January 24, 1899, affirmed said order of confirmation of sale, and on March 29, 1899, its mandate was duly issued to, and filed in, said circuit court. On June 19, 1899, the deficient judgment and the costs taxed in said cause in the United States circuit court of appeals were fully paid and satisfied. On September 16, 1899, the defendant in error, the Northwestern Mutual Life Insurance Company, filed its petition in said circuit court against Lucian Woodworth, and the sureties on said appeal bond, Frank D. Brown and George N. Clayton, alleging, among other things, that the possession and use of said real estate was withheld from said company by reason of the superseding of the order of March 15, 1898, during the pendency of the appeal therefrom, that the value of such use and possession during the pendency of said appeal amounted to \$3,750, and praying that Woodworth and the sureties Brown and Clayton be cited to appear and show cause why judgment should not be summarily entered against them for said \$3,750 and interests and costs. On September 16, 1899, an order to show cause against said Woodworth, Brown, and Clayton was made on said petition as prayed for therein, and on October 2, 1899, they filed their showing in resistance to said petition, alleging that 'damages for the rents and profits of the premises, or use and detention thereof pending appeal, are not recoverable on a supersedeas bond, and that the bond in question was not given as security, or for the payment of rents and profits, or the use or detention of the property pending appeal,' and praying for the dismissal of said petition. On December 9, 1899, said circuit court entered a judgment and decree against the plaintiffs in error, Woodworth, Brown, and Clayton, as prayed for in said petition. Afterwards, in due season, to wit, on January 31, 1900, said last-named judgment and decree having been rendered on December 9, 1899, the record in the proceedings on said petition was removed by writ of error and also by appeal to the United States circuit court of appeals for the eighth circuit, where it still remains, the cause being as yet undecided.

[357] *And the said United States circuit court of appeals hereby certifies that to the end that it may properly decide said case, it desires the instruction of the Supreme Court of the United States upon the following question or proposition of law arising therein which is duly raised and presented by the record in said case, said question being as follows:

"Is the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser, entitled, after that order has been affirmed on the appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of

the real estate by the supersedeas bond and the appeal in which it was allowed?"

Mr. John N. Baldwin argued the cause and filed a brief for plaintiffs in error and appellants:

The case of *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. Rep. 911, is decisive of the question certified to this court.

The Sydney, 47 Fed. 260; *National Bank v. McGahan*, 45 Fed. 280; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 1 L. R. A. 397, 36 Fed. 221.

A mortgage of real property in the state of Nebraska does not convey any title or vest any estate before or after conditions broken, but merely creates a lien on the property, and the mortgagor of the real property retains the legal title and is entitled to the possession thereof until confirmation of a sale under a decree of foreclosure of the mortgage and a deed made pursuant thereto.

Orr v. Broad, 52 Neb. 490, 72 N. W. 850.

No distinction can be made between an appeal from an order of confirmation of sale and an appeal from a decree. The owner of property is entitled to the rents and profits of the same until final transfer of the title by the master's deed.

Philadelphia Mortg. & T. Co. v. Gustus, 55 Neb. 435, 75 N. W. 1107. See also *Huston v. Canfield*, 57 Neb. 345, 77 N. W. 763; *Clark v. Missouri, K. & T. Trust Co.* 59 Neb. 53, 80 N. W. 257.

A mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession.

Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420.

The mortgagor's legal title was not and could not be divested, and the title did not vest in the mortgagee or the purchaser at the sale until the deed was delivered.

Clason v. Corley, 5 Sandf. 447; *Whalin v. White*, 25 N. Y. 462; *Harrigan v. Golden*, 41 App. Div. 423, 58 N. Y. Supp. 726; *Mitchell v. Bartlett*, 51 N. Y. 447; *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405; *Orr v. Broad*, 52 Neb. 490, 72 N. W. 850; *Clark v. Missouri, K. & T. Trust Co.* 59 Neb. 53, 80 N. W. 257.

It has been distinctly held that during the pendency of an appeal from the order of confirmation, and until the affirmance of the order of the lower court, redemption can be made.

Philadelphia Mortg. & T. Co. v. Gustus, 55 Neb. 435, 75 N. W. 1107.

Mr. Howard Kennedy, Jr., argued the cause and filed a brief for defendant in error and appellee:

In Nebraska, upon confirmation of the sale, the ownership of the premises and the incidents of ownership, including the right to the rents, issues, and profits, become in equity vested in the purchaser, and upon the subsequent execution and delivery of the master's deed the title thereby conveyed re-

lates back to the date of the confirmation of the sale.

Clark & L. Invest. Co. v. Way, 52 Neb. 204, 71 N. W. 1021.

The general equitable rule goes even farther, and carries the title back by relation to the date of the sale, so as to award to the purchaser the intermediate rents.

Lathrop v. Nelson, 4 Dill. 194, Fed. Cas. No. 8,111; *Anson v. Towgood*, 1 Jac. & W. 637; *Vesey v. Elwood*, 3 Dru. & War. 74; *Taylor v. Cooper*, 10 Leigh, 317, 34 Am. Dec. 737; *Wagner v. Cohen*, 6 Gill, 97, 46 Am. Dec. 660; *Stevenson v. Hancock*, 72 Mo. 612; *Wimpfheimer v. Prudential Ins. Co.* 56 N. J. Eq. 585, 39 Atl. 916; *Jashenosky v. Volrath*, 59 Ohio St. 540, 53 N. E. 46.

The purchaser's title becomes effective when his right to a deed accrues.

Fuller v. Van Geesen, 4 Hill, 171; *Nellis v. Lathrop*, 22 Wend. 121, 34 Am. Dec. 285.

The confirmation of the sale establishes absolutely the purchaser's right to a deed. The order itself directs the immediate delivery of the deed and of the possession of the premises to the purchaser. Even without a specific direction to that effect the purchaser would be entitled to the possession of the premises.

Horn v. Volcano Water Co. 18 Cal. 141; *Kershaw v. Thompson*, 4 Johns. Ch. 609.

A supersedeas bond in an ejectment case covers rents and profits accruing pending the proceedings in error.

St. Louis Smelting & Ref. Co. v. Wyman, 22 Fed. 184; *Tarpey v. Sharp*, 12 Utah, 383, 43 Pac. 104; *Re Gleeson*, 192 Pa. 279, 43 Atl. 1101.

Supersedeas bonds given in the state courts, conditioned for the payment of "all damages," cover rents and profits accruing pending an appeal or error proceedings in an action for the recovery of real estate or the possession thereof.

Cahall v. Citizens' Mut. Bldg. Asso. 74 Ala. 539; *Hays v. Wilstach*, 101 Ind. 100; *Green v. Sternberg*, 15 Mo. App. 32; *Turner v. Johnson*, 20 Ky. L. Rep. 2009, 50 S. W. 675.

Where, by writ of error and suspension bond (conditioned to answer all damages and costs), the enforcement of a judgment of ouster from office was prevented, and until the writ was dismissed the relator was excluded from the office and deprived of the salary annexed to it, the amount of the salary received by the defendant during the period of such deprivation constituted the measure of the damages which the plaintiff was entitled to recover upon the suspension bond.

United States use of Crawford v. Addison, 6 Wall. 291, 18 L. ed. 919.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The question propounded is to be considered in view of the following facts: The property affected by the sale under foreclosure was situated in the state of Nebraska, the bond in question was given in a judicial

proceeding in a court of the United States, and—as stated by counsel for plaintiff in error in argument—upon the affirmance of the order of confirmation by the appellate court, a deed was issued to the purchaser at the sale under foreclosure, and demand was made by him for payment of the rents, issues, and profits sought to be recovered by the action at bar.

As said by this court in *Nalle v. Young*, 160 U. S. 624, 637, 40 L. ed. 560, 564, 16 Sup. Ct. Rep. 420, in an equity foreclosure in a circuit court of the United States, the requirements of the state law should be complied with and *the forms of proceedings [358] thereby prescribed pursued as nearly as practicable. This appears to have been done in the foreclosure proceedings under review, the decree of confirmation of the sale not purporting to vest title in the purchaser, but containing a direction for the execution and delivery of a deed. A reference to the statutes of Nebraska, regulating sales under foreclosure, and to the decisions of the courts of that state, will conduce to an ascertainment of the nature of the right or title, if any, vested in a purchaser under a sale thus confirmed.

By section 497a of the Code of Civil Procedure of Nebraska, it is provided that the owner of any real estate against which a decree of foreclosure has been rendered, or upon which an execution has been levied to satisfy a judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be finally confirmed. Section 498 provides for the examination and confirmation of such sale by the court. Section 499 provides that, upon the confirmation of a sale made of real estate sold on execution, the sheriff or other officer who made such sale shall make to the purchaser of such real estate as good and sufficient a deed of conveyance for the property or land sold as the person against whom such writ of execution was issued could have made of the same at the time the land became liable to the judgment, or at any time thereafter. And § 500 provides, among other things, that the deed so made shall vest in the purchaser as good and perfect an estate in the premises as was vested in the execution debtor at or after the time when the land became liable for the satisfaction of the judgment.

Construing these sections of the Code, the supreme court of Nebraska, in *Yeazel v. White* (1894) 40 Neb. 432, *sub nom.* *Yeazel v. Einspahr*, 24 L. R. A. 449, 58 N. W. 1020, held that the owner of real estate sold on execution retains the legal title thereto, and is entitled, in his own right, to the possession, rents, profits, and usufruct of such real estate, until a final confirmation of the sale. In the course of the opinion the court said:

"In *State Bank v. Green*, 10 Neb. 130, 4 N. W. 942, Lake, J., speaking for this court, said: 'Under our law governing sales of real property on execution, the title of the purchaser depends entirely upon *the sale be- [359] ing finally confirmed, and until this is done the rights of the execution debtor are not

certainly divested.' And in *Lamb v. Sherman*, 19 Neb. 681, 28 N. W. 319, Maxwell, Ch. J., speaking for this court, on that subject, said: 'A purchaser at execution sale of real estate upon the payment of the purchase money and confirmation of the sale becomes the equitable owner of the property, and in a proper case may compel the issuing of a sheriff's deed to himself.'

In *Clark & L. Invest. Co. v. Way* (1897) 52 Neb. 204, 71 N. W. 1021, the following among other facts were presented for the consideration of the court: A junior mortgagee, one of the defendants in a foreclosure suit instituted by a prior mortgagee to foreclose such prior mortgage as respected unpaid interest and the amount of certain taxes which had been paid by the prior mortgagee, became the purchaser at the sale made under the decree of foreclosure. The sale was confirmed by the court. Thereupon the mortgagor defendants appealed from the order of confirmation of sale, but, after the case was pending in the appellate court for about a year, the appeal was voluntarily dismissed. Thereafter, upon the hearing of a motion to require the purchaser to complete his bid, it was held—and the decision in this particular was affirmed by the supreme court of Nebraska—that on the dismissal of the appeal from the order confirming the sale the "title" of the purchaser related back, for all purposes, at least to the time of such confirmation, and the purchaser from that time was the owner of the property and liable for subsequent taxes and interest on the prior mortgage encumbrance. Further, it was said by the court: "Undoubtedly the purchaser is entitled to an accounting for rents in such a case from the time of confirmation."

[360] The authorities just reviewed seem to be decisive of the proposition that by the local law of Nebraska, in a case like that at bar, where, upon confirmation of a sale under a decree of foreclosure, the sale is treated as perfected, credit is given to the purchaser mortgagee upon the mortgage indebtedness then due, and judgment passes for a deficiency, but the delivery of a deed is prevented by the prosecution of an unfounded appeal from the order confirming the sale, the affirmation by the appellate court of the order of confirmation of the sale and the deed subsequently executed vest in the purchaser, by relation, as of the time of the confirmation of the sale, as well the legal as the equitable title to the land, with the right to the rents, issues, and profits which accrued after the confirmation of the sale. The cases of *Orr v. Broad*, 52 Neb. 490, 72 N. W. 850; *Clark v. Missouri, K. & T. Trust Co.*, 59 Neb. 53, 80 N. W. 257, and *Huston v. Canfield*, 57 Neb. 345, 77 N. W. 763, are, however, cited as sustaining a contrary doctrine to that just announced, but, on careful examination, they will be found not to do so. In each case the right of a mortgagor to the possession of the land and the rents and profits thereof was declared to continue until the confirmation of a sale on foreclosure. True, in the first two cases, the right of a purchaser at a sale under execution of a debtor's interest in

land, encumbered by mortgage, to the possession of the land and the rents and profits, as against a mortgagee, was in effect declared to be dependent upon the acquisition of the legal title, by the delivery to the purchaser of a deed of the premises, following the confirmation of the sale. In each of the cases, however, a deed had regularly issued, and there was no claim that the mortgagor or debtor had wrongfully interfered with the passing of the legal title. There was consequently no occasion for considering or applying the doctrine of relation.

It is, however, strenuously insisted that in *Philadelphia Mortg. & T. Co. v. Gustus*, 55 Neb. 436, 75 N. W. 1107, broad expressions were used in the opinion announced by the court which do not harmonize with the reasoning contained in the opinion in *Clark & L. Invest. Co. v. Way*. But we do not need to pass on this contention. The point for decision in the *Gustus Case* was whether, under the statutes of Nebraska, the judgment debtor possessed the right to redeem from a foreclosure sale during the pendency of an appeal from the order of confirmation of the sale, and the Nebraska court, in holding that the right to redeem might be exercised during the pendency of the appeal, said:

"The appeal and bond, if they did not vacate the order of the district court, superseded, suspended, or rendered it inoperative. The purchaser acquired no rights, and the applicant was not divested of his title to [361] and rights in the land. *Tootle v. White*, 4 Neb. 461; *State Bank v. Green*, 8 Neb. 297, 1 N. W. 210; *State Bank v. Green*, 10 Neb. 133, 4 N. W. 942. All things remained as before the sale and subsequent order of the district court, and will so remain and exist until a decision in and by this court of the matter appealed. The order of the district court, by the perfection of the appeal, became ineffectual as to all other purposes for which it was made, and it certainly does not seem unfair to say that it was not of force or effect as against the right to redeem, nor does it appear unwarranted to construe the section of the Code in its reference to time to have indicated the date when the order shall become forceful and of full operation, which it cannot until this court has so decreed."

Nowhere, however, in the opinion was any allusion made to the prior decision in *Clark & L. Invest. Co. v. Way*, which we are constrained to think would have been done if the grounds for the decision in the latter case and the reasoning of the opinion in that case were deemed to be destructive of the ruling made in the earlier case. The court in the *Gustus Case* was dealing with a judgment debtor who was seeking the benefit of a remedial statute. We entertain no doubt that if the supreme court of Nebraska was called upon to determine whether or not a judgment debtor who had taken an unfounded appeal might rightfully retain the rents and profits which he had collected while in possession of the property during the pendency of such appeal, it would, in order to prevent injustice, apply the doctrine of relation.

tion, as was done in *Clark & L. Invest. Co. v. Way*, and hold that the affirmance of the order of confirmation of the sale related back and gave efficacy to the original order of confirmation, as of its date, and vested in the purchaser, from that time, at least, the equitable title to the land sold and an equitable right to the thereafter accruing rents and profits.

[362] The claim in the case at bar is for the rents and profits of the land, which accrued and were collected by the mortgagor after the entry of the order of confirmation of the sale. Upon general principles, independent of the decisions of the courts of Nebraska, we would be constrained to hold that, under the circumstances present in the case at bar, as we have heretofore *detailed, the purchaser acquired, as against the mortgagor, by relation, both the legal and equitable title to the land purchased,—at least as of the date of the order of confirmation of the sale. This being the case, we come to consider the question as to whether recovery may be had upon a supersedeas bond given in a judicial foreclosure proceeding pending in a court of the United States, of the rents and profits which accrued and were collected by the judgment debtor after the confirmation of the sale of the mortgaged property.

It has been strenuously urged that a negative answer to the question just stated is rendered necessary by the decision of this court in *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. Rep. 911. This contention is based upon the following grounds: (1) That no distinction can logically be made between an appeal from an order confirming a sale had under a decree in foreclosure, as in the case at bar, and an appeal from a decree ordering a sale, as in the *Kountze Case*; and, (2) that the mortgagor, after the sale of the land under a decree in foreclosure, is the owner of the rents and profits of such land until final approval by the court of the sale and the execution and delivery of a deed by the master. Of course, if the assumption existing in the second ground be correct, that is, that the mortgagor, despite the confirmation of the sale, is entitled in his own right to the rents and profits subsequently accruing, there would be plausibility in the claim that there was no logical distinction between an appeal from a decree of sale and an appeal from an order of confirmation of the sale. But the assumption in question, as we have shown, is not well founded, and this being the case, it results that there is a substantial distinction in the character of the two classes of decrees. In the one case, the title to the land, both legal and equitable, continues in the mortgagor; in the other, at least the equitable title to the land and its rents, issues, and profits vested in the purchaser by the sale under the decree at the time of the confirmation of such sale. In this aspect, following the reasoning in the *Kountze Case*, the appropriation by the mortgagor, during the pendency of a wrongful appeal by such mortgagor from the order confirming the sale, of the rents, issues, and profits of the land, which equitably *belonged

to the purchaser, was "damage" within the meaning of the statute and the condition of the bond. True, in the *Kountze Case* the mortgagee purchaser was denied the right to recover the rents and profits which had been collected by the mortgagor intermediate the decree of sale and the actual sale of the property. But this was because the appeal was from a decree ordering a sale, and it was held the mortgagor was not divested of the right to collect and retain the rents and profits of the land before a final determination of a right to sell and a sale made accordingly. The taking by the mortgagor of that which belonged to him, and not to the mortgagee, it was decided did not constitute an injury to the latter. The court, however, in its reasoning, made plain the fact that where, as in the case at bar, the real owner of the rents and profits of real estate, in whom the legal as well as equitable title had become vested before action brought upon the bond, was the party for whose benefit the bond on appeal was given, and the effect of the giving of such bond was to enable the mortgagor, the principal in such bond, to appropriate rents, issues, and profits of the land during the pendency of the appeal, which equitably belonged to the purchaser, that appropriation constituted "damage" to the obligee in the bond, within the meaning of the condition for payment of "all damages and costs which it may incur by reason or on account of said appeal."

The question certified must be answered in the affirmative.

And it is so ordered.

Mr. Justice Harlan and Mr. Justice Brewer took no part in the decision of this cause.

*TRAVELERS' INSURANCE COMPANY, [364]
Plff. in Err.,
v.

STATE OF CONNECTICUT.

(See S. C. Reporter's ed. 364-372.)

Constitutional law—discrimination—taxation of nonresident stockholders.

No unconstitutional discrimination against nonresident stockholders in domestic corporations is made by Conn. Pub. Acts 1897, chap. 153, § 2, providing for the assessment of such stock at its market value, with no deduction on account of real estate held by the corporation, although provision for such deduction in assessing resident stockholders is made by Conn. Gen. Stat. § 3836, as amended by Pub. Acts 1889, chap. 63, since nonresident stockholders pay no local taxes, but simply contribute so much to the general expenses of the state, while the resident stock-

NOTE.—As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and note.

As to the validity of class legislation—see *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and note; and *State v. Loomis* (Mo.) 21 L. R. A. 789, and note.

holders pay no tax to the state, but only to the municipality in which they reside.

[No. 219.]

Argued April 14, 15, 1902. Decided May 5, 1902.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a judgment sustaining a demurrer to an answer in an action by the State of Connecticut to recover taxes assessed on nonresident stockholders in a domestic corporation. *Affirmed.*

See same case below, 73 Conn. 255, 47 Atl. 299.

Statement by Mr. Justice **Brewer**:

Section 2 of chapter 153 of the Public Acts of Connecticut, passed in 1897, reads as follows:

"The cashier or secretary of each corporation whose stock is liable to taxation, and not otherwise taxed by the provisions of this title, shall, on the 1st day of October, annually, or within ten days thereafter, deliver to the comptroller a sworn list of all its stockholders residing without this state on said day, and the number and market value of the shares of stock therein then belonging to each; and shall, on or before the 20th day of October, annually, pay to the state $1\frac{1}{2}$ per cent of such value; and if any such cashier or secretary shall neglect to comply with the provisions of this section he shall forfeit to the state \$100, in addition to said $1\frac{1}{2}$ per cent so required to be paid."

This method of assessment and taxation of nonresident stockholders in insurance corporations has been in force in Connecticut since 1866, although at first the rate of tax was only 1 per cent. Pub. Acts 1866, chap. 29.

By § 1 of chap. 50 of the Public Acts of 1899 it is provided:

[365] "Section 1923 of the General Statutes is hereby amended to read as follows: When not otherwise provided in its charter, the stock of every corporation shall be personal property, and be transferred only on its books in such form as the directors *shall prescribe; and such corporation shall at all times have a lien upon all the stock owned by any person therein, for all debts due to it from him; and any corporation desiring to enforce such lien may give notice to such stockholder, his executor or administrator, and if there be none, his heir at law, that unless he shall pay his indebtedness to said corporation within three months it will sell said stock; and such corporation may prescribe by its by-laws the manner of giving notice required by this section, but the notice of sale shall in no case be given until the liability has become fixed."

The original section in the General Statutes, enacted in 1888, is precisely the same as the first half of the amended section, and secured to the corporation a lien upon the stock for debts due to it by the stockholder, the amendment consisting in the addition of the last half, which provides the method of enforcing such lien.

Section 3836 of the General Statutes, as amended by chapter 63 of the Public Acts of 1889, reads:

"Sec. 3836. Shares of the capital stock of any bank, national banking association, trust, insurance, turnpike, bridge, or plank-road company, owned by any resident of this state, shall be set in his list at its market value in the town in which he may reside; but so much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, shall be deducted from the market value of its stock, in its returns to the assessors."

This action was commenced by the state of Connecticut to recover of the Travelers' Insurance Company, under the first of the statutes quoted, taxes due for the year 1898, from nonresident stockholders. The defendant answered, alleging that its capital stock consisted of 10,000 shares, of which 8,201 were owned by residents and 1,799 by non-residents of the state; that it was the owner of a large amount of real estate on which it had been assessed and had paid a tax, and adding these averments:

"7. The market value of the stock of the defendant company on the 1st day of October, 1898, was \$250 per share.

"8. All of the said resident owners of said stock were assessed *upon the stock owned by [366] them respectively on the 1st day of October, 1898, at an assessed valuation equal to the said market value of said stock less a large deduction therefrom by reason of the company's said investments in real estate.

"9. The amount per share sought to be collected from the defendant in this action as a tax upon the stock owned by said non-resident shareholders is far in excess of the amount per share paid and required to be paid as a tax by the several resident shareholders aforesaid on the stock owned by them on the said 1st day of October, 1898."

A demurrer to this answer was sustained and judgment entered for the state, which was affirmed by the supreme court of the state (73 Conn. 255, 47 Atl. 299), and thereupon the case was brought here on error.

Messrs. William R. Matson and Lucius F. Robinson argued the cause and filed a brief for plaintiff in error:

The deduction allowed in the assessment of shares of residents is clearly a privilege and immunity within the meaning of U. S. Const. art. 4, § 2.

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Campbell v. Morris*, 3 Harr. & M'H. 554; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Oliver v. Washington Mills*, 11 Allen, 268.

A statute which allows a deduction from the appraised value of the personal estate of a resident of an amount equal to the excess of his debts over the aggregate amount of his nontaxable bonds, stocks, and deposits, but which gives a nonresident's property circumstanced the same no deduction, "provides an immunity from taxation to a resident that it denies to a nonresident, discriminates in favor of a resident

and against a nonresident, and denies to citizens of other states an immunity given to our own citizens."

Sprague v. Fletcher, 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239.

A state cannot refuse a peddler's license to a citizen of another state upon the same terms that it grants licenses to its own citizens.

Bliss's Petition, 63 N. H. 135.

The statute of a state taxing the slaves of nonresidents in double the amount at which those of a resident were taxed has been held unconstitutional.

Wiley v. Parmer, 14 Ala. 627.

The imposition of a higher tax on bank stock owned by a nonresident than a resident would be obliged to pay would be in conflict with the provision of the Federal Constitution that the citizens of each state shall be entitled to the privileges and immunities of citizens of the several states.

Farmington v. Downing, 67 N. H. 441, 30 Atl. 345.

One very plain and unquestionable immunity is exemption from any tax, burden, or imposition under state laws, as a condition to the enjoyment of any right or privilege under the laws of the United States.

Cooley, Const. Lim. 6th ed. p. 489.

A state has no right to attempt to give priority to the claims of its citizens as individual creditors over the claims of individual creditors, citizens of other states.

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165. See also *Maynard v. Granite State Provident Asso.* 34 C. C. A. 438, 92 Fed. 435.

The place of residence, within the meaning of the tax statutes of the state, is the place of domicile, the place where the taxpayer has his permanent home.

Hartford v. Champion, 58 Conn. 268, 20 Atl. 171.

A statute giving the shareholders of a corporation resident in Michigan preference over shareholders resident without that state discriminates against citizens of other states who are shareholders.

Maynard v. Granite State Provident Asso. 34 C. C. A. 438, 92 Fed. 435.

Property rights in shares of a state corporation are not excepted from the constitutional protection to citizens of other states.

Ibid. See also *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

The provision of the 14th Amendment forbidding any state to deny to any person within its jurisdiction the equal protection of the laws is applicable to arbitrary and unequal tax exactions.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722; *Santa Clara County v. Southern* 185 U. S.

P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

All persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The same means and methods must be applied impartially, so that the law shall operate equally and uniformly upon all persons in similar circumstances.

Kentucky Railroad Tax Cases, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

The right of a state to distinguish, select, and classify objects of legislation is not without limitations.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The privileges guarded by the Constitution include "the right to take, hold, and possess property of every kind."

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Maynard v. Granite State Provident Asso.* 34 C. C. A. 438, 92 Fed. 435.

The amount of discrimination is not to be confounded with the important principle involved.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Mr. Charles Phelps argued the cause and filed a brief for defendant in error:

Equality of taxation is not a privilege or immunity.

State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 669; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Merchants' & Mfrs'. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

So long as the state does not deny to any persons who come within its jurisdiction equal treatment in the matter of taxation with its own citizens similarly situated, its laws are not obnoxious to the civil rights act nor to the provisions of the Constitution of the United States.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Travelers Ins. Co.* 70 Conn. 590, 40 Atl. 465.

"Privileges and immunities" are the civil rights belonging to all citizens of the

state; rights which are general and fundamental.

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Slaughter-House Cases*, 16 Wall. 76, 21 L. ed. 408; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

Such are protection by the government the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Slaughter-House Cases*, 16 Wall. 76, 21 L. ed. 408.

"Privileges and immunities" are the rights which the state governments were created to establish and secure. Special privileges enjoyed by citizens in their own state are not secured by the provisions of § 2, ¶ 1, of article 4 of the Constitution.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.

The 14th Amendment did not increase the "privileges and immunities" of the citizen of a state; it only gave him an additional guaranty for the protection of those he already had.

Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

Section 2, article 4, of the Constitution was intended "to confer on the citizens of the several states a general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances."

Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

One invokes the aid of the 14th Amendment as a citizen of the United States when the rights which he alleges to have been infringed are not based upon national citizenship.

Ibid.

Neither article 4 nor the 14th Amendment of the Constitution secures to citizens of the several states or of the United States absolute uniformity in taxation.

Davidson v. New Orleans, 96 U. S. 105, 24 L. ed. 620; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 504, 22 L. ed. 195; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

The simple fact that a tax is excessive, or that it may bear more heavily upon one class of corporations than upon another, does not thereby render the same unconstitutional.

Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482.

Mr. Justice **Brewer** delivered the opinion of the court:

The single question presented for our consideration is whether this legislation of the

state of Connecticut in respect to the taxation of the shares of stock in a local corporation held by nonresidents is in conflict with ¶ 1 of § 2 of article 4 of the Federal Constitution, or the 14th Amendment thereto. It is alleged that there is such discrimination between resident and nonresident stockholders as works a denial of the equal protection of the laws, and to the prejudice of citizens of other states. The stock of the nonresident stockholder is assessed at its market value, without any deduction on account of real estate held by the corporation. The stock of the resident stockholder is assessed at its market value, less the proportionate value of all real estate held by the corporation upon which it has already paid a tax. As thus stated, there would appear to be a wrongful discrimination, and that the nonresident stockholder was subjected to a larger burden of *taxation than the resi- [367] dent stockholder, and this, not as a result of the action of any mere ministerial officers in making assessments, but by reason of the direct command of the statute to include the real estate in the valuation in the one case and to exclude it in the other.

But this apparent discrimination against the nonresident disappears when the system of taxation prevailing in Connecticut is considered. By that system the nonresident stockholder pays no local taxes. He simply pays a state tax,—contributes so much to the general expenses of the state. While, on the other hand, the resident stockholder pays no tax to the state, but only to the municipality in which he resides. In other words, the state imposes no direct taxes for its benefit upon the property belonging to residents, but collects its entire revenue from corporations, licenses, etc. The rate of state tax upon the nonresident stockholder is fixed, 15 mills on a dollar, applying equally to all, while the rate of local taxation varies in the several cities and towns, according to the judgment of their local authorities as to the amount necessary to be raised for carrying on the municipal government. Obviously the varying difference in the rate of the tax upon the resident and the nonresident stockholders does not invalidate the legislation. How, then, can it be that a difference in the basis of assessment is such an unjust discrimination as necessarily vitiates the tax upon the nonresident? The resident stockholder does not pay the 15 mills to the state which is demanded of the nonresident, and the nonresident stockholder does not pay to any locality the sum, greater or less than 15 mills, which may be imposed by the authorities of that locality. In respect to this the supreme court, in its opinion, said (p. 281, Atl. p. 308):

"It is unnecessary to consider whether, or under what circumstances, the limitations imposed by a state in respect to the mutual relations of members of its corporations in the matter of taxation may transform legislation for that purpose into a denial of rights secured to citizens of other states; it is enough for present purposes that a mere inequality in the stress of taxation cannot produce that effect.

[338] "But the claim that in this case the inequality operates*against nonresidents or citizens of other states as a class is unfounded. While the admissions of the demurrer assume the tax in respect to the defendant for this year to bear more heavily on nonresidents than on residents, the general effect of the law is matter of common knowledge. The average rate of taxation for municipal purposes for the 168 towns approximates 15 mills, which is the rate for the special tax imposed in respect to nonresident shares; but the average rate for municipal taxation in the ten larger towns (representing much more than half the grand list of the state) is about 21 mills. The clear purpose of the legislature in fixing the mode of valuation for the property subject to a single rate for special taxation, and the valuation for the property subject to widely varying rates for municipal taxation, was to approximate a general equality in the burden that should fall on the two classes of property; and it well may be that the rule objected to in respect to the valuation of the interests of resident shareholders in corporations investing in taxable land still leaves, as a whole, a lighter burden of contribution resting upon nonresident shareholders."

In other words, the state, dealing with the question of taxation of the shares of stock in a local corporation, found two classes; one, shares held by residents, and the other, those held by nonresidents. It was believed that a resident in a city or town, enjoying all the benefits of local government, should be taxed for the expenses of that government upon all the property he possessed, whether that property consisted in part or in whole of shares of stock. On the other hand, the nonresident, enjoying little or none of the benefits of local government, was exempted from taxation on account of the expenses of such local government. At the same time it was not right that he should escape all contribution to the support of the state which created and protected the corporation and the property of all its stockholders, and so a tax was cast upon the nonresident stockholder for the expenses of the state. This, with kindred taxes, has been found sufficient to pay the running expenses of the state government. The resident is not called upon to pay any of the expenses of the state, but only [369] to bear his proportional*share of those of the municipality. The nonresident is called upon to pay no share of the expenses of the municipality, but only to contribute to the support of the state.

The legislature, with these inequalities before it, aimed, as appears from the opinion of the supreme court, to apportion fairly the burden of taxes between the resident and the nonresident stockholder; and the mere fact that in a given year the actual workings of the system may result in a larger burden on the nonresident was properly held not to vitiate the system, for a different result might obtain in a succeeding year, the results varying with the calls made in the different localities for local expenses. If it be said that equality would be secured by imposing upon the resident stockholder a

uniform tax for local purposes of 15 mills, without any reduction on account of real estate held by the corporation, a gross inequality might result in many towns between the resident stockholder and other taxpayers of that locality, in that they might be called upon to pay much more than he. On the other hand, if it be contended that inequality might be avoided by holding the sins of nonresident stockholders to be that of the city in which the corporation has its principal office (in this case Hartford), then unjust discrimination between that city and other localities would follow, in that to the one was given the total benefit of property which in fact belonged to parties living outside of the state. So, while there may result from year to year a variance in the amount of the burden actually cast upon nonresidents as compared with that cast upon residents, yet it is also true that a like inequality will exist between residents of different localities in the state by reason of the different rates of taxation in those localities. You cannot put one resident against one nonresident stockholder, and by a comparison of their different burdens determine the validity of the legislation, any more than you can place a stockholder resident in one municipality over against a stockholder resident in another municipality, and by comparison of their different burdens determine the validity of the tax law in respect to resident stockholders. It does not seem possible to adjust, with unerring certainty, all the varying burdens which grow out of the fact that some of the stock of "the various [370] state corporations is held outside of the state and some within the state, and the latter in separate municipalities with different rates of taxation.

It may also be said that, apparently, equality would be more certainly secured by making the assessment in each case upon the market value of the stock, diminished by the value of the real estate upon which taxes have been paid. But here again a difficulty is presented. Many of the taxable corporations own no real estate, and much of the real estate which belongs to corporations who have investments therein is located outside of the state. According to the returns made by this particular corporation, out of a holding in real estate amounting in value to \$1,778,662.05, upon which it had paid taxes, that which was situated in Connecticut was valued at only \$137,965.81. Now, it may be true that as to the real estate held outside of the state the title and possession of the corporation are protected, not by Connecticut, but by the state in which such real estate is found. But can it be said that there was any unjust discrimination between the different nonresident stockholders in the various corporations, or even between all the nonresident and resident stockholders, when the state, ignoring this matter of real estate, and considering that the corporation as a state institution was protected in all its corporate rights by the state, provided that nonresident stockholders should pay upon the market value of their investments in the property of that corporation? In respect to

this the supreme court of Connecticut said (p. 280, Atl. p. 308):

[371] "This change as to the valuation of the property and franchise of a corporation owning taxable real estate, for the purposes of municipal taxation, may produce in some instances more inequality, may be uncalled for or unwise (upon such considerations the action of the legislature is conclusive), but it certainly does not transmute the legislation in question from permissible taxation to a denial to citizens of other states of that common right in the use and enjoyment of property secured to our own citizens. The plan of taxation remains the same; after the change in valuation, as before, it is simply a mode of securing to towns for purposes of municipal taxation *the benefit of that part of the corporate property represented by shares owned by their inhabitants, and subjecting to state taxation that part represented by shares owned by nonresidents, and which cannot be thus subjected to municipal taxation. Here is no hidden purpose to attack the rights of citizens of other states,—no evidence that the underlying intention and real substance of the legislation is to hinder citizens of other states in acquiring and holding property. The alleged hindrance is confined to those who buy stock in corporations paying taxes on real estate. Only a small number of the corporations within the scope of the act own taxable real estate to any appreciable amount. Can it be said that the law regulating the taxation of half a dozen different kinds of corporations is really intended to hinder citizens of other states from owning stock in the small number of these corporations that may from time to time invest in taxable real estate; or, that the real substance of the law changes from legitimate taxation to hostile and forbidden discrimination with each change of its investments by a corporation? Clearly the legislature is free from any sinister motive in this legislation."

But, further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents.

This court has frequently held that mere inequality in the results of a state tax law is not sufficient to invalidate it. Thus, in *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 504, 22 L. ed. 189, 195, it was said:

[372] "Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds *of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the nu-

merous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems adjusted with reference to the valuation of different kinds of property are adopted. The courts permit this."

Again, in *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. ed. 669, 673:

"Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large state like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual,—the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded."

And in *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. ed. 236, 238, 17 Sup. Ct. Rep. 829, 830:

"This whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533."

For these reasons we are of opinion that the act challenged cannot be held to conflict with either of the clauses of the Federal Constitution referred to, and *the judgment of the Supreme Court of Connecticut is affirmed.*

Mr. Justice Harlan did not hear the argument, and took no part in the decision of this case.

*STATE OF MINNESOTA, Complainant, [373]
v.

ETHAN ALLEN HITCHCOCK, Secretary of the Interior, and Binger Hermann, Commissioner of the General Land Office.

(See S. C. Reporter's ed. 373-402.)

Original jurisdiction of Supreme Court—when United States is a party to suit—suit by state—school lands—Indian cession.

1. Neither the silence of counsel nor the express consent of the parties will justify the Supreme Court of the United States in ignoring the question whether it has original jurisdiction of a suit commenced therein.

185 U. S.

2. A suit by a state to enjoin the Secretary of the Interior and the Commissioner of the Land Office from selling school lands in the Red Lake Indian reservation must be regarded as a controversy to which the United States is a party, and of which, as a state is also a party, the Supreme Court of the United States has, under U. S. Const. art. 3, § 2, original jurisdiction, in view of the provision of the act of March 2, 1901 (31 Stat. at L. 950, chap. 808), that the Indians need not be made parties to such a suit if the Secretary of the Interior is made a party thereto, and that the Attorney General on request of the Secretary shall represent and defend the Indian rights.
3. The state of Minnesota has no interest in any of the land included in the cession, by the Chippewa Indians in Minnesota, of all their title and interest in unsurveyed and unallotted lands, whose fee was in the United States subject to the Indian right of occupancy by an agreement made in conformity with the act of January 14, 1889 (25 Stat. at L. 642, chap. 24), under which such lands were to be sold and the proceeds devoted to the benefit of such Indians, although by a prior provision in the act of February 26, 1857 (11 Stat. at L. 166, chap. 60), authorizing the organization of the state of Minnesota, there was granted to that state for the use of schools sections 16 and 36 in every township of the public lands in such state, except when sold or otherwise disposed of, in which event the state might take other lands "equivalent thereto and as contiguous as may be."

[No. 4, Original.]

Argued November 1, 4, 1901. Decided May 5, 1902.

A SUIT in equity by the State of Minnesota to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling certain sections in what was formerly known as the Red Lake Indian reservation. *Bill dismissed.*

Statement by Mr. Justice **Brewer**:

This is a suit in equity commenced in this court by the state of Minnesota to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling any sections 16 and 36 in what was on January 14, 1889, known as the Red Lake Indian reservation.

By the bill, answer, and an agreed statement the following facts appear: By § 18 of the act to establish the territorial government of Minnesota, approved March 3, 1849 (9 Stat. at L. 403, chap. 121), it was enacted "that when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered 16 and 36 in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same."

On February 26, 1856, the legislature of the territory of Minnesota sent a memorial to Congress for the relief of settlers upon 185 U. S.

school lands (Minn. Laws 1856, p. 368), which reads:

"To the Honorable the Senate and House [374] of Representatives of the United States in Congress assembled:

"The memorial of the legislative assembly of the territory of Minnesota respectfully represents:

"That under the provisions of the act of Congress, extending the provisions of the pre-emption law of 1841 over the unsurveyed lands of Minnesota, many of our settlers have heavy investments, both of money and labor, in the opening of farms, erection of buildings, and the laying out and improving of town sites (lots in which said town sites were frequently transferred before the government survey, at high prices, to the occupants thereof), who were found, when the government survey was made, to be upon the school sections, and that the said settler had no means of ascertaining previous to the survey where the school sections would come.

"That it is a great injustice and hardship to compel such persons to repurchase or lose entirely the improvements and homes made by themselves in good faith in the expectation of pre-empting or entering them according to the provisions of the statute. Therefore, your memorialists would respectfully request your honorable body to pass an act giving such persons in this territory as have, previously to the government survey, settled upon the school sections (and have otherwise the right of pre-emption), the right to pre-empt the same as other government lands are pre-empted. And also providing for the entry of the town sites in this territory which are on school sections and were occupied as such previous to the government survey, as other town sites upon unoffered government lands are entered.

"And also allowing the county commissioners of the county in which such lands may be situate to enter in lieu thereof, for the benefit of the school fund of the township in which such land so as aforesaid settled or occupied may be, and without charge, an equal amount of such surveyed lands, subject either to private entry or pre-emption, in the same land district as they may select.

"And as in duty bound your memorialists will ever pray."

In response to this memorial Congress passed the following joint resolution March 3, 1857 (11 Stat. at L. 254):

"That where any settlements, by the erection of a dwelling house or the cultivation of any portion of the land, shall have been or shall be made upon the sixteenth or thirty-sixth sections (which sections have been reserved by law for the purpose of being applied to the support of schools in the territories of Minnesota, Kansas, and Nebraska, and in the states and territories hereafter to be erected out of the same) before the said sections shall have been or shall be surveyed; or when such sections have been or may be selected or occupied as town sites, under and by virtue of the act of Congress approved twenty-third of May, eighteen hundred and forty-four, or reserved for public

uses before the survey, then other lands shall be selected by the proper authorities, in lieu thereof, agreeably to the provisions of the act of Congress approved twentieth May, eighteen hundred and twenty-six, entitled 'An Act to Appropriate Lands for the Support of Schools in Certain Townships and Fractional Townships not Before Provided for.' And if such settler can bring himself, or herself, within the provisions of the act of fourth of September, eighteen hundred and forty-one, or the occupants of the town site he enabled to show a compliance with the provisions of the law of twenty-third of May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portion of the sixteenth or thirty-sixth sections so settled and occupied, shall be in them respectively, as if such sections had not been previously reserved for school purposes."

On February 26, 1857, Congress passed an act authorizing the formation of a state government. 11 Stat. at L. 166, chap. 60. Section 5, so far as is applicable, is as follows:

"And be it further enacted, That the following propositions be, and the same are hereby, offered to the said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said state of Minnesota, to wit:

"First, That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

[376] *On October 13, 1857, a Constitution was formed, in which, by § 3 of article 2, the foregoing proposition was accepted in this language:

"The propositions contained in the act of Congress entitled 'An Act to Authorize the People of the Territory of Minnesota to Form a Constitution and State Government, Preparatory to Their Admission into the Union on Equal Footing with the Original States,' are hereby accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall nonresident proprietors be taxed higher than residents."

By an act of date May 11, 1858, Minnesota was admitted into the Union. 11 Stat. at L. 285, chap. 31. In that it was recited "that the state of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever."

At the date of this admission a large part of the territory in the northwestern part of the state, including the tracts in controversy, was and for a long time thereafter remained unceded Indian lands, subject to the Indian title of occupancy. It was, among other things, stipulated in the agreed statement:

"That, except as its status may have been affected or changed by the treaty of October 2, 1863 (13 Stat. at L. 667), by the President's order of March 18, 1879, enlarging what was then known as the White Earth Indian reservation, by the act of Congress of January 14, 1889 (25 Stat. at L. 642, chap. 24), or by the act of Congress of June 2, 1890 (26 Stat. at L. 126, chap. 391), or by one or more of these, the district or country embracing the lands in controversy continued to be unceded Indian lands subject to the original right of occupancy of the Chippewa Indians up to the time of the action had on March 4, 1890, under the said act of January 14, 1889."

Referring to the matter stated in this stipulation, it may be *noticed that by the treaty [377] of October 2, 1863, the Red Lake and Pembina bands of Chippewa Indians dwelling in northwestern Minnesota ceded lands within certain defined boundaries to the United States, and in article 6 of the treaty the portion of the territory occupied by them and not ceded is spoken of as a reservation, for by it the President was required to appoint a board of visitors, "whose duty it shall be to attend at all annuity payments of the said Chippewa Indians, to inspect their fields and other improvements, and to report annually thereon on or before the 1st day of November, and also as to the qualifications and moral deportment of all persons residing upon the reservation under the authority of law."

This tract was thereafter known as the Red Lake Indian reservation, and is referred to in the President's order of March 18, 1879, in which he bounds a proposed reservation on one side by the "Red Lake Indian reservation." The act of June 2, 1890 (26 Stat. at L. 126, chap. 391), grants to the Duluth & Winnipeg Railroad Company a right of way through the "Red Lake (and other) reservations." The 2d section of the act provides the mode of fixing the compensation to be paid the Indians for the right of way, and that no right of way shall vest in the company until, among other things, "the consent of the Indians on said reservation as to the amount of said compensation and right of way shall have been first obtained in a manner satisfactory to the President of the United States." On January 14, 1889, an act was passed (25 Stat. at L. 642, chap. 24), providing for a commission to negotiate with all the bands or tribes of Chippewa Indians in Minnesota for the cession and relinquishment, "for the purposes and upon the terms" stated in the act, and subject to the approval of the President, "of all their title and interest in and to all the reservations of said Indians in the state of Minnesota, except the White Earth and Red Lake reservations, and to all and so much of these two reservations as in the judgment of said

commission is not required to make and fill the allotments required by this and existing acts."

[378] That act directed that all the Chippewa Indians in Minnesota, "except those on the Red Lake reservation," were to be removed to and allotted lands in the White Earth reservation, *and those on the Red Lake reservation were to be allotted lands on so much of that reservation as should be reserved by the commission for that purpose. The ceded lands were thereafter to be surveyed, inspected, classified as agricultural or pine lands, the latter appraised by 40-acre tracts and sold at vendue, and the agricultural lands disposed of to actual settlers at \$1.25 per acre. The proceeds arising from the disposition of the two classes of land were to be held and applied as directed in § 7, which reads:

"That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the state of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares *per capita* to all other classes of said Indians; and the remaining one fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: *Provided*, that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said

[379] Indians, *a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three mil-

lion dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three fourths thereof, during the first five years, be expended in procuring live stock, teams, farming implements, and seed for such of the Indians, to the extent of their shares, as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder."

Under this act a commission was appointed and an agreement made with the Indians for a cession of a large part of the Red Lake Indian reservation, which agreement was approved by the President March 4, 1890, the unceded portion being reserved by the commissioners "for the purpose of making and filling the allotments" provided for in the act.

According to the agreed statement of facts the lands in the reservation were wholly unsurveyed at the time of the passage of this last act, January 14, 1889, and until after the approval of the agreement for this cession, March 4, 1890.

On February 28, 1891 (26 Stat. at L. 796, chap. 384), Congress passed this act:

"Where settlements with a view to pre-emption or homestead have been or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the state or territory in which they lie, other lands of equal acreage are hereby appropriated and *granted, and may [380] be selected by said state or territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, where any state is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, with-

out awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the state or territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, that nothing herein contained shall prevent any state or territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

Upon these facts the state contends that the territory in question was not an Indian reservation, but what is known as unceded Indian country, subject to the original right of occupancy by the Chippewa Indians, and [381] also that, whether the country *was an Indian reservation or unceded Indian country, it was subject to the grant of sections 16 and 36 to the state when the Indian right of occupancy was extinguished.

Defendant's contentions are:

1. That this tract of country was a reservation, set apart and appropriated to the uses of the civilization and support of the Indians.

2. That these lands never became "public lands," and so never became subject to the state's school-land grant.

3. That the school-land grant attached to no particular lands until surveyed. Until then the specific sections remained subject to disposition by Congress, the state, in the event of such disposition, being remitted to the selection of other lands as indemnity. Especially did the joint resolution of March 3, 1857, subject these sections in Minnesota to reservation for public uses at any time before survey, and, in the event of any such reservation, make the state's grant, to that extent, one of indemnity lands.

4. That the act of January 14, 1889, and the agreement negotiated thereunder with the Indians, dedicated and appropriated all the lands in the Red Lake reservation exclusively to the civilization, education, and support of the Indians. This was a disposal of the lands within the meaning of the enabling act of February 26, 1857, and in any event was a reservation of them for public uses under the joint resolution of March 3, 1857.

5. That in interpreting the act of 1889, it is of no moment that the state has a system of common schools aided by a grant of lands from the general government. That act in terms keeps the education of these Indians under national control, and dedicates a portion of the proceeds of the sale of these lands "exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst, and for their benefit."

6. That in determining whether the act of

1889 and the agreement negotiated thereunder were intended to appropriate sections 16 and 36, along with the other lands, to the civilization, education, and support of the Indians, inquiry must be made as to how the act and agreement were understood by the Indians.

Messrs. Frank B. Kellogg and Henry W. Childs argued the cause, and, with *Messrs. C. A. Severance, Robert E. Olds, and W. B. Douglas*, filed a brief for complainant:

The fee to public lands occupied by Indian tribes, whether the status be that of an Indian reservation created by law or a treaty, or merely Indian country, is in the United States, and passes by grant, subject to the Indian right of occupancy, and no patent is necessary.

Cherokee Nation v. Georgia, 5 Pet. 48, 8 L. ed. 42; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. ed. 440; *Heydenfeldt v. Daney Gold & S. Min. Co.* 93 U. S. 634, 23 L. ed. 995; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123; *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *Gaines v. Nicholson*, 9 How. 356, 13 L. ed. 172.

The rights of the state were merely in abeyance or suspension during the period of Indian occupancy, and vested *eo instanti* upon the extinction of the Indian right of occupancy and identification by public survey. The only qualification of this is when there has been an appropriation of a section, prior to survey, for any public purpose contemplated by the compact between the United States and the state.

Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Gaines v. Nicholson*, 9 How. 356, 13 L. ed. 172.

The appropriation of the public lands for the encouragement of education is a cherished policy of the national government, initiated before the adoption of the present Constitution of the United States.

Cooper v. Roberts, 18 How. 178, 15 L. ed. 339.

When a grant is made to a state, for the use of its schools, of certain sections of land out of the public domain, the grant as to such sections falling within Indian reservations or territory to which the Indian right of occupancy has not been extinguished, is in suspension only during the period of such occupancy.

Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338; *United States v. Thomas*, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Natoma Water & Min. Co. v. Bugbey*, 96 U. S. 165, 24 L. ed. 621.

Lands embraced within an Indian reservation at the time of the passage of the granting act were subject to the act.

Re Kansas, 2 Copp, 1107.

If at the date of the survey it is found that sections 16 and 36 are embraced within an Indian reservation or are Indian country, the state may elect to make indemnity selections at once, or may await the extinguishment of the Indian right, and eventually take the original sections.

Re Colorado, 6 Land Dec. 412; *Re Barnard*, 9 Land Dec. 553; *Re Michigan*, 8 Land Dec. 308; *Callanan v. Chicago, M. & St. P. R. Co.* 10 Land Dec. 285; *Re Sherry*, 12 Land Dec. 176.

Where land is at the time of the survey occupied under a homestead pre-emption, the state's title does not vest, but if the pre-emptor fails thereafter to perfect his claim, or for any reason abandons it, the state's title will spring up and vest as of the date of the survey.

Re Watson, 6 Land Dec. 71. See also *Re Lowe*, 1 Land Dec. 630; *Mette v. California*, 1 Copp, 632; *Larsen v. Pechierer*, 1 Land Dec. 401; *Re Miner*, 9 Land Dec. 408; *Re Marceau*, 9 Land Dec. 554; *Re Talbot*, 8 Land Dec. 495; *Gonzales v. Flagstaff*, 10 Land Dec. 348; *Revenaugh v. Washington*, 13 Land Dec. 434.

The right which the settler has at the date of survey is personal, and a purchaser from him subsequent to the survey and prior to the publication of the settler's title secures no rights as against the state.

Larsen v. Pechierer, 1 Land Dec. 401; *Re Watson*, 4 Land Dec. 169; *Re Johansen*, 5 Land Dec. 408; *Gonzales v. Flagstaff*, 10 Land Dec. 348; *Re Marceau*, 9 Land Dec. 554; *Re Dermody*, 10 Land Dec. 419; *Revenaugh v. Washington*, 13 Land Dec. 434.

Of course, so long as the Indians or other parties were rightfully in possession, the state could not enter or derive any benefit from the land to which; under this arrangement, it actually took the fee.

Re Sherry, 12 Land Dec. 176.

A proviso limiting a grant will be strictly construed.

United States v. Dickson, 15 Pet. 165, 10 L. ed. 698.

The reservation of land for public uses was intended to cover "public uses, as for arsenals, fortifications, lighthouses, customhouses, and other public purposes for which real property is required by the government."

Gonzales v. French, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Spaulding v. Martin*, 11 Wis. 273.

The grant having been expressly made of sections 16 and 36, the act of 1889 will not be deemed to contemplate any other disposition of them, in the absence of express words evincing such a purpose.

Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440.

No deed was necessary to vest the title of school lands in the state.

Gaines v. Nicholson, 9 How. 356, 13 L. ed. 172.

Sections 16 and 36 not having been mentioned in the act of 1889, and those sections having been previously granted to the state 185 U. S.

for the use of public schools, the act of 1889 will be construed not to embrace these sections.

Wileox v. Jackson ex dem. McConnel, 13 Pet. 498, 10 L. ed. 264; *Spaulding v. Martin*, 11 Wis. 262; *Lake Superior Ship Canal R. & Iron Co. v. Cunningham*, 155 U. S. 373, 39 L. ed. 189, 15 Sup. Ct. Rep. 103; *Ex parte Crow Dog*, 109 U. S. 556, sub nom. *Ex parte Kang-Gi-Shun-Ca*, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396.

The later act must be so read as to harmonize with and effectuate the policy of the earlier one.

Sutherland, Stat. Constr. §§ 287, 288.

In interpreting a statute or a constitutional provision, resort may properly be had to the history of the times, to the conditions of the country as they existed at the date of the enactment, to the previous condition of the law, and the object to be accomplished by the legislative body.

Church of Holy Trinity v. United States, 143 U. S. 459, 36 L. ed. 228, 12 Sup. Ct. Rep. 511; *United States v. Union P. R. Co.* 91 U. S. 79, 23 L. ed. 228; *Croomes v. State*, 40 Tex. Crim. Rep. 672, 51 S. W. 927, 53 S. W. 882; *Collins v. New Hampshire*, 171 U. S. 34, 43 L. ed. 61, 18 Sup. Ct. Rep. 768; *United States v. Wong Kim Ark*, 169 U. S. 653, 42 L. ed. 892, 18 Sup. Ct. Rep. 456.

No patent, no selection, no certification by the Department, no act whatever was required to vest the title of these lands in the state, except identification by survey. Even in the selection of lien lands it has been held that no patent is necessary; that the bare selection by the state vests the title.

Hedrick v. Hughes, 15 Wall. 123, 21 L. ed. 52.

Assistant Attorney General **Van Devanter** argued the cause and filed a brief for defendants:

The tract of country embracing the sections in controversy was a reservation set apart and appropriated to the uses of the civilization and support of the Indians.

Spaulding v. Chandler, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360; *Wileox v. Jackson ex dem. McConnel*, 13 Pet. 498, 10 L. ed. 264.

A grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and such rule will be applied as a *presumptio juris et de jure* wherever, by possibility, a right may be acquired in any manner known to the law.

United States v. Chaves, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57.

The lands in controversy never became public lands, and so never became subject to the state's school-land grant.

Neuhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496; *Barker v. Harvey*, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690; *Mann v. Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 18

Sup. Ct. Rep. 820; *Doolan v. Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Bordon v. Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856.

Until the survey and identification of the specific sections the right of the state is inchoate merely, and full power of disposition remains in Congress.

Heydenfeldt v. Daney Gold & Silver Min. Co. 93 U. S. 634, 23 L. ed. 995; *Re Colorado*, 6 Land Dec. 412; *Re Colorado*, 12 Land Dec. 70; *Minnesota v. Bachelder*, 1 Wall. 109, 17 L. ed. 551.

The obligation to protect the Indians from local hostility, and to provide for their maintenance, instruction, and civilization, has always been recognized as a national obligation, which could not, with justice to the Indians, be intrusted to local governments.

United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Fellows v. Blacksmith*, 19 How. 366, 15 L. ed. 684; *The Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket v. Johnson County*, 18 L. ed. 667; *The New York Indians*, 5 Wall. 761, *sub nom. Fellows v. Dunniston*, 18 L. ed. 708.

How the care and duty shall be exercised is a political question, and it is not the province of the court to intrude "upon the domain committed by the Constitution to the political departments of the government," or "in effect determine questions of mere governmental policy."

United States v. Choctaw Nation, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149.

How the words of the agreement were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; *The Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket v. Johnson County*, 18 L. ed. 667; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *United States v. Choctaw Nation*, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149.

Messrs. Frank B. Kellogg and Henry W. Childs, with Assistant Attorney General Van Deranter, filed a brief on the question of jurisdiction:

This is a suit between a state and citizens of another state, within the meaning of the decisions.

Osborn v. Bank of United States, 9 Wheat. 738, 856, 6 L. ed. 204, 232; 1 Foster, Fed. Pr. 2d ed. § 19; *Bonnafec v. Williams*, 3 How. 574, 11 L. ed. 732; *Susquehanna & W. Valley Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Childress v. Emory*, 8 Wheat. 642, 5 L. ed. 705; *Rice v. Houston*, 13 Wall. 66, 20 L. ed. 484; *Dodge v. Tuleys*, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; *Davies v. Lathrop*, 20 Blatchf. 397, 12 Fed. 353; *Harper v. Norfolk & W. R. Co.* 36 Fed. 102; *Shirk v. La Fayette*, 52 Fed. 857.

For purposes of determining the jurisdic-

tional question, this suit is not to be deemed one against the United States.

Osborn v. Bank of United States, 9 Wheat. 738, 856, 6 L. ed. 204, 232; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Litchfield v. Webster County*, 101 U. S. 773, 25 L. ed. 925; *United States v. Lee*, 106 U. S. 212, 27 L. ed. 179, 1 Sup. Ct. Rep. 240; *Allen v. Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 924; *Louisiana Bd. of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623; *Virginia Coupon Cases*, 114 U. S. 270, *sub nom. Poindexter v. Greenhow*, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 256.

Authorities holding that a suit to enjoin a state official is not a suit against a state apply with equal force to a suit to enjoin a government official, because the United States cannot be sued without its own consent, which consent can only be given by an act of Congress.

United States v. Lee, 106 U. S. 216, 27 L. ed. 180, 1 Sup. Ct. Rep. 240.

In those cases where the jurisdiction of this court has been invoked to enjoin the action or threatened action of government officials, the original jurisdiction of this court has been, not only exercised, but expressly conceded.

Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; *Georgia v. Stanton*, 6 Wall. 75, 18 L. ed. 724.

The failure to join the Chippewa Indians as parties defendant cannot affect the jurisdiction of the court.

The relation between the government and the Indians is one similar to that of guardian and ward, and the Indians may be looked upon as in a state of pupillage.

Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41; *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *United States v. Flournoy Live-Stock & Real-Estate Co.* 71 Fed. 576; *United States v. Choctaw Nation*, 119 U. S. 1, 30 L. ed. 307, 7 Sup. Ct. Rep. 75; *Barker v. Harvey*, 181 U. S. 492, 45 L. ed. 968, 21 Sup. Ct. Rep. 690.

The case is within the rule that a trustee may sue or be sued without the appearance of his beneficiary in the action, where the trust is of such a nature as to warrant the construction that the trustee has been authorized to appear in behalf of the beneficiary.

Carcy v. Brown, 92 U. S. 171, 23 L. ed. 469; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. ed. 400, 8 Sup. Ct. Rep. 441.

On analogy drawn from the rule excluding legatees and next of kin in bills for a debt or legacy brought against the personal representative of a deceased person the Indians need not be joined in this action.

Adams, Eq. pp. 315, 316.

[382] *Mr. Justice **Brewer** delivered the opinion of the court:

A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter, irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject-matter. The question having been suggested by the court, a brief has been presented, and our jurisdiction sought to be sustained on several grounds. The question is one of the original, and not of the appellate, jurisdiction. The pertinent constitutional provisions are found in § 2 of article 3 as follows:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof and foreign states, citizens, or subjects.

[383] "In all cases affecting ambassadors, other public ministers, *and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The first of these paragraphs defines the matters to which the judicial power of the United States extends, and the second divides the original and appellate jurisdiction of this court. By the latter paragraph this court is given original jurisdiction of those cases "in which a state shall be party." This paragraph distributing the original and appellate jurisdiction of this court is not to be taken as enlarging the judicial power of the United States or adding to the cases or matters to which by the 1st paragraph the judicial power is declared to extend. The question is, therefore, not finally settled by the 185 U. S.

fact that the state of Minnesota is a party to this litigation. It must also appear that the case is one to which by the 1st paragraph the judicial power of the United States extends. There are three clauses in the 1st paragraph which call for notice; one, that which extends the judicial power of the United States to controversies "between a state and citizens of another state;" second, that which extends it "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and, third, that which extends it to controversies "to which the United States shall be a party." To bring the case within the 1st clause referred to, the bill alleges that the defendant, Ethan Allen Hitchcock, Secretary of the Interior, is a citizen of Missouri, and the defendant, Binger Hermann, Commissioner of the General Land Office, a citizen of Oregon, and therefore it is said the case comes strictly within the language of the 1st paragraph in that there is presented a controversy between a state—Minnesota—and citizens of other states. To that it may be replied that there is no real controversy between the state, the plaintiff, and the defendants as individuals; that the latter, merely as citizens, have no interest in the controversy for or against the plaintiff; that in case either of the defendants should die or resign and a citizen of Minnesota be *appointed in his place, the jurisdiction of the court would cease, and this although the real parties in interest remain the same. In respect to the 2d it may be said that if it were held that this court had original jurisdiction of every case of a justiciable nature in which a state was a party and in which was presented some question arising under the Constitution, laws of the United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance. To this it may be replied that this court cannot deny its jurisdiction in a case to which it is extended by the Constitution. As to the 3d it may be objected that the United States is not in terms a party to the litigation, and has no pecuniary interest in the controversy, it being in reality one between the state and the Indians.

We omit, as unnecessary to the disposition of this case, any consideration of the applicability of the first two clauses, because we think the case comes within the scope of the 3d clause, and we need not now go farther. This is a controversy to which the United States may be regarded as a party. It is one therefore to which the judicial power of the United States extends. It is, of course, under that clause, a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff, and does not extend to those cases in which it is a party defendant.

The case of *United States v. Texas*, 143 U.

S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488, is in point, and upon many aspects of the question very suggestive. That was a suit brought by the United States against the state of Texas to determine the title to a tract, called the county of Greer, which was claimed by the state to be within its limits and a part of its territory, and by the United States to be outside the state of Texas and belonging to the United States. The jurisdiction of this court was challenged, but was sustained. After referring to the provisions of the Constitution and the judiciary act of 1789, Mr. Justice Harlan, speaking for the court, said:

[385] "The words in the Constitution, "in all cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a state may be made, of right, a party defendant, or in which a state may, of right, be a party plaintiff.

"It is, however, said that the words last quoted refer only to suits in which a state is a party, and in which, also, the opposite party is another state of the Union or a foreign state. This cannot be correct, for it must be conceded that a state can bring an original suit in this court against a citizen of another state. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 287, 32 L. ed. 239, 242. 8 Sup. Ct. Rep. 1370. Besides, unless a state is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws, or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States 'to all cases,' in law and equity, arising under the Constitution, laws, and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction 'in all cases' 'in which a state shall be party;' that is, in all cases mentioned in the preceding clause in which a state may, of right, be made a party defendant, as well as in all cases in which a state may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies capable of judicial solution might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine

[386] *them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the

United States, in order to form a more perfect Union, establish justice, and insure domestic tranquillity, have constituted with authority to speak for all the people and all the states, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more states, but not jurisdiction of controversies of like character between the United States and a state." P. 643, L. ed. p. 292, Sup. Ct. Rep. p. 493.

While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the court of claims rests upon this proposition.

It may be said that the United States is not named as defendant, and therefore it cannot be considered a party to the controversy. It is true that it was at one time held that the 11th Amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," was applicable only to cases in which the state was named in the record as a party defendant. *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the state, when "the state, though not named, is the real party against which the relief is asked, and the judgment will operate." *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164. Of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the government cannot be sued except by its consent, nor within the rule established in the *Ayers Case*.

*Now, the legal title to these lands is in [387] the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the government of its title and vest it in the state. The United States is therefore the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely

nominal party on the record, but by the question of the effect of the judgment or decree which can be entered.

But it may be said that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians, and in trust for their benefit. This is undoubtedly true, and if the case stood alone upon the construction of the treaty between the United States and the Indians, there might be substantial force in this suggestion. But Congress has, for the government, assumed a personal responsibility. On March 2, 1901, it passed the following act:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a state to what are commonly known as school lands within any Indian reservation or any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such state may be fully tested and determined without making the Indian tribe, or any portion thereof, a party to the suit, if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter, shall devolve upon the Attorney General upon the request of such Secretary." 31 Stat. at L. 950, chap. 808.

[388] *It has by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit: that the United States will, for the purposes of the litigation, stand as the real party in interest, and, so far as it could within constitutional limits, has expressed the consent of the government to the maintenance of this suit in this court. By the act it, in effect, declares that it waives all objections on the ground that it is a mere trustee; that it assumes the full responsibilities of ownership: and that it will, whatever may be the outcome of any litigation, stand responsible to the Indians for the full value of the lands in controversy. Can the court say that the United States may not assume such responsibility; may not waive all objections on account of the mere matter of trusteeship, and stand in court as the responsible owner, against whom all litigation may be directed? If it stands as such owner, then within the proposition heretofore referred to a suit which is against its agents, not affecting them individually, but affecting only its title to the real estate, is in substance and effect a suit against the United States. The controversy is made by the act of 1901 one to which the United States is a party in interest, to be directly affected by the result, and therefore the case is within the 1st paragraph, as one to which the judicial power of the United States extends.

Our conclusion therefore is that the original jurisdiction vested by the Constitution in this court over controversies in which a state is a party is not affected by the ques-

tion whether the state is party plaintiff or party defendant; that a dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding; and that the United States is to be taken, for the purposes of this case, as the real party in interest adverse to the state. We are of opinion, therefore, that this court has jurisdiction of this controversy, and is called upon to determine the case upon its merits.

We pass, therefore, to a consideration of such merits.

Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is *a matter of little moment. [389] Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.

It is true that in the third division of the agreed statement there is a stipulation that the territory embraced within the so-called Red Lake Indian reservation remained unceded Indian lands up to the action had on March 4, 1890, unless its status was affected by certain matters named. Doubtless its status, if by that is meant simply the character of the title, was not affected by those matters. While its boundaries were indicated, while it was called the Red Lake Indian reservation, yet the acts referred to did not purport to change the rights of the Indians or the government, neither did they in fact change them. The land remained on March 4, 1890, land the fee of which was in the United States, but subject to the Chippewa Indians' right of occupancy. No patent had ever been executed by the United States to the Indians in severalty or to the tribe at large. The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract.

Yet if it was necessary to determine the question we should have little doubt that this was a reservation within the accepted meaning of the term. Prior to the treaty of October 2, 1863, the boundaries of the lands occupied by the Chippewa Indians had been defined by sundry treaties, and by that treaty a large portion of the lands thus occupied were ceded by the Indians; that is, the Indians ceded to the United States all their interest and right of possession. While there was no formal action in respect to the remaining tract, the effect was to leave the Indians in a distinct tract reserved for their occupation, and in the same act this tract was spoken of as a reservation. Now, *in or- [390] der to create a reservation, it is not neces-

sary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation. *Spalding v. Chandler*, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360, is in point. There, as here, was presented the question of the origin of a reservation, and in respect thereto it was said (pp. 403, 404, L. ed. p. 473, Sup. Ct. Rep. p. 364):

"It is not necessary to determine how the reservation of the particular tract, subsequently known as the 'Indian reserve,' came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. . . . But whether the Indians simply continued to encamp where they had been accustomed to prior to making the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty, and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. . . . If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer."

Turning to the legislation of Congress in respect to school lands in Minnesota, the clause in the act establishing the territorial government has only this significance. It provided that when the lands in the territory should be surveyed sections Nos. 16 and 36 "shall be and the same are hereby reserved" for the purpose of being applied to schools. But the agreed statement shows that these lands were not surveyed until after

[391] the act of January 14, 1889, and the agreement with the Indians made in pursuance thereof, and approved by the President March 4, 1900. Further, the state had been admitted into the Union, and the rights of the state are to be determined by the act of admission rather than by any prior declaration by Congress of its purpose in respect to certain lands. The act of admission provided:

"That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

It will be perceived that this grant was of

"public lands." It was held in *Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. ed. 769, that—

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 741, 23 L. ed. 634, 637, speaking of a grant to the state of Kansas in aid of the construction of a railway, as affecting lands within an Indian reservation, it was said:

"But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers, within certain defined limits, is granted; but only the public lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy."

In *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 119, 38 L. ed. 377, 380, 14 Sup. Ct. Rep. 496, 498, are these words, referring to the reservation of sections 16 and 36 to Kansas as school lands:

"If the reservation named was intended as a grant of the sections sixteen (16) and thirty-six (36) to the territory and to the states to be created out of them, or as a dedication of them for schools, it could only apply to such lands as were public*lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands involved in this controversy, as we have already shown."

See also *Doolan v. Carr*, 125 U. S. 618, 632, 31 L. ed. 844, 849, 8 Sup. Ct. Rep. 1228; *Bardon v. Northern P. R. Co.* 145 U. S. 535, 538, 36 L. ed. 806, 809, 12 Sup. Ct. Rep. 856; *Mann v. Tacoma Land Co.* 153 U. S. 273, 284, 38 L. ed. 714, 717, 14 Sup. Ct. Rep. 820; *Barker v. Harvey*, 181 U. S. 481, 490, 45 L. ed. 963, 968, 21 Sup. Ct. Rep. 690.

Again, the language of the section does not imply a grant in *presenti*. It is "shall be granted." Doubtless under that promise whenever lands became public lands they came within the scope of the grant. As said in *Beecher v. Wetherby*, 95 U. S. 517, 523, 24 L. ed. 440, 441, with reference to a similar clause in the act for the admission of Wisconsin into the Union:

"It was therefore an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the state, which had not been sold or otherwise disposed of, should be granted to the state for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance of the propositions as soon as the sections could

be afterwards identified by the public surveys. In either case the lands which might be embraced within those sections were appropriated to the state. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted."

And again, in *United States v. Thomas*, 151 U. S. 577, 583, 38 L. ed. 276, 278, 14 Sup. Ct. Rep. 426, 428:

[393] "Mr. Justice Lamar, while Secretary of the Interior, had frequent occasion to consider the nature and effect of the grant of school lands, where the title was at all encumbered or doubtful: and on this subject he said (6 Land Dec. 418) that the true theory was this: 'That where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title and right of possession cannot then vest in the state, the state may, if it so desires, elect to take equivalent lands in fulfilment of the compact, or it may wait until the right and title of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.' And this view he considered 'as fully sustained by the decision of the courts and the opinions of the Attorneys General,' and cited in support of it *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338; 3 Ops. Atty. Gen. 56; 8 Ops. Atty. Gen. 255; 9 Ops. Atty. Gen. 346; 16 Ops. Atty. Gen. 430; *Ham v. Missouri*, 18 How. 126, 15 L. ed. 334."

So, also, in *Cooper v. Roberts*, 18 How. 173, 179, 15 L. ed. 338, 340, the question presented was whether certain mineral lands were excepted from the grant of school lands to the state. The words of the school-land grant were, as here, "shall be granted," and it was said:

"We agree that until the survey of the township and the designation of the specific section, the right of the state rests in compact,—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment the title of the state becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others. *Gaines v. Nicholson*, 9 How. 356, 13 L. ed. 172."

But while this is true it is also true that Congress does not, by the section making the school-land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the government within the state, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school

185 U. S.

grant; that it intends that the state shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will *justify[394] an appropriation of a body of lands within the state to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the state must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that within the limits of an Indian reservation' or unceded Indian country—that is, within a tract which is not strictly public lands—certain lands should be set apart for a public park, or as a reservation for military purposes, or for any other public uses, it has the power notwithstanding the provisions of the school-grant section. So it is that when Congress came in 1889 to make provision for this body of lands it could have by treaty taken simply a cession of the Indian rights of occupancy, and thereupon the lands would have become public lands and within the scope of the school grant. But it also had the power to make arrangements with the Indians by which the entire tract would be otherwise appropriated.

What was in fact done? The act of January 14, 1889, provided for a commission to negotiate for the cession and relinquishment of "all and so much of" the White Earth and Red Lake reservations as in the judgment of the commission should not be required to satisfy the allotments required by the existing acts, the cession to be "for the purposes and upon the terms hereinafter stated." The allotments referred to were allotments in severalty, made in conformity to the provisions of the act of February 8, 1887, 24 Stat. at L. 388, chap. 119. The ceded lands were to be divided into two classes, one appraised and sold at auction, and the other disposed of to actual settlers at \$1.25 per acre. The proceeds of those sales were to be placed in the Treasury of the United States as a permanent fund to the credit of the Indians, drawing interest at 5 per centum for fifty years, the interest to be expended, three fourths paid in cash to the Indians severally and the remaining one fourth devoted, under the direction of the Secretary of the Interior, "exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit." The cession was not to the United States absolutely, *but in trust. It was a[395] cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at 5 per cent, and one fourth of the interest to be devoted exclusively to the maintenance of free schools among the Indians and for their benefit.

Now it is contended that this legislation, though dealing with, in terms, all the unallotted lands, is subordinated to the prior promise of the government to grant sections 16 and 36 to the state for school purposes. In other words, the cession and relinquish-

ment by the Indians, it is said, extend to all the unallotted lands, but that cession and relinquishment having been accomplished, the trust which by the same legislation is created in respect to the same lands is limited, and restricted by the prior promise of the government, and this notwithstanding the fact that the government had provided that the state might take other lands, in case any particular sections 16 and 36 had become appropriated to other public uses. We are not disposed to belittle this contention. The arguments in favor of it, both those founded on technical rules of statutory construction and those based upon the long-established policies of the government in respect to both the Indians and the public schools, are presented by counsel for the state with exceeding force and ability. Notwithstanding this, we are constrained to believe that not only the technical rules of statutory construction, but also the general scope of the legislation in these matters, and the policy of the United States in respect to public schools, and also to Indians, as the wards of government, concur in sustaining the contention of the government that none of these ceded lands passed under the school grant to the state.

[396] And first in reference to technical rules of statutory construction. The cession was, as we have seen, of all the unallotted lands, and the cession was of those lands "for the purposes and upon the terms hereinafter stated." It was a distinct conveyance by the Indians of certain lands for a named purpose. Now if the United States, the recipient of this cession, was competent to carry into execution the expressed purposes, does it *not follow that the cession subjected all the lands to them? Can it be said that the Indians making the cession for a moment supposed that the lands ceded were not to be used for the purposes named; and if the language carries upon its face one obvious meaning, and would naturally be so understood by the Indians, that construction, within all the rules respecting Indian treaties, must be enforced. As said in *Worcester v. Georgia*, 6 Pet. 515, 582, 8 L. ed. 483, 508:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

And in *Choctaw Nation v. United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75, 90:

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and con-

trol of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

But reliance is placed upon the doctrine that a later general statute does not repeal by implication a prior special statute, unless there is an absolute incompatibility between the two,* and the earlier will remain as an[397] exception to the later. It is said that here the earlier statute was a special grant or promise to grant two particular sections in each township; the later a general statute in respect to all of a large body of lands. There is no necessary incompatibility between the two, and the earlier should be taken as an exception to the later, and the later held applicable to all the lands except the specially named sections. *Beecher v. Wetherby*, 95 U. S. 517, 24 L. ed. 440, is referred to as an illustration of the doctrine and in point in reference to school lands. But in that case the cession from the Indians was not subject to any trust. The facts were these: The action was replevin to recover logs cut upon a particular section, and the title to the logs depended on the title to the land. The Wisconsin school grant, in 1846, though of only section 16, was in form similar to that to Minnesota, and the defendant claimed under that grant. A treaty had been concluded with the Menomonees February 8, 1831, containing a provision that two specified townships should be set apart for the use of the Stockbridge and Munsee Indians. In these townships was the section 16 in controversy. By treaty, ratified January 23, 1849, the Menomonees, in consideration of the sum of \$350,000 and a reservation west of the Mississippi, agreed to cede all their lands in Wisconsin. The 8th article of the treaty stipulated that they should be permitted to remain on the ceded lands for two years, and until notified by the President that the lands were wanted. By treaty of May 12, 1854, this proposed reservation west of the Mississippi river was retroceded by the Indians to the United States, and in consideration of such cession the United States agreed to give them a home, "to be held as Indian lands are held," upon Wolf river, in Wisconsin, which tract included the townships set apart for the benefit of the Stockbridge and Munsee Indians. On February 6, 1871, Congress passed an act for the sale of these two townships, except eighteen contiguous sections thereof, and the appropriation of the proceeds for the benefit of the Stockbridge and Munsee Indians; and in pursuance of that act the United States sold the land in con-

trovery to the plaintiff. The court held that the title of the defendant under the school grant was superior to that of the [398] plaintiff under the *sale by the United States. Two facts are apparent: First, the Menomonee Indians in the first instance received a cash and real estate consideration for the large reservation which they conveyed to the United States; second, that while thereafter a tract was ceded to them to be held as Indian lands are held,—a tract which included the section in controversy,—and while by an earlier treaty with the Menomonees two townships of such tract (including this particular section 16) had been set apart for the use and benefit of the Stockbridge and Munsee Indians, yet there appears no treaty or agreement with either the Menomonee or Stockbridge or Munsee Indians in reference to the sale of these two townships. Yet, as stated by the court, “when the logs in suit were cut, those tribes had removed from the land in controversy, and other sections had been set apart for their occupation.” The ruling was that the United States held the fee, subject only to the Indian right of occupancy; that by the school-land section in the enabling act there was a grant, or promise to grant,—in either event to be taken as an appropriation of the fee to the state, subject to the Indian right of occupancy; that the Indians had removed from the lands and had received other lands for their occupation; that hence all Indian rights had ceased. The court, quoting in its opinion from *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210, said (p. 526, L. ed. p. 441): “The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant.”

Hence, applying the doctrine in respect to earlier special and later general statutes, the government having received from the Indians their right of occupancy, without any stipulation or agreement or trust in respect thereto, it was held that the act providing for the sale of the two townships could not have been intended to authorize a sale of specific sections therein which had been already conveyed or promised to the state. But this case stands on entirely different grounds. Before any survey of the lands, before the state right had attached to any particular sections, the United States made a treaty or agreement with the Indians, by [399] which they accepted a cession of the *entire tract under a trust for its disposition in a particular way. The question is not as to the construction of two separate statutes, but as to the scope and effect to be given to a treaty or agreement with the Indians, and whether it is to be narrowed in its scope by any rules applicable to the construction of statutes,—rules with which it is not to be supposed the Indians were familiar.

Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100, is also referred to. In that case the controversy was in respect to a tract of land within the place limits of the grant to the Northern Pacific 185 U. S.

Railroad Company (13 Stat. at L. 365, chap. 217) and which at the time of the filing of the map of definite location was within the limits of an Indian reservation. By the 2d section of the granting act it was provided that “the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.” In 1872 the United States entered into a treaty with the Indians by which for a cash consideration so much of the reservation as covered the land in controversy was ceded to the United States. It was held that by the original act the fee which was in the United States passed to the railroad company, subject to the Indian right of occupancy, which was afterwards, in pursuance of the promise to the company in the granting act, extinguished for a cash consideration, and immediately there was vested in the company a title paramount to that of one attempting a pre-emption. Here then, as in the prior case, the cession by the Indians was subject to no trust or condition, and the question was simply as to the effect to be given to various statutes.

Heydenfeldt v. Daney Gold & Silver Min. Co. 93 U. S. 634, 23 L. ed. 995, while not involving any question of Indian rights, is worthy of notice, as affecting a state's claim to school lands. The Nevada enabling act, approved March 21, 1864 (13 Stat. at L. 30, 32, chap. 36), contained this provision: “That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less *than one quarter section, and as contiguous [400] as may be, shall be, and are hereby, granted to said state for the support of common schools.” The plaintiff claimed title by conveyance from the state of a part of a section sixteen. The defendant rested upon a mineral patent from the United States, his entry upon the lands having been prior to any survey, and in conformity to the miners' laws, customs, and usages of the district. Although the terms of the school-land section were terms of present grant, and although the entry by the defendant was after the state had been admitted, yet his title was adjudged superior to that obtained from the state, the court holding that the United States had full power to dispose of the land until after a survey and the identification thereby.

Again, it is well to bear in mind the joint resolution passed by Congress on March 3, 1857, a resolution which was prompted by a memorial from the legislature of the territory of Minnesota, and which, recognizing the possibility of settlements or town site entries before the public surveys on lands which by such surveys were afterwards found to be school sections, provided that when any such sections should be occupied by settlers or selected as town sites “or reserved for public uses before the survey,” then other lands might be selected in lieu thereof. That

the sale of the ceded lands for the purpose of creating a fund for the benefit of the Indians was a use of them for a public purpose cannot be doubted. But the contention of counsel for the state is "that the public uses which were intended to operate as an appropriation prior to the services were uses to which the land itself might be put or employed for governmental uses." It is unnecessary to rest upon a determination of this question. We refer to the resolution as an express declaration by Congress that the school sections were not granted to the state absolutely, and beyond any further control by Congress, or any further action under the general land laws. As in *Heydenfeldt v. Dancy Gold & Silver Min. Co.* 93 U. S. 634, 23 L. ed. 995, priority was given to a mining entry over the state's school right, so here, in terms, preference is given to private entries, town site entries, or reservations for public uses. In other words, the act of admission, with its clause in respect to school

[401] *lands, was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the state. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof. In this connection may also be noticed the act of February 28, 1891, although passed after the approval of the agreement for the cession of these lands by the Indians. That act in terms authorized the selection of other lands "where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States."

We come finally to a consideration of the policy of the government both in respect to schools and to Indians. It is undoubtedly true that such policy from the beginning has been liberal in the appropriation of lands for school purposes. See a review of the legislation in respect thereto in the opinion in *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338.

It is not to be supposed that Congress intended any departure from this policy in its legislation in respect to lands within Minnesota, and the courts are justified in any fair construction of such legislation as will secure to the state its full quota of lands for aid in the development of its public school system. It is also true that much of the legislation in respect to Indians and many of the treaties with them have contemplated simply the cession of their lands and their removal to tracts further west. In such cases, where there has been simply a cession by the Indian tribe of its reservation and a removal to some new territory, it is not strange that the school grants have been generally held operative in the ceded reservations. The interests of public schools have always been considered paramount to those of railroad companies in grants made to aid in their construction. The one speaks for intellectual, the other for material, develop-

ment. Of course, when the Indian tribe has been removed by treaty from one body of land to another the interest of the tribe in the land from which it has been removed ceases, and the full obligation of the government to the Indians is satisfied when the pecuniary or real-estate consideration for the cession is secured *to them. But in some in- [402] stances, and this is one of them, the Indians have not been removed from one reservation to another, but the government has proceeded upon the theory that the time has come when efforts shall be made to civilize and fit them for citizenship. Allotments are made in severalty, and something attempted more than provision for the material wants of the Indians. In construing provisions designed for their education and civilization as fully, if not more than in construing provisions for their material wants, is it a duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress. Instead of removing these Chippewa Indians from Minnesota, the purpose of the legislation and agreement was to fit them for citizenship by allotting them lands in severalty and providing a system of public schools. Surely it could not have been understood by the Indians that only part of the lands they ceded were to be used for these purposes. They were dealing with the tract as an entirety, and they had a right to expect that the entire tract would be used as declared in the act and agreement. No provision is made for compensating the Indians for lands which would be lost if the right of the state was sustained, whereas, on the other hand, the right of the state to compensation for the particular school sections within the tract had already been secured. Contrasting the two policies,—that in respect to public schools and that in respect to the care of the Indians,—it would seem that we are called upon to uphold the rights of the Indians, which otherwise would be wholly lost without compensation, as against the claims of the state for which satisfaction in other directions has been provided.

For these reasons we are of opinion that the claim of Minnesota to these lands cannot be sustained, and a decree will be entered in favor of the defendants dismissing the bill.

Mr. Justice Gray did not hear the argument, and took no part in the decision of this case.

*CARNEGIE STEEL COMPANY, Limited, [403]
Petitioner,

v.

CAMBRIA IRON COMPANY.

(See S. C. Reporter's ed. 403-487.)

Patents—process invention — construction

NOTE.—On anticipation of patents—see notes to *Leggett v. Standard Oil Co.* 37 L. ed. U. S. 185 U. S.

*of claim—disclaimer—infringement—
stipulation of fact—repudiation for mis-
take.*

1. A process patent is not anticipated by mechanism which might, with slight alterations, have been adapted to carry out that process, unless such use of it would have occurred to one whose duty it was to make practical use of the mechanism described.
2. The process claim of the Jones patent, No. 404,414, for mixing molten pig iron so as to secure greater uniformity in chemical composition and avoid the necessity of remelting before further treatment in converters, the dominant idea of which is the permanent retention in a large covered reservoir of so large a quantity of the molten metal as will absorb variations of the product from the blast furnaces received into it and discharged from it into the converters, was not anticipated by prior patents or publications which contemplated the storage or mixture in reservoirs of molten metal from blast furnaces for use in casting or converters, in none of which was the retention of a quantity of the molten metal recognized as essential; or by the practice in steel works of mixing remelted pig iron from cupola furnaces in receiving or reservoir ladles in which a considerable residue was generally maintained.
3. Whether the process claim of the Jones patent, No. 404,414, for mixing molten metal, which, when read in connection with the specifications, clearly covered the product of blast furnaces, was intended to include the products of cupola furnaces as well, and is therefore invalid, need not be considered in a suit for infringement by the use of an apparatus for mixing molten metal taken from blast furnaces.
4. A construction of the claim of the Jones patent, No. 404,414, for a process of mixing molten pig metal, as covering a method for avoiding abrupt variations in its chemical constituents, preparatory to further treatment in converting it into steel, is not inconsistent with the specification of the patent that its primary object was to render the product of steel works uniform in chemical composition.
5. A disclaimer of statements in the specifications of a patent may be entered in a suit for its infringement, when such statements, if retained, might be construed as having the effect of illegally broadening the claim, and there is no purpose of thus obtaining the benefit of a reissue.
6. The idea of the permanent retention in a reservoir of a large quantity of molten metal as a basis for unification of the product of blast furnaces received into it is sufficiently disclosed in the claim of the Jones patent, No. 404,414, for a process of mixing molten pig iron so as to secure greater uniformity in chemical composition, preparatory to further treatment, which specifies neither the size of the reservoir nor the amount of metal to be left therein, where the specifications call for a reservoir of any convenient size, "holding, say, 100 tons of metal," with the bottom of the discharge spout 2 feet above the bottom of the vessel in a 100-ton tank, "and more or less according to the capacity of the vessel," for the purpose of leaving a considerable quantity remaining and unpoured with which the fresh additions may mix.

7. Infringement of the process claim of the Jones patent, No. 404,414, for mixing molten pig iron, the dominant idea of which is the permanent retention in a large covered reservoir of so large a quantity of the molten metal as will absorb the variations of the product from the blast furnaces received into it and discharged from it into the converters, results from the use of a covered refractory lined and turtle-shaped tilting vessel of about 300 tons' capacity for receiving the molten metal from the blast furnaces and supplying the converters, in the practical operation of which, by not allowing the vessel to tilt beyond a certain point gauged by a chalk mark, there is habitually retained in such vessel about 175 tons of molten metal, notwithstanding a long prior use of an intermediate uncovered receiving ladle for cupola metal, which held considerably more than the amount of metal necessary to charge a converter.
8. Counsel who has entered into a stipulation of facts to save delay may, upon giving notice in sufficient time to prevent prejudice to the opposite party, repudiate any fact therein with respect to which the facts subsequently developed show that it was inadvertently signed.

[No. 17.]

Argued January 22, 23, 1901. Ordered for reargument March 18, 1901. Reargued October 17, 18, 21, 1901. Decided May 5, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed a decree of the Circuit Court in favor of plaintiff in a suit for the infringement of a patent, and remanded the cause to that court, with directions to dismiss the bill. *Reversed.*

See same case below, 37 C. C. A. 593, 96 Fed. 850.

Statement by Mr. Justice **Brown**:

This was a bill in equity filed in the circuit court for the western district of Pennsylvania by the Carnegie Steel Company against the Cambria Iron Company, for an injunction and the recovery of damages for the infringement of letters patent No. 404,414, issued June 4, 1889, to William R. Jones, of whom plaintiff was the assignee, for a "method of mixing molten pig metal."

In his specification the patentee declares that the—

"Primary object of my invention is to provide means for rendering the product of steel works uniform in chemical composition. *In practice it is found that metal [404] tapped from different blast furnaces is apt to vary considerably in chemical composition, particularly in silicon and sulphur, and such lack of uniformity is observable in different portions of the same cast, and even in different portions of the same pig. . . . The consequence of this tendency of the silicon and sulphur to segregate or form pockets in the crude metal is that the

product of the refining process in the converters or otherwise in like manner lacks uniformity in these elements, and therefore often causes great inconvenience and loss, making it impossible to manufacture all the articles of a single order of homogeneous composition. Especially is this so in the process of refining crude iron taken from the smelting furnace and charged directly into the converter without remelting in a cupola, and, although such direct process possesses many economic advantages, it has on this account been little practised."

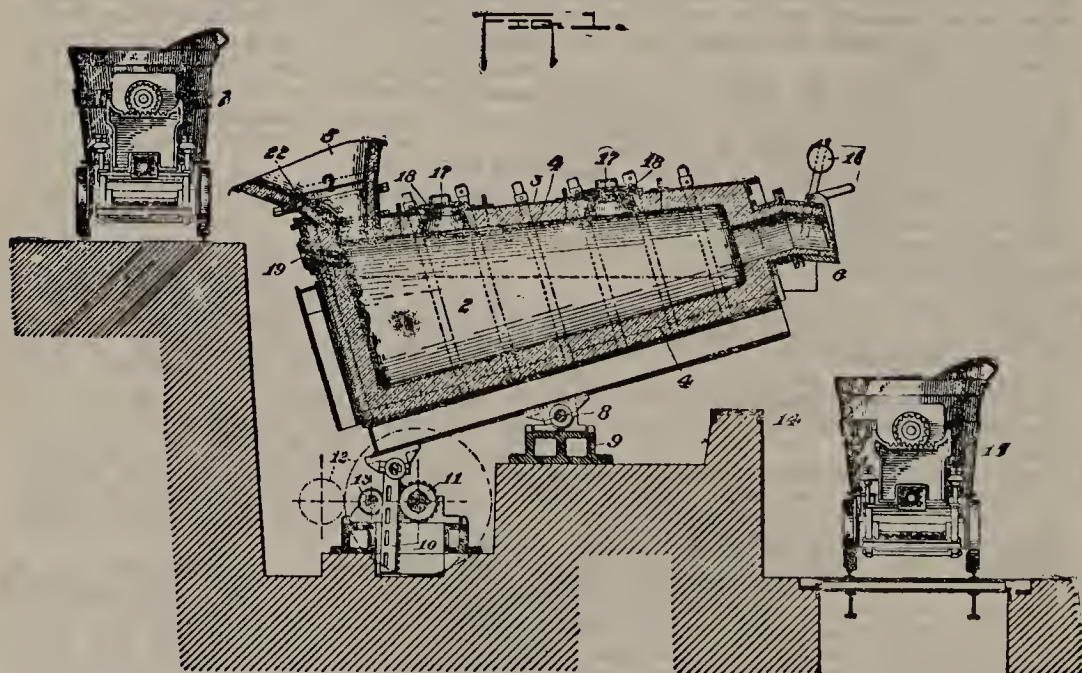
"For the purpose of avoiding the practical evils above stated, I use in the refining process a charge composed, not merely of metal taken at one time from the smelting furnace, but of a number of parts taken from different smelting furnaces, or from the same furnace at different casts, or at different periods of the same cast, and subject the metal before its final refining to a process of mixing, whereby its particles are diffused or mingled thoroughly among each other, and the entire charge is practically homogeneous in composition, representing in each part the average of the unequally diffused and segregated elements of silicon and sulphur originally contained in each of the several parts or charges. By proceeding in this way, not only is each charge for the refining furnace or converter homogeneous in itself, but, as it represents an average of a variety of uniform constituent

parts, all the charges of the converter from time to time will be substantially uniform, and the products of all will be homogeneous."

"To this end my invention may be practised with a variety of forms of apparatus,—for example, by merely receiving in a charging ladle a number of small portions of metal taken from several ladles or receiving vessels containing crude metal obtained at different times or from different furnaces, the mixing being **performed merely* [405] by the act of pouring into the charging ladle, and other like means may be employed. (The clause in italics was subsequently disclaimed.) I prefer, however, to employ the apparatus shown in the accompanying drawings, and have made it the subject of a separate patent application, serial No. 289,673, and, without intending to limit the invention to the use of that specific apparatus, I shall describe it particularly, so that others skilled in the art may intelligently employ the same."

"My invention is not limited to its use in connection with converters, since similar advantages may be obtained by casting the metal from the mixing vessel into pigs for use in converters, puddling furnaces, or for any other uses to which pig iron may be put in the art." (This paragraph subsequently disclaimed.)

(The apparatus is represented by the drawing here inserted.)



"Referring now to the drawings, 2 represents the reservoir before mentioned. It consists of a covered hollow vessel having an outer casing 3, of iron or steel, which is suitably braced and strengthened by interior beams and tie-rods, as shown in the drawings. The whole exterior of the vessel is lined with fire brick or other refractory [406] lining, which should be of sufficient *thickness to retain the heat of the molten con-

tents of the vessel and to prevent chilling thereof. The vessel is strongly braced and supported by braces and tie-rods, and may be of any convenient size, holding, say, 100 tons of metal (more or less), and its shape is preferably such as shown in the drawings, being rectangular, or nearly so, in cross section and an irregular trapezium in longitudinal section, one end being considerably deeper than the other. At the top

of the deeper end, which I call the 'rear' end, is a hopper 5, into which the molten metal employed in charging the vessel is poured, and at the front end is a discharge spout 6, which is so located that the bottom of the spout is some distance above the bottom of the vessel,—say 2 feet in a hundred-ton tank, and more or less, according to the capacity of the vessel,—the purpose of which is that when the metal is poured out of the spout a considerable quantity may always be left remaining and unpoured, and that whenever the vessel is replenished there may already be contained in it a body of molten metal with which the fresh addition may mix. I thus secure, as much as possible, uniformity in the character of the metal which is fed to and discharged from the tank, and cause the fluctuations in quality of the successive tappings to be very gradual."

"For convenient use of the apparatus I have found it best to so arrange it that it is adapted to receive its charges of metals from cars or bogies 7, which run on an elevated track at about the level of the normal position of the hopper 5, and to discharge its contents into similar cars or bogies 15 on a track below the spout 6. In order to facilitate the charging and discharging of the metal, the vessel is set on journals or bearings 8, which have their bearings in suitable pedestals 9, and its rear end is provided with depending rack bars 10, which are pivotally connected with the bottom of the mixing vessel 2, and are in gear with pinions 11, the shaft of which is connected by gearings 12 with the driving mechanism of a suitable engine. The pinions are held in gear with the rack bars by idler wheels or rollers 13. As the journals or bearings 8 are located on a transverse line somewhat [407] in advance of the center of gravity *of the vessel, it tends by its own weight to tilt backward into the position shown in Fig. 1, but may be restored to a level position by driving the pinions 11, and thus raising the rack bars 10 until the front part of the bottom of the vessel comes in contact with a rest or stop 14."

"The mode of operation of the apparatus is as follows: When the vessel is in the backwardly inclined position shown in Fig. 1, it is ready to receive a charge of metal from the ear 7. Before introducing the first charge, however, the mixing vessels should be heated by internal combustion of coke or gas, and when the walls of the vessel are sufficiently hot to hold the molten metal without chilling it, it is charged repeatedly from the cars 7 with metal obtained either from a number of furnaces or at different times from a single furnace. The charges of metal introduced at different times into the vessel, though differing in quality, mix together, and when the vessel has received a sufficient charge its contents constitute a homogeneous molten mass, whose quality may not be precisely the same as that of any one of its constituent charges, but represents the average quality of all the charges. If desired, the commingling of the contents may be aided

by agitation of the vessel on its trunnions, so as to cause the stirring or shaking of its liquid contents. The mixing chamber being deeper at its rear than at the front end, as before described, and its normal position, when not discharging metal for the purpose of casting, being with the bottom inclined upward toward the front or discharging end, and the bottom of the spout being situate above the bottom of the vessel, at its forward end, it is adapted to receive and hold a large quantity of molten metal without its surface rising high enough to enter the discharge spout."

"The discharge spout 6 is furnished with a movable cover operated by a weighted lever 16, which, when closed, serves to exclude the outside air and prevent a draft of air through the vessel and the consequent rapid cooling of the molten contents. If care is exercised in keeping the cover closed, the metal can be kept in a fluid condition for a long time, the heat being kept up by repeated fresh charges of molten metal, and, if necessary or found desirable, by burning gas introduced by a pipe or pipes into its interior."

"*After the vessel is properly charged, the [408] metal is drawn off into the cars 15 from time to time, as it is needed, by opening the door or cover 16 of the spout 6 and driving the engine 12 so as to elevate the rear end of the vessel and tilt it forward, and thus to discharge any required amount of its contents in the manner before explained into the cars 15, which are transported to the converters, or *the metal is cast into pigs or otherwise used.* (Italics disclaimed.) The tilting of the vessel does not, however, drain off all the contents thereof, a portion being prevented from escaping by reason of the elevated position of the spout 6, and as the vessel is replenished from time to time each new charge mixes with parts of previous charges remaining in the vessel, by which means any sudden variations in the quality of the metal supplied to the converter is avoided. Instead of discharging the metal into the cars 12 and carrying it in the cars to the converters or casting house, the vessel 2 may be so situate relatively to the other parts of a furnace plant as to deliver its contents immediately to the converters or other place where it is to be utilized."

"I find it in practice very advantageous to employ two or more mixing vessels constructed substantially as I have described, and to draw a portion of each converter charge from each of the mixing vessels. My invention is, however, not limited to the employment of two or any specific number of such vessels."

"I shall now describe, briefly, other parts of the apparatus which are desirable and important in its practical use."

"At the top of the vessel 2 are manholes 17 designed to permit of access to its interior for the purpose of repairing or fixing the lining. These holes are provided with suitable covers 18 to exclude cold drafts of air from entering the interior. There is also a hole 19 at the rear end of the vessel near the top, through which a rabble may

be inserted for the purpose of assisting or accelerating the mixing of the molten metal, and at the other end, at the level of the bottom of the interior, there are holes 20 provided with suitable spouts to enable all the molten contents to be drawn off when it becomes necessary to do so. (See Fig. 3.) The holes 20 should be provided with suitable stoppers."

[409] *"I claim—

"1. In the art of refining iron directly from the smelting furnace, the process of equalizing the chemical composition of the crude metal by thoroughly commingling or mixing together the liquid-metal charge and subsequently refining the mixed and equalized charge, substantially as and for the purposes described.

"2. In the art of mixing molten metal to secure uniformity of the same in its constituent parts preparatory to further treatment, the process of introducing into a mixing receptacle successive portions of molten metal ununiform in their nonmetallic constituents (sulphur, silicon, etc.) removing portions only of the composite molten contents of the receptacle without entirely draining or emptying the same, and successively replenishing the receptacle with fresh ununiform additions, substantially as and for the purposes described."

The answer set up the invalidity of the patent by reason of an insufficient specification, anticipation, want of novelty, and abandonment; and also denied infringement.

Upon a hearing upon the pleadings and proofs, the circuit court held with the plaintiff, and found that the process was patentable; that it was not anticipated; that it was of great utility and importance; and that defendant had infringed the second claim. 89 Fed. 721.

A decree having been entered for an injunction and an account of profits and damages, in accordance with this opinion, the case was carried to the court of appeals, which ordered the decree of the circuit court to be reversed, and the case remanded to that court with direction to dismiss the bill. 37 C. C. A. 593, 96 Fed. 850. Whereupon plaintiff applied for and was granted this writ of certiorari.

Mr. Thomas W. Bakewell argued the cause, and, with *Messrs. Philander C. Knox* and *Thomas B. Kerr*, filed a brief for petitioner:

An inventor is entitled to all the benefits and uses of his invention, whether he recognized them or not.

Roberts v. Ryder, 91 U. S. 150, 23 L. ed. 267.

But, as a matter of fact, Jones has described the uses and advantages of his invention in a way which cannot fail to be understood by any skilled steel maker familiar with the art and with the difficulties to be cured.

Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177.

Matters of common knowledge in the

steel-making art are as if they had been set forth in detail in the specification.

Ibid.

Anticipations must be proved, and are not to be presumed, and every reasonable doubt must be resolved against the party setting them up.

Cantrell v. Wallick, 117 U. S. 694, 29 L. ed. 1018, 6 Sup. Ct. Rep. 970.

The policy of the law is to treat the question of invention as one of fact, and to determine it by the test of practical success.

Kcystone Mfg. Co. v. Adams, 151 U. S. 145, 38 L. ed. 104, 14 Sup. Ct. Rep. 295; *Vickers v. Siddell*, L. R. 15 App. Cas. 502; *Webster Loom Co. v. Higgins*, 105 U. S. 580, 26 L. ed. 1177.

The burden of proof is strongly upon the defendant to make out a clear and certain anticipation.

Coffin v. Ogden, 18 Wall. 120, 21 L. ed. 821.

The mere suggestion that a given result can be obtained is not patentable, and does not anticipate a patent by another.

Scymour v. Osborne, 11 Wall. 516, 20 L. ed. 33; *Graham v. Gammon*, 7 Biss. 490, Fed. Cas. No. 5,668.

Mere accidental resemblance to the patent in suit, without a substantial and known performance of the functions of the patented process, would not be sufficient to establish the defense.

Topliff v. Topliff, 145 U. S. 156, 36 L. ed. 658, 12 Sup. Ct. Rep. 825.

A new use may be patentable where the result justifies it, even when analogous to the old uses.

C. & A. Potts & Co. v. Creager, 155 U. S. 605, 39 L. ed. 278, 15 Sup. Ct. Rep. 194; *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.* 156 U. S. 502, 39 L. ed. 511, 15 Sup. Ct. Rep. 434.

Not only must the prior device or practice be the same in form in order to anticipate a patented invention, but its principle of operation and its function must be the same. The inventive thought of the later device must have been present in the mind of the inventor or user of the earlier device or process.

Topliff v. Topliff, 145 U. S. 156, 36 L. ed. 658, 12 Sup. Ct. Rep. 825; *Clough v. Gilbert & B. Mfg. Co.* 106 U. S. 166, 27 L. ed. 134, 1 Sup. Ct. Rep. 188.

As the Jones patent was for a method, proof that the apparatus used in the practice of that method was old or did not involve invention is quite irrelevant.

New Process Fermentation Co. v. Maus, 122 U. S. 413, 30 L. ed. 1193, 7 Sup. Ct. Rep. 1304.

If the alleged anticipations are very old, the presumption is that they do not contain the invention, because otherwise they would have come into use in the art to which the patent in suit relates.

Fisher v. American Pneumatic Tool Co. 18 C. C. A. 235, 38 U. S. App. 129, 71 Fed. 523.

A process is patentable when it involves chemical action, or when it involves some

other elemental action, some application of a natural law or principle.

Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745.

Or when a body is subjected to an act or series of acts whereby it is "transformed and reduced to a different state or thing," as distinguished from a merely different shape.

Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; *Mowry v. Whitney*, 14 Wall. 620, 20 L. ed. 860.

On the contrary, the mere result of a machine is unpatentable, because the "real discovery" is the machine itself. The purpose is to give to the inventor the benefit of what he has contributed to the art.

Risdon Iron & Locomotive Works v. Medart, 158 U. S. 72, 39 L. ed. 901, 15 Sup. Ct. Rep. 745.

If he has contributed a new machine, the machine is what he should claim; if a method which is not merely the necessary function of a machine, the method as such should be patented.

Lawther v. Hamilton, 124 U. S. 1, 31 L. ed. 325, 8 Sup. Ct. Rep. 342.

It is not an objection to a process that apparatus must be used in practising it.

Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139.

A valid process need only consist of some series of steps, and "involve" some chemical or elemental action. The patentee need not have been the first discoverer of the elementary principles on which his process is based. It is enough if he has applied them in a new way, or in a new order, or to effect a new result; the rule in this regard being as broad as in the case of patents for combinations of machine elements.

Tilghman v. Proctor, 102 U. S. 729, 26 L. ed. 288.

Other authorities relevant to this question are the following:

Mowry v. Whitney, 14 Wall. 620, 20 L. ed. 860; *Downton v. Yeager Milling Co.* 108 U. S. 466, 27 L. ed. 789, 3 Sup. Ct. Rep. 10; *Eames v. Andrews*, 122 U. S. 40, 30 L. ed. 1064, 7 Sup. Ct. Rep. 1073; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. ed. 390, 9 Sup. Ct. Rep. 83; *Roberts v. Dickey*, 4 Fish. Pat. Cas. 532, Fed. Cas. No. 11,889.

Broadly considered, the question of admission of the disclaimer in evidence was not appealable.

Roemer v. Bernheim, 132 U. S. 103, *sub nom. Roemer v. Neumann*, 33 L. ed. 277, 10 Sup. Ct. Rep. 12.

If the right to file a disclaimer pending suit exists, it imports the right to offer the same in evidence.

Smith v. Nichols, 21 Wall. 117, 22 L. ed. 566.

So far as diligence in entering the disclaimer is concerned, the court below in effect found that the appellee was not guilty of unreasonable neglect or delay. The
185 U. S.

courts have construed this part of the statute liberally.

Seymour v. McCormick, 19 How. 106, 15 L. ed. 562; *O'Reilly v. Morse*, 15 How. 62, 14 L. ed. 601.

The grant or right to disclaim is not limited to cases where the patent includes matter not invented by the patentee, but gives him the right to hold by virtue of the patent such parts of the same as he may choose.

O'Reilly v. Morse, 15 How. 62, 14 L. ed. 601; *Hailes v. Albany Stove Co.* 123 U. S. 582, 31 L. ed. 284, 8 Sup. Ct. Rep. 262; *Sessions v. Romadka*, 145 U. S. 41, 36 L. ed. 614, 12 Sup. Ct. Rep. 799; *Hurlbut v. Schilling*, 130 U. S. 456, 32 L. ed. 1011, 9 Sup. Ct. Rep. 584; *Schwarzwalder v. New York Filter Co.* 13 C. C. A. 380, 26 U. S. App. 547, 66 Fed. 152.

The effect of the disclaimer in the case at bar was to cause the patent to be construed as if the disclaimed matter had never been included in it.

Dunbar v. Myers, 94 U. S. 193, 24 L. ed. 34; *Schwarzwalder v. New York Filter Co.* 13 C. C. A. 380, 26 U. S. App. 547, 66 Fed. 152.

Mr. Thomas B. Reed also argued the cause and filed a brief for petitioner.

Messrs. Thomas B. Reed, Thomas W. Bakewell, and Thomas B. Kerr filed a reply brief for petitioner:

The patent should be construed so as to give to the inventor the benefit of his invention, if such construction is fairly warranted by the language which he has employed.

Klein v. Russell, 19 Wall. 433, 22 L. ed. 116; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. ed. 800, 12 Sup. Ct. Rep. 76.

Even if it were true that the patentee has failed to recite in detail the advantages of his invention, he should not be deprived of the benefit of the rule of law above mentioned, if it appears that those advantages are recognized by those skilled in the art, and that they result necessarily from the practice of the process which he has described.

Roberts v. Ryer, 91 U. S. 150, 23 L. ed. 267; *Dixon-Woods Co. v. Pfeifer*, 5 C. C. A. 148, 14 U. S. App. 245, 55 Fed. 390.

The burden is upon the defendant to show that the invention is described in terms or by necessary implication in prior publications.

Coffin v. Ogden, 18 Wall. 120, 21 L. ed. 821; *Cantrell v. Wallick*, 117 U. S. 689, 29 L. ed. 1017, 6 Sup. Ct. Rep. 970.

Messrs. James I. Kay and Francis T. Chambers argued the cause, and, with **Mr. Philip T. Dodge**, filed a brief for respondent:

The Jones invention, whether it is a great or a little invention, must be found described in the patent, and must be defined with reasonable accuracy in the limit of its claims.

National Mcter Co. v. Yonkers Water Comrs. 149 U. S. 48, 37 L. ed. 644, 13 Sup. Ct. Rep. 774; *Weatherhead v. Coupe*, 147 U. S. 322, 37 L. ed. 188, 13 Sup. Ct. Rep.

312; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. ed. 800, 12 Sup. Ct. Rep. 76; *White v. Dunbar*, 119 U. S. 47, 30 L. ed. 303, 7 Sup. Ct. Rep. 72; *Fay v. Cordesman*, 109 U. S. 408, 27 L. ed. 979, 3 Sup. Ct. Rep. 236; *Burns v. Meyer*, 100 U. S. 671, 25 L. ed. 738; *Keystone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 274, 24 L. ed. 344; *Merrill v. Yeomans*, 94 U. S. 568, 24 L. ed. 235; *Bates v. Coe*, 98 U. S. 31, 25 L. ed. 68; *Gill v. Wells*, 22 Wall. 1, 22 L. ed. 699.

Proof as to the relationship of a patented invention to the art to which it appertains, so as to enable the court to judge whether the invention is one of a primary character, or one only of a subordinate character, is relevant and important in order to enable the court to properly and justly apply the doctrine of equivalents in considering the claim and deciding the question of infringement.

Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 32 L. ed. 715, 9 Sup. Ct. Rep. 299; *Miller v. Eagle Mfg. Co.* 151 U. S. 186-207, 38 L. ed. 121-130, 14 Sup. Ct. Rep. 310.

No device or step not referred to in the patent can be, by construction or reference to evidence outside of the patent, incorporated in it.

McClain v. Ortmyer, 141 U. S. 419, 35 L. ed. 800, 12 Sup. Ct. Rep. 76.

The claim as allowed in the patent must be read and interpreted with reference to the rejected claims and to the prior state of the art, and cannot be construed to cover either that which was rejected by the Patent Office or disclosed by the prior devices.

Hubbell v. United States, 179 U. S. 77, 45 L. ed. 95, 21 Sup. Ct. Rep. 24; *Leggett v. Avery*, 101 U. S. 256, 25 L. ed. 865; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. ed. 723, 6 Sup. Ct. Rep. 493; *Knapp v. Morss*, 150 U. S. 227, 37 L. ed. 1061, 14 Sup. Ct. Rep. 81; *Magie Light Co. v. Economy Gas-Lamp Co.* 38 C. C. A. 56, 97 Fed. 87; *Irwin v. Hasselman*, 38 C. C. A. 587, 97 Fed. 964; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 99 Fed. 758; *Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* 41 C. C. A. 351, 101 Fed. 282; *Reineke v. Dixon-Woods Co.* 42 C. C. A. 388, 102 Fed. 349; *New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co.* 103 Fed. 316.

Where a function is not described in the patent the presumption is against a construction which makes such function an important feature of the invention.

MacColl v. Knowles Loom Works, 37 C. C. A. 346, 95 Fed. 982; *Union Edge Setter Co. v. Keith*, 139 U. S. 530, 35 L. ed. 261, 11 Sup. Ct. Rep. 621; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. ed. 800, 12 Sup. Ct. Rep. 76; *Kursheedt Mfg. Co. v. Naday*, 103 Fed. 948.

The patented method is not limited to the mixing of metal drawn directly from the blast furnace, but covers as well the mixing of remelted pig metal.

Lovell Mfg. Co. v. Cary, 147 U. S. 623, 37 L. ed. 307, 13 Sup. Ct. Rep. 472; *Leggett v. Standard Oil Co.* 149 U. S. 287, 37 L. ed. 974

737, 13 Sup. Ct. Rep. 902; *United States Mitis Co. v. Carnegie Steel Co.* 89 Fed. 343; *United States Repair & Guaranty Co. v. Assyrian Asphalt Co.* 96 Fed. 235; *Falk Mfg. Co. v. Missouri R. Co.* 43 C. C. A. 240, 103 Fed. 295.

A patent, like any other instrument, is to be interpreted upon its own terms.

Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. ed. 149.

The court will not transpose the patent into a different art from that to which it purports to relate, and will not, upon evidence extraneous to the patent, find that the purpose of the invention was different from that stated, and that a claim for mixing molten pig iron in a way to produce a uniform homogeneous product is to be interpreted as though it were a claim for a manipulation in the process of Bessemerizing iron, with which uniformity in product has nothing whatever to do.

Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 29 L. ed. 952, 6 Sup. Ct. Rep. 846; *White v. Dunbar*, 119 U. S. 47, 30 L. ed. 303, 7 Sup. Ct. Rep. 72.

The disclaimer is ineffective to change the meaning and scope of the patent as issued.

Grant v. Walter, 148 U. S. 547, 37 L. ed. 552, 13 Sup. Ct. Rep. 699.

The typical case for the application of a disclaimer is where two distinct claims exist, one of which it is desired to cancel: the disclaimer then acts as the pruning knife of a tree; one branch is cut away, another branch is unaffected. Such disclaimers were before the courts in—

O'Reilly v. Morse, 15 How. 62, 14 L. ed. 601; *Seymour v. McCormick*, 19 How. 591, 15 L. ed. 777; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; *Burdett v. Estey*, 4 Bann. & Ard. 7, Fed. Cas. No. 2,145; *Mattheus v. Spangenberg*, 20 Blatchf. 482, 19 Fed. 823; *Torrent v. Duluth Lumber Co.* 30 Fed. 830; *Parker v. Sears*, 1 Fish. Pat. Cas. 99, Fed. Cas. No. 10,748; *Burden v. Corning*, 2 Fish. Pat. Cas. 477, Fed. Cas. No. 2,143; *Christman v. Rumsey*, 4 Bann. & Ard. 517, Fed. Cas. No. 2,704; *Tyler v. Galloway*, 20 Blatchf. 445, 12 Fed. 567; *Brainard v. Cramme*, 20 Blatchf. 530, 12 Fed. 621; *Hake v. Brown*, 37 Fed. 783; *Union Paper-Bag-Mach. Co. v. Waterbury*, 39 Fed. 389; *Steam Gauge & Lantern Co. v. Kennedy*, 41 Fed. 38; *Smead v. Union Free School Dist.* 44 Fed. 614.

There is another series of cases in which patent claims are construed by the courts to cover alternately two distinct inventions, definitely distinguishable from each other, and in which a disclaimer has been held to be an effective remedy for limiting these claims to one alternative.

Tuck v. Bramhill, 3 Fish. Pat. Cas. 400, Fed. Cas. No. 14,213; *Taylor v. Archer*, 4 Fish. Pat. Cas. 449, Fed. Cas. No. 13,778; *Libbey v. Mt. Washington Glass Co.* 26 Fed. 758; *Electric Accumulator Co. v. Julien Electric Co.* 38 Fed. 117.

The law furnishes no warrant for the re-

vision of a specification by erasures made under the guise of a disclaimer.

Union Metallic Cartridge Co. v. United States Cartridge Co. 112 U. S. 624, 28 L. ed. 828, 5 Sup. Ct. Rep. 475; 15 Am. & Eng. P. C. 367; *Hailes v. Albany Stove Co.* 123 U. S. 582, 31 L. ed. 284, 8 Sup. Ct. Rep. 262; *Collins Co. v. Coes*, 130 U. S. 56, 32 L. ed. 858, 9 Sup. Ct. Rep. 514; *Hurlbut v. Schillinger*, 130 U. S. 456, 32 L. ed. 1011, 9 Sup. Ct. Rep. 584; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; *Grant v. Walter*, 148 U. S. 547, 37 L. ed. 552, 13 Sup. Ct. Rep. 699; *Torant v. Duluth Lumber Co.* 30 Fed. 830; *Rumford Chemical Works v. Lauer*, 5 Fish. Pat. Cas. 615, Fed. Cas. No. 12,135; *White v. E. P. Gleason Mfg. Co.* 21 Blatchf. 364, 17 Fed. 159; *Albany Steam Trap Co. v. Worthington*, 25 C. C. A. 258, 51 U. S. App. 164, 79 Fed. 966.

This court has never permitted itself to hesitate in affirming the rights of the public to continue the use of any known process, because of real or alleged discoveries of peculiar advantages in such use.

Lovell Mfg. Co. v. Cary, 147 U. S. 623, 37 L. ed. 307, 13 Sup. Ct. Rep. 472; *Roberts v. Ryer*, 91 U. S. 150, 23 L. ed. 267; *Ansonia Brass & Copper Co. v. Electrical Supply Co.* 144 U. S. 11, 36 L. ed. 327, 12 Sup. Ct. Rep. 601. See also *Wood-Paper Patent*, 23 Wall. 566, *sub nom.* *American Wood Paper Co. v. Fiber Disintegrating Co.* 23 L. ed. 31; *Blake v. San Francisco*, 113 U. S. 679, 28 L. ed. 1070, 5 Sup. Ct. Rep. 692; *Burt v. Ivory*, 133 U. S. 349, 33 L. ed. 647, 10 Sup. Ct. Rep. 394; *French v. Carter*, 137 U. S. 239, 34 L. ed. 664, 11 Sup. Ct. Rep. 90; *Busell Trimmer Co. v. Stevens*, 137 U. S. 435, 34 L. ed. 723, 11 Sup. Ct. Rep. 150; *United States Mitis Co. v. Carnegie Steel Co.* 89 Fed. 343; *Falk Mfg. Co. v. Missouri R. Co.* 43 C. C. A. 240, 103 Fed. 295.

The "Furniture Spring" case, *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 37 L. ed. 307, 13 Sup. Ct. Rep. 472; and the "Glue Soup" case, *Leggett v. Standard Oil Co.* 149 U. S. 287, 37 L. ed. 737, 13 Sup. Ct. Rep. 902,—are controlling of the present issue.

The application of an old process or machine to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not been contemplated.

Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co. 110 U. S. 490, 28 L. ed. 222, 4 Sup. Ct. Rep. 220; *Miller v. Force*, 116 U. S. 22, 29 L. ed. 552, 6 Sup. Ct. Rep. 204; *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *American Road Mach. Co. v. Pennock & S. Co.* 164 U. S. 26, 41 L. ed. 337, 17 Sup. Ct. Rep. 1; *Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 798.

Generally, improvement in degree is not patentable.

Roberts v. Ryer, 91 U. S. 150, 23 L. ed. 267; *Dunbar v. Myers*, 94 U. S. 187, 24 L. ed. 34; *Crouch v. Rocmer*, 103 U. S. 797, 26 185 U. S.

L. ed. 426; *Stow v. Chicago*, 104 U. S. 547, 26 L. ed. 816.

Improvement in degree by substituting one old material for another old material is not invention.

Hotchkiss v. Greenwood, 11 How. 248, 13 L. ed. 683.

Mere change in size, weight, form, proportion, and shape, without change in function, is not patentable.

Phillips v. Page, 24 How. 164, 16 L. ed. 639; *Smith v. Nichols*, 21 Wall. 112, 22 L. ed. 566; *Dalton v. Jennings*, 93 U. S. 271, 23 L. ed. 925; *Pomace Holder Co. v. Ferguson*, 119 U. S. 335, 30 L. ed. 406, 7 Sup. Ct. Rep. 382; *Milligan & H. Glue Co. v. Upton*, 97 U. S. 3, 24 L. ed. 985; *Estey v. Burdett*, 109 U. S. 633, 27 L. ed. 1058, 3 Sup. Ct. Rep. 531; *Peters v. Active Mfg. Co.* 129 U. S. 530, 32 L. ed. 738, 9 Sup. Ct. Rep. 389; *Grant v. Walter*, 148 U. S. 547, 37 L. ed. 552, 13 Sup. Ct. Rep. 699; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627; *Wright v. Yuengling*, 155 U. S. 47, 39 L. ed. 64, 15 Sup. Ct. Rep. 1; *American Road Mach. Co. v. Pennock & S. Co.* 164 U. S. 26, 41 L. ed. 337, 17 Sup. Ct. Rep. 1; *Busell Trimmer Co. v. Stevens*, 137 U. S. 423, 34 L. ed. 719, 11 Sup. Ct. Rep. 150; *Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 34 L. ed. 920, 11 Sup. Ct. Rep. 292; *Marchand v. Emken*, 132 U. S. 195, 33 L. ed. 332, 10 Sup. Ct. Rep. 65.

*Mr. Justice **Brown** delivered the opinion[410] of the court:

Steel is a product, or, perhaps, more accurately, a species of iron, refined of some of its grosser elements, intermediate in the amount of its carbon between wrought and cast-iron, and tempered to a hardness which enables it to take a cutting edge, a toughness sufficient to bear a heavy strain, an elasticity which adapts it for springs and other articles requiring resiliency, as well as a susceptibility to polish, which makes it useful for ornamental and artistic purposes.

Pig iron, which was the original basis for the manufacture of all iron and steel, is made by the reduction of iron ore in large blast furnaces, which are filled with layers of ore, charcoal or coke, and flux. By the agency of this the iron is melted out and falls to the bottom of the furnaces, is drawn out through openings for that purpose into canals, and finally into molds, where it solidifies into what are termed pigs. Prior to the invention of Sir Henry Bessemer, steel was manufactured from a pig-iron base by a tedious and expensive process of refining in furnaces adapted to that purpose. The process was so costly that steel was little used except for cutlery and comparatively small articles, and was practically unknown in the construction of bridges, rails, buildings, and other structures where large quantities of iron were required.

In 1856 Bessemer discovered a process of purifying iron without the use of fuel, by blowing air through a molten mass of pig

iron placed in a refractory lined vessel called a converter, whereby the silicon, carbon, and other nonmetallic constituents were consumed, and the iron thus fitted for immediate conversion into steel by recarbonization. The present process of recarbonization was a supplementary invention of Mushet, who accomplished it by the introduction of ferro-manganese, or spiegel-eisen, while the iron in a molten state was issuing from the converter, in which it had been purified, and was thus converted into steel. The process of running molten metal from blast furnaces into pigs and remelting them in eupola furnaces for use in a converter was termed the indirect process, and was generally used prior to the Jones invention.

[411] *His process is thus described by Bessemer in his patent of 1869: "The most important of these operations consist in melting the pig metal, transferring it in the molten state to the converting vessel, blowing air through it, and converting it into a malleable metal, mixing the metal so converted with a certain quantity of fluid manganese pig iron, pouring the mixed metals into a casting ladle, and running it from thence through a suitable valve into ingots or other molds, and the removal therefrom of the ingots or other cast masses when solidified." This invention of Bessemer, simple as it appears, may be said not only to have revolutionized the manufacture of steel, and to have introduced it into large constructions where it had never been seen before, but to have created for it uses to which ordinary iron had been but illy adapted.

While in the Bessemer specification of 1856 it is said "the iron to be used for the purposes of my present invention may be conveyed by a gutter in a fluid state direct from the smelting furnace where it has been obtained from the ore," without the expense and delay incident to the intermediate eupola process, practical experience, in this country at least, showed that the refining of iron without first casting it into pigs, selecting or mixing the pigs, and remelting them, was attended with such expense that the entire abandonment of the practice was seriously considered. The difficulty was in the material variations between different portions of the same cast, and even different parts of the same pig,—an irregularity which was increased when the metal was drawn from several furnaces. There was added to this frequent changes in the character and composition of the ore, coke, and limestone flux with which the furnace was charged. The consequence was that the nonuniform chemical composition of the metal from the molten blast furnaces yielded products of steel, such as rails and beams, which were not only irregular chemically, but of irregular and uncertain final condition,—some sound, others of imperfect strength and full of flaws.

These irregularities were in a measure obviated, not only by a careful selection of pigs beforehand, but by the necessity of employing open receiving ladles or reservoirs

[412] into which the *product of one or more cu-

pola furnaces was drawn off into such reservoirs, which were made large enough to hold the product of two or three furnaces, and from which the molten metal was withdrawn into the converters. Had the amount required for the converters in each case been the exact product of one or more eupolas, no reservoirs would have been necessary, but as the demand was variable, a storage of molten metal was required to retain the product of one or more eupolas, until it was required for the converters. Of course, as the product of two or more furnaces was drawn off into these receiving ladles, there would be some intermixing of those products, although the receiving ladles do not appear to have been used for that purpose, the operators relying more particularly upon the careful selection of pigs beforehand, to obtain the requisite uniformity for conversion into steel. The ladles being open at the top, the molten metal could not long be retained in them, and in the best practice it was so arranged that the withdrawals from the reservoir were made every few minutes, and without regard to the amount left in the reservoir after each withdrawal. It will be borne in mind that the object in either case, whether by direct or indirect process, is to obtain, as far as possible, a uniform product of iron for the converter.

"These results," said one of the witnesses (Kennedy), speaking of the process used before that of Jones, "are not obtained by the practice of taking metal from two blast furnaces by running a train of ladles in front of them and tapping into each ladle half a charge and following it from a second furnace. By such practice, of course, there is some independent equalization of the composition of each ladle or of the ladles of each group, but it affords no further advantage, and in fact would not obviate the difficulties of direct metal working. It does not enable the converter manager to foretell the character of each charge from the character of the preceding charge, and would therefore entail the uncertainties of operation and the irregularity of the product which the Jones method avoids."

It had long been an object of manufacturers that steel should be made directly from the molten metal, as it comes from the blast furnaces, without having to pass through the intermediate *or eupola process, which [413] involved the casting of the furnace metal into pigs. These, after becoming cold, were assorted, broken up, recharged and remelted in a eupola furnace, and then placed in a converter for conversion into steel. By this eupola process a product, practically uniform in character and suitable for further treatment in the converters, was secured, but at the expense (more than 60 cents per ton) of rehandling and remelting the iron as it came from the blast furnaces, in eupolas, and the contamination of the metal with sulphur evolved from the coke in the process of remelting. The obstacles connected with this method and the difficulties attendant upon the use of the direct process

are thus comprehensively set forth by Mr. Julian Kennedy, one of the experts:

"Ever since the invention of the Bessemer process it has been well recognized that great economies could be attained by transferring the molten metal from the blast furnace to the converter without allowing it to solidify. Until within a few years, however, this direct process, as it has been called, has not been generally used. It is easy to see why this was the case. The fluctuation in the chemical composition of the metal from the blast furnace was too great to allow that degree of uniformity of product in the Bessemer steel produced from it which is absolutely necessary in the case of steel rails, for example, which must be as reliable as human skill can make them, and where no reasonable expense can be spared to make them perfectly safe and trustworthy. A very few broken rails in a track, with the damage to property and human life which this might cause, would far more than offset any possible saving in a year's work, due to the use of the direct process. For this reason the practice, until within comparatively recent years, has been to cast the metal in pigs, then to analyze it and reject any portion not closely approximating a rigid specification in its chemical composition, and to select, mix, and then melt the approved metal in eupola furnaces. By this means very great uniformity of chemical composition of the remelted metal can be obtained, and good and reliable steel made from it with regularity and certainty."

[414] *Speaking of a time when the direct process (before that of Jones) had been in use for several years, he said:

"After studying the results which had been obtained at the Edgar Thomson works and elsewhere in the use of the direct process, I consulted with Mr. James Gayley, and we agreed that in the building of a new works it would not be profitable to use direct metal, but that, on the contrary, the disadvantages resulting from the irregularity in the product were so great that it would be better to go to the expense of building and using eupola furnaces. We did not then perceive any means adequate to overcome these disadvantages."

The difficulties connected with the prior devices are also stated in an article by Mr. Holley, published in 1877, from which we extract the following paragraph:

"Third. The embarrassing feature of the direct process is the irregularity in the heat—that is to say, in the silicon of the charges—resulting in the large amount of scrap due to too little of this element, and in the increased number of second-quality rails due to too much of it; while in France, where 3 to 5 per cent of manganese is the heating ingredient, there may always be an excess of this latter element without injuring the quality of the steel, although the variation of heat is here, also, a serious difficulty. In other words, it has not yet been practicable to work the blast furnace with sufficient regularity to realize approx-

imately the theoretical advantages of the direct process."

"Fourth. The obvious remedy is to mix a number of blast-furnace charges, so as to reduce the irregularity to a minimum. Two systems of doing this are on the eve of trial: The one is simply mixing so few charges in a tank that the metal will be drawn out before it chills; the other is to store a larger number of charges in a heated tank,—that is to say, in an immense open-hearth furnace."

"A few words of history may be of interest. Mr. Bessemer's early intention was to use blast-furnace metal direct. The earlier Bessemer practice, especially that in Sweden, was with metal right from the blast furnace. But this practice did not make headway, except where there was from 3 to 5 per cent of manganese in the pig blown, for reasons just mentioned; *so that while it soon became standard at Terrenoire and elsewhere in France, as well as in Sweden, and to some extent in Germany, yet in England it was not only unused, but pronounced impracticable so late as September, 1874." [415]

This difficulty,—and it seems to have been so serious as to render the direct process commercially impracticable,—Jones sought to remedy, and did remedy, by creating a covered reservoir of molten metal between the blast furnaces and the converters, in which should always be maintained a large quantity of metal, happily termed by the district judge a dominant pool, which should be drawn off in small quantities at a time, and replenished by a like quantity of metal from the blast furnaces. In this way, while the metals taken from the several blast furnaces might differ in their heat and constituent elements, yet, being received and mixed with the molten metal in the dominant pool, they were, when discharged from the reservoir, approximately, though not perfectly, uniform, the original variations having been lost in their mixture with the dominant pool. "It is therefore plain," says the district judge in his opinion, "that with a mixer thus operated, it is possible to have wide variations in the composition of the blast furnace metal charges added, and at the same time the successive withdrawals for the Bessemer converter show quite small and gradual changes of composition. The heat of the detained mass is affected by the incoming charges just from the blast furnace, but the heat of such addition, whether relatively high or low, must mingle with, be modified by, and average with, the heat of the larger and dominating mass." It is not insisted that this method gave absolutely uniform results, "nor," says the witness Fry, "did the inventor, as I understood him, comprehend such, but, on the contrary, he recognized the practical impossibility of rendering uniform a continuous supply of metal, and desired only to reduce the abrupt changes of the several portions added to the gradual changes of the portions withdrawn, and this is what he

worked out from his invention in a thoroughly practical way."

While the patent in suit is for a process, and not for a mechanism, the process will be the more easily understood by a reference to the apparatus above reproduced, [416] which consists of a "reservoir, or closed receptacle, commonly termed a "mixer," lined with fire brick of sufficient thickness to retain the heat of the molten iron, and of such size and strength as to be capable of receiving and retaining a large amount—"say, 100 tons"—of molten iron. This reservoir is mounted upon journals, and is adapted to be tipped so as to receive at one end molten metal from the blast furnaces, carried to it in ears, and by being tipped in the other direction, to discharge the same into similar ears, in which it is carried to the converter. The essence of the invention lies in the fact that the tip is so regulated by a stop that the reservoir can never be wholly emptied, but a "considerable quantity" of metal always remains,—a dominant pool, into which successive additions are received.

That the invention is one of very considerable importance is attested by the fact that it was not only put into immediate use in the Edgar Thomson works at Braddock, then owned by the plaintiff, but has since been adopted by all the leading steel manufacturers in this country, and by many similar works in Europe, where the patent was sold for £10,000. Mr. Carnegie, one of the witnesses, says of it: "There were both advantages and disadvantages [in the direct process used prior to Jones's invention], but the disadvantages were so great that we often debated whether to abandon the process or not. We found it impossible to get a uniform quality of rails as well as by the cupola method. . . . When we were still anxiously struggling with the problem, and undecided whether to continue or abandon it, Captain Jones . . . told us that he believed he had invented a plan which would solve the problem. . . . We thought so well of the idea—I was so convinced of its reasonableness—that I directed him to go ahead with his invention. . . . Captain Jones did so, and almost from that day our troubles ended. He had scored a tremendous success; another step forward was taken in the manufacture of steel, and we are using the invention to-day. . . . Without this invention I believe that we should have abandoned the mode of running direct from the blast furnaces. Above all things, the manufacturer has to regard the [417] uniformity of product, *the equality of rails; and this uniformity cannot be obtained without Jones's invention, as far as I know."

It is true that what is termed the direct process was used in connection with the Bessemer invention in some foreign countries, notably Sweden and France, with more or less success, due to the peculiar character of the ores used in those countries; but such attempts in this country had proven practically failures, and had

been abandoned. In regard to this the witness Kennedy said:

"The Jones method has made the direct process, which was attended with great danger and difficulties before the date of his invention, a thoroughly practicable and successful one. Instead of it being a question of great doubt whether to run the metal direct to the converter or remelt it, as it was up to the time of Jones's invention, no one would now think of building a new works containing both furnaces and converters without arranging to mix the metal by the Jones method, which not only effects an immense saving in the cost of operating the works, but enables a uniformly good product to be made, and also a purer product than can be obtained from cupola metal, which absorbs and is contaminated by sulphur from the coke which constitutes the fuel of the cupola."

Indeed, the value of the process is not wholly denied, though much depreciated, by the defendant, which relies rather upon the fact that it was well known in the art, and that so far as it is described in the Jones specification and drawings it was not infringed by it.

1. We now proceed to an examination of the question of *anticipation*, in support of which a number of English patents are produced, which will be briefly considered: First, the British patent to Taberner of 1856, the object of which was, as stated by the patentee in his specification, "to dispense with the necessity of employing one or more large furnaces, and to use in lieu thereof several small furnaces, the combined capacities whereof are equal to that of one or more large furnaces, and to cause these small furnaces to discharge their contents at short intervals of time into one large reservoir, from which the molten metal may be drawn for casting from. . . . The *principal features in this invention [418] consist in directing the blast to the body or belly of the furnace, as well as to the hearth thereof, for the purpose of fusing or smelting the entire mass of ore in the furnace simultaneously, or nearly so. . . . The mode hitherto practised in smelting furnaces has been to direct blasts into the hearth only thereof, thereby requiring several hours to smelt or fuse the contents of a large furnace." The specification is somewhat blind, and it is difficult to see what definite or valuable result is obtained by the use of several small instead of one large furnace, except, perhaps, a quicker heating and less delay in its practical operations; but it is sufficient for the purposes of this case to say of it that it contains no suggestion of a mixing of different casts for the purpose of obtaining a more uniform product, and that the invention has no relation to a further treatment or refining. It does contemplate the use of a reservoir, but there is no suggestion of a reservation, in such reservoir, of a quantity of molten metal. It is not denied that the use of a reservoir from which molten metal may be drawn long antedated the Jones patent. But the best that can be said of

the Taberner patent is that, if the reservoir had been of sufficient size and properly constructed so as to never be completely emptied, it might have been adapted to carry out the Jones process; but there is no evidence that it was ever so constructed, or that the production of a uniform discharge from the reservoir was contemplated. That it could not have been intended for the purpose of carrying out the Bessemer process, or any other process, for the use of blast-furnace metal in a converter, is evident from the fact that the patent was nearly simultaneous with the Bessemer patent, of the existence of which the patentee appears to have been entirely ignorant.

The English patent to Deighton of 1873, for "improvements in the arrangement and mode of working an apparatus for the manufacture of Bessemer steel," contains the closest approximation to the principle of the Jones invention. If this does not anticipate, none does. The primary object of the patent seems to have been to prevent the loss of time while the converters are being cooled and relined or repaired, and [419] again *prepared for work, by providing that the converting vessel shall be so arranged that it can be readily detached from its actuating mechanism and lifted bodily out of its bearings by a suitable crane or other lifting mechanism, and a spare converter substituted in its place.

There is, however, a further provision in the patent, as follows:

"Instead of manufacturing Bessemer iron or steel from pig iron, which has been melted in cupolas, my invention also consists in taking the molten metal directly from the blast furnace to the converter, in which case I prefer to arrange the Bessemer plant in a line at a right angle to a row of two or more blast furnaces, and place a vessel to receive the molten metal tapped from two or more blast furnaces to get a better average of metal which will be more suitable for making Bessemer steel or metal of uniform quality, the vessel or receiver being placed on a weighing machine so that any required weight may be drawn or tapped from it and charged into the converter."

The specifications provide for manufacturing Bessemer steel directly from the smelting furnace by employing gates or channels for molten metal from each furnace, leading to a reservoir, which is placed low enough to give fall for the molten metal to flow from the blast furnace to this reservoir, which forms a receptacle for mixing the molten metal from two or more of the smelting furnaces. From the reservoir the mixed molten metal is tapped, and flows down the swivel trough into the converter. By placing the reservoir on a weighing machine, it can be readily ascertained when the exact quantity required has been tapped from it into the converter. The sixth claim of the patent is for "the system or mode of arranging and working Bessemer converters with a receiver or receptacle for mixing the molten metal from two or more smelting furnaces to get a more uniform

quality of metal, substantially as hereinbefore described and illustrated by the drawings."

While Deighton seems to have conceived the idea that uniformity of product was necessary to the successful use of the direct process, and might be attained by mixing the discharge from several blast furnaces in an open reservoir, standing between *the [420] furnaces and the converter, the dominant idea of the Jones invention, that a constant quantity of molten iron should always be kept in such reservoir to serve as a basis for such mixture and an equalizer of the different discharges, does not seem to have occurred to him. As the discharge pipe was located at the bottom of the reservoir, it was certainly possible to empty it entirely, and the testimony in the case indicates that this was the natural method of operation. If this were so, then the reservoir accomplished nothing beyond the mixing of each batch of metal introduced into it from the different blast furnaces. There is nowhere in the specification a suggestion of supplying to and withdrawing from the reservoir small amounts at a time, a constant quantity of metal being retained in the reservoir for the purpose of equalizing the different products of the blast furnaces. While the Deighton reservoir, if a cover had been added to it, might perhaps have been utilized for that purpose, there is no evidence that such use ever occurred to the inventor. Indeed, the absence of a cover to the reservoir is evidence, even to a nonexpert, that it was not contemplated that a permanent quantity of molten iron should be retained in it, since a radiation of heat would thereby be produced and the contents skulled or crusted over with a layer of refuse iron or slag. The testimony is clear that the Jones process cannot be carried on in an open reservoir, and the absence of a cover is conclusive that it is not so used.

It is insisted, however, that defendants have demonstrated, by practical experimentation with a plant constructed according to the specification of the Deighton patent, that the results are practically the same as those obtained by the Jones process. This plant, however, was constructed after suit brought, long after the Deighton patent had been allowed to expire, and with no opportunity afforded the plaintiffs to inspect the plant or witness its operation. The tank was fitted with a cover, and a constant pool of molten metal retained in it; but this was not the Deighton process, but the Jones process adapted to the Deighton device. Were this evidence admissible at all, we are satisfied that it is met by the fact that if the Deighton patent had been adaptable to the Jones process, it is scarcely possible *that its merits should have failed [421] to seize upon the attention of manufacturers, who would have brought the patent into general use, instead of allowing it to lapse for the nonpayment of a comparatively small fee. As something in the nature of the Jones process was needed to enable steel to be manufactured directly from the

product of blast furnaces, the utility of the Deighton patent for that purpose would at once have been recognized and its success assured. But evidently that patent was not the final step in the accomplishment of the mixing process. It contributed nothing to the art of manufacturing steel, and, although issued in 1873, was allowed to lapse in 1876, after an apparently unprofitable existence for three years by reason of the nonpayment of the stamp duty necessary to keep it alive. It is sufficient to say of it that it fails to disclose, fully and precisely, the essential features of the process covered by the Jones patent. Walker, Patents, § 54; *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. ed. 33, 42; *Illinois C. R. Co. v. Turrill*, 94 U. S. 704, 24 L. ed. 241.

Although Deighton was an employee of the Moss Bay Company of Workington, England, if any attempt were made by this company to make use of his process, it evidently amounted to nothing, since one of the writers, Snelus, contributing to the Journal of the Iron and Steel Institute, 1876, says: "One great drawback to the direct easting process was that you could not always get your metal at the exact time you wanted it. He believed that it would be found that the great advantage the Bessemer works in America had was the intermediate receiving ladle, which was designed by Mr. Holley, and which was universally used there, although it was never used in England. The Moss Bay Company attempted to modify the thing some time ago, and put up a heating furnace: but that, to his mind, was a step in the wrong direction. Anyhow, the thing had failed, and no one in England, so far as he knew, was using any intermediate receiver between the blast furnace and the converters."

[422] This defense presents the common instance of a patent which attracted no attention, and was commercially a failure, being set up as an anticipation of a subsequent patent which has proved a success, because there appears to be in the mechanism described a possibility of its having been, with some alterations, adaptable to the process thereafter discovered. As hereinafter observed, a process patent can only be anticipated by a similar process. It is not sufficient to show a piece of mechanism by which the process might have been performed.

In the American patents to Durfee, Nos. 118,597 and 122,312, both of 1871, the desirableness of manufacturing steel directly from the blast furnace is recognized, and in his second patent he says: "That in the manufacture of steel by the pneumatic or Bessemer process a great saving of fuel and iron, of wear and tear of furnaces, and of labor, would be effected were it possible to make uniformly good products of the desired temper by converting the crude iron immediately it is tapped from the blast furnace in which it is made. This plan has been and may still be practised to a considerable extent, but it has been found that, by reason of the irregular working of blast

furnaces and the consequent varying character and quality of the crude iron produced, it was always very difficult and in most cases impossible to secure such uniformity in the converted metal as was essential to success in the business. Hence, at several establishments where the plan of taking the fluid iron as it was tapped from the blast furnace, and pouring it at once into the converter, had been practised, it has been abandoned, the proprietors preferring to incur the expense of handling and remelting the crude iron after it had been cast into pigs, in order thus to secure the advantage of carefully selecting and mixing the materials for each charge to be converted."

He proposed to accomplish this by using a reverberatory gas furnace, into which the crude iron from the blast furnace is poured, and in which it may be mixed with other irons, and so treated as to insure uniformity. Pig iron of different qualities, or any metals or metalloids or fluxes, can be added and mixed with the metal as may be necessary to bring it to the required character. The process is so manifestly different from that described by Jones that it demands no further attention. If it were put in practice at all, it seems to have proved a failure, as, although an English patent was taken out by Durfee, it was allowed to lapse by reason of the nonpayment of the stamp duty.

"Two American patents to James P. With- [423] erow, No. 315,587 and No. 327,425, both issued in 1885, are pressed upon our attention. In the second patent, the only one necessary to notice, he restates the advantages of the direct process and the difficulties theretofore encountered in its practical operation. "In the manufacture of steel by the pneumatic process, the converters are charged with molten metal, the product of the blast furnace. This metal is usually cast in the form of pigs, then remelted in the cupola as needed, before being charged into the converter. . . . It is very desirable to take advantage of the molten condition of the metal as it comes from the blast furnace for its use in the converter, because thereby the remelting of the metal and the expense of the construction of a cupola may be avoided. The charge of the converter is from one to five tons, and the easting of a blast furnace runs usually from ten to fifty tons. The difficulty of using the molten metal from the furnace to the converter consists in keeping the large quantity of metal from the latter in a proper molten condition for use in the former." He proposed to remedy this by a reservoir provided with a suitable cover and with tuyeres "which blow down upon the surface of the metal for the purpose of maintaining its heat and fluidity." As this reservoir was apparently adapted to hold a single cast, and therefore must be emptied before another cast was received into it, it was impossible that Witherow intended by its use to practise the Jones process. There is no suggestion anywhere in the patent of a desire to retain

a quantity of metal in the reservoir to serve as a basis for mixing the various products of the blast furnace, which was the dominant idea of the Jones patent. To anticipate a process patent, it is necessary, not only to show that the prior patent might have been used to carry out the process, but that such use was contemplated, or that the leading idea of the Jones patent of maintaining a dominant pool in the reservoir was such a use of the Witherow patents as would have occurred to an ordinary mechanic in operating his device. Whether the reservoir in the Witherow patent was partly or fully emptied seems to have been a matter of complete indifference to the inventor, and the idea of maintaining a constant quantity therein seems to have [424] never been conceived by him. His design seems to have been merely to provide a reservoir for the storage of the large quantity of metal from the blast furnaces, and to maintain its heat until the comparatively small quantities required in the converters had been drawn off for use. As he states in his specification: "The metal is usually tapped from a blast furnace once in every six hours, and the quantity thus cast is many times in excess of the charge of a converter," which "is from one to five tons," while "the cast of a blast furnace runs usually from ten to fifty tons." While the metal is tapped from the blast furnace once in every six hours, "the time between charges in the converter is usually twenty minutes and upwards, and the metal in the furnace must be kept in condition to be tapped from time to time into the converter as needed." This appears to have been the whole object of the invention.

The same remark may be made of all these prior devices. While all contemplate the reservoir between the blast furnaces and the converters, such reservoir is used for storage and for such incidental steps toward uniformity as the necessary mixing of the different products of the blast furnace would lead to, while in none of them is there a provision for supplying and withdrawing from the mixer such quantities of metal at a time and the retention of a considerable quantity of metal in the reservoir as a necessary prerequisite to that uniformity of product which was recognized as the great desideratum, and was the constant effort of manufacturers to secure. Granting that some of these devices may have been made use of to carry out the Jones process, none of them in practical operation seems to have been effective to secure the desired result. A process patent, such as that of Jones, is not anticipated by mechanism which might with slight alterations have been adapted to carry out that process, unless, at least, such use of it would have occurred to one whose duty it was to make practical use of the mechanism described. In other words, a process patent can only be anticipated by a similar process. A mechanical patent is anticipated by a prior device of like construction and capable of performing the same function: but it is otherwise with a process patent. The mere pos-

session of an instrument or piece of *mech-[425] anism contains no suggestion whatever of all the possible processes to which it may be adapted. *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 428, 30 L. ed. 1193, 1198, 7 Sup. Ct. Rep. 1304. If the mere fact that a prior device might be made effective for the carrying on of a particular process were sufficient to anticipate such process, the absurd result would follow that, if the process consisted merely of manipulation, it would be anticipated by the mere possession of a pair of hands.

True, if the process were the mere function of a machine, another machine capable of performing the same function might be an anticipation; but this is not because a process can be anticipated by a mechanism, but because, as we have held in several cases, the mere function of a machine is not patentable as a process at all. *Corning v. Burden*, 15 How. 252, 14 L. ed. 683; *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745.

To enable the Jones process to be successfully carried out it is necessary (1) that the intermediate reservoir or mixer should be of large size, "say, 100 tons" capacity; (2) that it be covered to prevent the access of cold air from without; (3) that it be provided with a stop, so that it may not be tilted so far as to be emptied of its contents; (4) that a quantity of molten metal so large as to absorb all the variations of the product of the blast furnace received into it and thus to unify the metals discharged into the converters, be constantly retained in it. None of the prior patents or processes to which we are referred meets these requirements. Indeed, it is scarcely too much to say that none meets more than one of them. When we add to this that none of them was ever used, or was ever susceptible of being used, without material alteration, to carry out the Jones process, it is evident that the defense of anticipation by prior patents rests upon a slender foundation.

Certain discussions, reported in the Journal of the British Iron and Steel Institute, are relied upon as embodying a description of the Jones process. Running through all these discussions there is the same idea of the difficulties experienced in the practical carrying out of the direct process by reason of the want of uniformity in the different products of the blast furnaces, and the possibility of remedying this and *thereby do-[426] ing away with the expense of remelting the pig iron in cupolas by a mixture of such products in a reservoir intermediate the furnaces and the converters; but the dominant idea of the Jones patent, of maintaining a permanent and large quantity of molten metal in the mixer for that purpose, does not seem to have occurred to any of the writers upon the subject. Through all these papers there is an admission of practical failure in the efforts theretofore made to obviate the difficulty, and a half-expressed hope that American ingenuity might ultimately solve the problem. Some of the expressions, taken by themselves, seem to

foreshadow the Jones idea; but there was nothing in any of these discussions that filled the requirement of the law (Rev. Stat. § 4886) of a description in a publication sufficient to anticipate the patent.

In some of the very works where attempts had been made to adopt a direct process they were abandoned as unprofitable, and the Jones invention subsequently adopted. The witness David Evans, manager of certain iron works in England and Wales, sums up his testimony in the following answer: "Prior to the invention of Captain Jones several firms used the direct process, but the results were not very satisfactory, as explained before, through want of uniformity. The results obtained gave a large number of defectives. But since the adoption of the mixer at the various works I have been engaged, we have reduced the defective or second-class rails fully one half, and also saved the remelting." Indeed, it is stated by several of these writers that the adoption of the Jones invention reduced the defective rails to something like half of what they were before.

Our attention is also challenged to certain unpatented practices, among which is one known as the Whitney foundry practice for the casting of car wheels, wherein the metal is tapped from three cupolas into an open reservoir of eight to ten tons' capacity, permitted to mix and even up in it, and the charges withdrawn to be cast into car wheels, the reservoir being maintained half full. The practice was to run the metal from the cupola furnaces into the reservoir ladle until it was nearly full, then to begin pouring out charges into the casting ladles, [427] while still continuing to pour metal into the ladle from the furnaces, the ladle being kept approximately full during the working day, when it was emptied and refilled on the following day. Aside from the fact that this process has only to do with eupola metal, uniformity in which was largely secured by a careful selection of the pig iron charged into the cupola furnaces, and had no reference whatever to the direct process of charging converters with the product of blast furnaces, it appears that, while Whitney recognized the fact that the charges of iron from the cupolas, when run together into the ladle, would mix, it appears that with this running together of the different charges the mixing operation ended. The maintenance of a permanent pool, and the constant pouring in and out in ladles,—the essence of the Jones invention,—had nothing to do with the process. Indeed, it may be doubted whether the mixing of the eupola metal was of any substantial value. Evidently it suggested to no one the Jones process. It is now too late to insist that it would have been suggested to any mechanic of ordinary skill and intelligence. But if the Whitney practice were primarily for the purpose of mixing, and were adequate for that purpose when applied to eupola metal carefully selected beforehand, it might be, and evidently would have been, wholly inefficient when used for the purpose of unifying the products of

blast furnaces,—in other words, for the Jones process; and it might and did require invention to make such changes as were necessary to adapt it to such purpose. Doubtless there was such mixing as the carefully selected eupola metal required for the purpose of manufacturing car wheels, but the fact that the Whitney practice was used for eupola metal has but little tendency to prove that it was adaptable without change to metal tapped from blast furnaces, which varied so largely in chemical composition.

The following observations of the District Judge are illustrative of the distinction between the Whitney foundry practice and the Jones process:

"We must avoid being misled by mere terms and subjects of work. While Jones and Whitney both desired the melting of metals, yet they had widely different objects in view. Whitney's purpose was to cast molten metal into a finished product: *Jones's merely to prepare molten metal for [428] further treatment, to wit, decarburizing it into steel. The *sine qua non* of purpose in Whitney was product uniformity. Uniformity of quality in car wheels is required, so they will stand strain and uniform wear."

"In the Bessemer direct process you cannot secure, initially or by treatment, uniformity of molten metal. So far as yet developed, the best you can do is to make the nonuniformity gradual and not abrupt. In Whitney, nonuniformity, whether gradual or abrupt, would be alike fatal. In Whitney, relatively absolute uniformity is an essential of product and a sequence of material used. In Jones, uniformity is a nonessential—in fact, a nonattainable—attribute of product, and is a necessary nonsequence of material used. In Whitney, we remelt in a eupola metal which has already undergone the refining process of the blast furnaces. In Jones, we take metal direct from the furnace and discard the eupola. It will thus be seen that apart from the wide difference between the primary work of a huge blast furnace, the base of all metallurgy, and the eupola of the founder, a mere subdivision of that art, we find in the Jones and Whitney processes a substantial difference of purpose, of process, and of subject-matter of work."

It should be borne in mind throughout the whole of this discussion that Jones never claimed to have succeeded in making a perfectly uniform product; that his object was to procure a uniformity which was adequate for the complete carrying on of the Bessemer process, or, as his second claim states, "for further treatment," and really to obviate the necessity of remelting the pigs, which had heretofore been regarded as preliminary to the further treatment by the Bessemer process.

Substantially the same remarks may be made with regard to the Kirk publication, which had to do only with the mixing of eupola metal. This publication was first held by the Patent Office to be an anticipation of the Jones process, the application

for which was rejected upon that ground. Upon further consideration, however, and with some slight amendments, the application of Jones appears to have been reconsidered, and was finally granted.

[429] *An attempt was made to show that the Jones invention was anticipated by a practice, common in steel works prior thereto, of tapping iron from cupola furnaces into a receiving ladle, which became known as the Bessemer cupola ladle, from which it was poured into the converters. Molten iron was tapped from several cupolas into this ladle, from which a charge was drawn and delivered to the converter vessel. Of course, if the ladle were of greater capacity than was necessary to charge a single converter, a residuum of metal would be left in it; but this seems to have been merely an incident of the operation of the ladle, which was used primarily for storage, and to have been of no substantial benefit in securing uniformity of product, which can only be obtained by making the receiver of larger size, and retaining a considerable quantity of metal in it after each discharge. The witness Kennedy says of this process:

"The irons were carefully selected from the different piles to make up the cupola charges. . . . I have often seen the ladle drained in pouring into the converter. . . . It did not hold two full charges. . . . I never knew of the ladle being used for mixing purposes. If such was the practice I would have known it. . . . The capacity of the ladle was so small, and the size of the pool of metal, when there was a pool, was of such varying size, that I do not see how any mixing could be accomplished. . . . Q. 18. When was this ladle drained, and when would there be some metal left in the handle?—A. There would be no regularity in the process. The rate at which the converters take the metal does not always correspond with the rate at which the cupolas are melting."

It is true the Jones patent is a simple one, and in the light of present experience it seems strange that none of the expert steel makers, who approached so near the consummation of their desires, should have failed to take the final step which was needed to convert their experiments into an assured success. This, however, is but the common history of important inventions, the simplicity of which seems to the ordinary observer to preclude the possibility of their involving an exercise of the inventive faculty. The very fact that the attempt which had been made to secure a uniformity of product seems to have been abandoned

[430] *after the Jones invention came into popular notice is strong evidence tending to show that this patent contains something which was of great value to the manufacturers of steel, and which entitled Jones to the reward due to a successful inventor.

2 The phraseology of the patent and the amendments introduced in the Patent Office are made the subject of much criticism, apparently for the purpose of showing either that Jones did not understand what he had

invented, or that the specification did not contain "such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make, construct, compound, and use the same." Rev. Stat. § 4888. If these criticisms are not altogether clear, they are pressed upon our consideration with an earnestness which challenges a careful consideration of the history of this patent in the Patent Office.

In his first application the patentee stated that "the primary object of the invention is to provide means for insuring uniformity in the product of a Bessemer steel works or a similar plant, in which the metal from more than one blast furnace is employed to charge the converters. The product of the different furnaces, or of the same furnace at different times, varies in quality, . . . so that . . . the manufactured steel lacks uniformity in grade. To avoid this I employ suitably constructed reservoirs or vessels, into which the molten metal from the blast furnaces is put, the vessels being of proper capacity to hold a considerable charge of metal from a single furnace, or from a number of furnaces, and being adapted to retain the metal in a molten state for sufficient time to enable the different charges to mix and become homogeneous. . . . Such apparatus possesses also an additional advantage in that it makes it possible to dispense with cupola furnaces for remelting the pigs preparatory to charging the converters. The metal may be tapped from the blast furnace into ladles or trucks, carried to and discharged into the mixing reservoir or vessel, and there retained in a molten state until sufficient metal has been accumulated to charge the converters."

It is true that he subsequently states, as observed in the opinion of the court of appeals, that "the main feature of my present *invention is the method of storing successive charges of molten metal in a receptacle before using it in converters or otherwise;" and hence it is insisted that the main feature of the invention was storage and not mixing; but the subsequent words of the same sentence, "drawing portions of the metal from the receptacle without at any time removing the whole thereof, and from time to time replenishing the receptacle with fresh charges, which mingle with the residual molten metal already therein, for the purpose of rendering the successive tapplings of metal uniform in quality,"—convey a wholly different impression, and show that the primary object was that of mixing different charges for the purpose of securing uniformity in the metal when discharged into the converters. This appears still plainer in the claim appended to this specification: "The process hereinbefore described, which consists in storing charges of molten metal in a covered receptacle provided with a heat-retaining lining, removing portions only of the molten contents of the said receptacle, without entirely draining or emptying the same, and successively replenishing the receptacle with fresh additions of molten metal, whereby the charac-

ter of the several charges of metal so treated is equalized; substantially as described." The word "storing" was evidently used in the sense of pouring the metal into the reservoir or mixer, as essential to the maintenance of a dominant pool therein. The application was evidently considered as not sufficiently differentiating this from former patents, and was rejected upon reference to the Witherow patents and to Kirk's Founding of Metals. Certain slight amendments were then made in the specification, the claim verbally changed, and an argument submitted to the effect that the purpose of the Witherow patent was "to receive and store the molten metal for the purpose of preventing the detention, incident to the necessity of discharging the contents of the blast furnace when there is no converter ready to receive it;" whereas the distinctive idea of the Jones patent was "to have a receptacle capable of holding metal in a molten condition into which metal, it may be from several blast furnaces, is run from time to time, and from which metal is drawn for treatment in the converters, or otherwise as required."

[432] *This was evidently considered as still too indefinite, and the application was thought to be fully met by the description in Kirk's Founding of Metals, and was rejected.

Thereupon the application was again amended, its present phraseology adopted, and the distinguishing feature of the invention more clearly set forth. Without further suggestion the application was allowed, and the patent issued.

It is true the process is described in the second claim as a "method of mixing molten metal," from which we are asked to infer that it was intended to include the products of cupola as well as of blast furnaces, whereas in the very first sentence of the specification it is stated that "in practice it is found that metal tapped from different blast furnaces is apt to vary considerably in chemical composition. . . . Especially is this so in the process of refining crude iron from the smelting furnace and charged directly into the converter without remelting in a cupola, and, although such direct process possesses many economic advantages, it has on this account been little practised." The first claim of the patent is expressly for an improvement in the art of refining iron directly from the smelting furnace. The second claim apparently extends to the art of mixing all molten metals, but the specification, taken in connection with the disclaimer, which describes a process designed to dispense with the use of cupolas, shows that it was intended to include metal tapped from blast furnaces, and was probably intended to be limited to that. Whether the claim would be void if construed to include eupola metal it is unnecessary to consider. It clearly includes metal from blast furnaces, and is not rendered void by the possibility of its including eupola metal. The claim of a patent must always be explained by and read in connection with the specification, and as this claim clearly includes metal taken from

blast furnaces, the question whether it includes every molten metal is as much eliminated from our consideration in this case as if it were sought to show that the word "metal" might include other metals than iron. Were infringement charged in the use of an apparatus for mixing eupola metal, the question would be squarely presented whether the claim had been illegally expanded beyond the specification.

*Much ingenuity and many words have[433] been expended in an endeavor to prove that the plaintiff and defendant, as well as the courts, differed widely in their construction of the patent and of what Jones was trying to accomplish. Upon the theory of the defendant the circuit court "did not attempt to construe the patent in any proper sense, but bent all its energies to wrest and torture the plain English of the patent into a meaning diametrically opposed to that which it bears on its face," and to make it appear that the great trouble at the time Mr. Jones conceived his invention arose, not from any lack of uniformity in the percentages of silicon and sulphur, but were solely the natural difficulties incident to abrupt variations in the percentage of silicon present; and that his statement that the trouble in the Bessemerizing operation, which was the thing Jones had in mind to obviate, was absolutely irreconcilable with the specification of the patent, because the sole object stated by Jones was to secure products, whether of Bessemer steel or otherwise, which would be practically homogeneous and substantially uniform in their contained sulphur and silicon,—results which can only be obtained by mixing the iron to a substantial uniformity. Defendant further states its view of the case as follows:

"If, as a matter of fact, Mr. Jones, at the time he applied for his patent, had in view, not only the process described by him for securing uniformity in the admixture of silicon and sulphur, but also another process, similar to that now used by the plaintiff and defendant, and by means of which the operation of Bessemerizing iron was made, . . . without securing uniformity in the product, then . . . it is manifestly clear from his patent and from all the surrounding facts that he deliberately and carefully suppressed any disclosure of this invention in his specification."

One of the arguments that this was the case was that if Jones "believed the method of use by which abrupt variations in silicon could be avoided without securing uniformity in product to be a patentable invention, there was even more reason for carefully suppressing all suggestion of such a mode of use in the patent for the manipulation to obtain uniform products, because the two processes are obviously alternative and inconsistent with each other, incapable of[434] being claimed in one application, and therefore disclosure might have worked a loss of a possible grant of the patent for the alternative mode of use."

It is true that its construction of the patent was pressed upon the courts by the defendant with great earnestness and elabo-

rateness of detail, and appears to have created an impression of its soundness upon the circuit court of appeals, but the circuit court did not seem to look upon it as the turning point of the case, nor do we regard it as at all decisive. It seems to assume that the second claim can only be met by evidence of absolute uniformity of product, whereas all that is claimed is a uniformity in the constituent parts of molten metal *preparatory to further treatment*; in other words, to make it fit for further treatment in the converters, without the necessity of remelting in the cupolar furnaces. Or, as stated by the district judge: "It is therefore plain that with a mixer thus operated it is possible to have wide variations in the composition of the blast-furnace metal charges added, and at the same time the successive withdrawals for the Bessemer converter show quite small and gradual changes of composition. The heat of the detained mass is affected by the incoming charges just from the blast furnace, but the heat of such addition, whether relatively high or low, must mingle with, be modified by, and average with the heat of the larger and dominating mass."

With regard to this portion of the opinion, counsel for defendant observes:

"The judge of circuit court, having lost sight of the statutory requirements as to a full, clear, and concise statement of the invention, and having persuaded himself that it was his judicial duty to find a way if possible to protect the Carnegie Company in his monopoly of what Mr. Gayley and his colleagues claim ought to have been the invention described in the patent, adopted the ingenious view that the patent was to be construed as though it disclosed and covered two inventions, one having for its object to obtain a product substantially uniform in its contained silicon and sulphur, and the other having for its object the improvement in the operation of Bessemerizing iron which is incident to an avoidance in the successive charges of abrupt variations in contained silicon."

[435] *We have not, however, been able to persuade ourselves that the two processes are so alternative and inconsistent with each other as to render them mutually destructive, or to justify counsel in charging the district judge with an abdication of his judicial duty of deciding the case according to what he believed to be the law and the facts. We dismiss the subject with the simple observation that much more seems to have been made of it than it deserves, and that a reference to the second claim shows its object was to secure uniformity of the molten metal in its constituent parts preparatory to its further treatment, by which further treatment we are to understand the Bessemerizing process of converting metal into steel, and that any step in that direction would necessarily lead to an avoidance of abrupt variations in silicon and sulphur, while such avoidance of abrupt variations would in their turn only tend toward a greater uniformity of product.

Some criticism was made upon the action
185 U. S. U. S., Book 46.

of the court in permitting a disclaimer of certain clauses in the specification, printed above in italics, which was made after the argument and upon the petition of the plaintiff, "that at the hearing of this cause it was taken by surprise by the argument of the defendant that the portions of the specification now disclaimed enlarged the scope of the invention of the said letters patent beyond what your petitioner believes to be the import of the claims thereof."

Upon the hearing defendant seems to have insisted that certain portions of the specifications were broader than the second claim. Those parts of the specification therefore were disclaimed. As we had occasion to observe in *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799, "the power to disclaim is a beneficial one, and ought not to be denied except where it is resorted to for a fraudulent and deceptive purpose." In that case the plaintiff was permitted to enter a disclaimer of all the claims but the one in suit, the patentee having included in the patent more devices than properly could be the subject of a single patent. In the case under consideration the disclaimer was not of a claim but of certain statements in the specification, which if retained might be construed to have the effect of illegally broadening the second claim. The first statement disclaimed *was that the invention might be practised by merely receiving a number of small portions of metal taken from different ladles, the mixing being performed merely by the act of pouring into the charging ladle. The use of the word "merely" ignored the steps embodied in the second claim, where the mixing is not performed by merely pouring together the several charges into a ladle, but by maintaining a permanent quantity of metal in the reservoir, to which charges were alternately added and from which they were withdrawn. The other clauses were intended to disclaim the casting of the metal into pigs. We think there is no force in the criticism that a disclaimer may not extend to a part of the specification, as well as to a distinct claim. *Hurlbut v. Schillinger*, 130 U. S. 456, 32 L. ed. 1011, 9 Sup. Ct. Rep. 584; *Schillinger v. Gunther*, 17 Blatchf. 66, Fed. Cas. No. 12,458; *Schwartzwalder v. New York Filter Co.* 13 C. C. A. 380, 26 U. S. App. 547, 66 Fed. 152. Had the purpose of the disclaimer been to reform or alter the description of the invention, or convert the claim from one thing into something else, it might have been objectionable, as patents can only be amended for mistakes of this kind by a reissue. But the disclaimer in this case appears to have been made to obviate an ambiguity in the specification, and with no idea of obtaining the benefit of a reissue. If the clauses had the effect of broadening the patent the disclaimer removes the objection. If they did not, the disclaimer could do no harm, and cannot be made the subject of criticism.

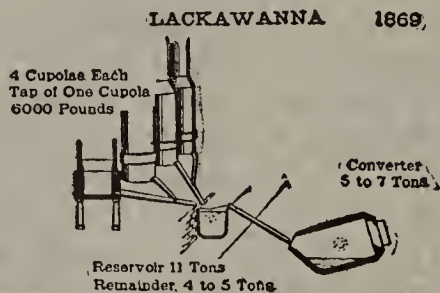
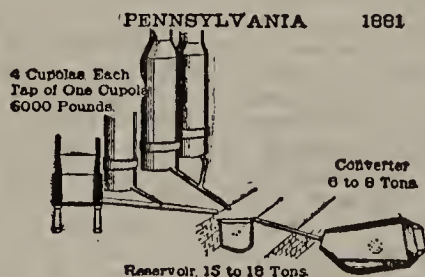
It is insisted, too, that there is no mention in the second claim of a dominant pool, and that the words "removing portions

only of the composite molten contents of the receptacle without entirely draining or emptying the same, and successively replenishing the receptacle with fresh ununiform additions," are satisfied by leaving a quantity of iron, however small, in the reservoir, and that it really includes nothing that was not well known before. It is true that neither the size of the reservoir nor the amount of metal to be left therein, after each discharge is made into the converter, is specified; but it is stated in the specification that this reservoir may be of any convenient size, "holding, say, 100 tons of metal (more or less)," with the bottom of the discharge spout some distance above [437] the bottom *of the vessel, "say, 2 feet in a hundred-ton tank, and more or less, according to the capacity of the vessel, the purpose of which is that when the metal is poured out of the spout a considerable quantity may always be left remaining and unpoured, and that whenever the vessel is replenished there may already be contained in it a body of molten metal with which the fresh addition may mix." Though the size of the reservoir and the considerable quantity left therein as a dominant pool might have been described more definitely (but perhaps at the risk of an infringement being avoided by one using a receiver of a different size containing a different quantity), we think it is impossible to read this patent without gathering from it the dominant idea of Jones not to describe a reservoir for storage, with or without incidental mixing, but to provide a receptacle the main, if not the sole, object of which is to preserve therein a large and constant quantity of molten iron as a basis for a gradual unification of the product of several blast furnaces, or of several casts from the same furnace, and herein distinguishing it from all prior inventions. The specification of the patent is not addressed to lawyers, or even to the public generally, but to the manufacturers of steel; and any description which is sufficient to apprise them in the language of the art of the definite feature of the invention, and to serve as a warning to others of what the patent claims as a monopoly, is sufficiently definite to sustain the patent. He may assume that what was already known in the art of manufacturing steel was known to them, and, as observed

what he has made that is new, and what it replaces of the old. That which is common and well known is as if it were written out in the patent and delineated in the drawings." We think this second claim not only describes with sufficient clearness the purpose of the patent to secure uniformity of the molten metal in its constituent parts preparatory to further treatment, but, read with the specification, sufficiently describes the process by which this uniformity may be secured by always preserving in the reservoir a sufficient quantity of molten metal to secure such uniformity *of product. [438] It is undoubtedly true that the storage feature appeared more prominently in the specification which was first rejected upon the ground that it was not sufficiently differentiated from prior patents than in that which was finally accepted, but there is nothing to indicate that Jones did not understand from the first that the distinguishing feature of his invention was the preservation of a considerable quantity of iron in the reservoir.

3. The question of *infringement* only remains to be considered, and, in the view we have taken of the prior devices, presents no serious difficulty. The court of appeals was of opinion that "the defendant's reservoir, or accumulating ladle, complained of, is the same in principle as one which has been in use at the Cambria works ever since Bessemer steel was first manufactured there, with only this difference, that at first it was used at cupola, now at furnace." If such were the fact, of course defendant would not be open to the charge of infringement. Undoubtedly it has the right to make use of all prior devices, and particularly such as had been used at its own manufactory. In order to understand the device made use of by the defendant prior to the Jones invention, we reproduce herewith two small but easily understood cuts, taken from its brief, showing the character of the ladle known as the Bessemer intermediate ladle, used by it and generally by all American mills manufacturing steel by the Bessemer process.

It appears elsewhere in the testimony that the intermediate reservoir or ladle was from fifteen to eighteen tons' capacity, and the converter from six to eight tons; that



by Mr. Justice Bradley in *Webster Loom Co. v. Higgins*, 105 U. S. 580, 586, 26 L. ed. 1177, 1179, "he may begin at the point where his invention begins, and describe

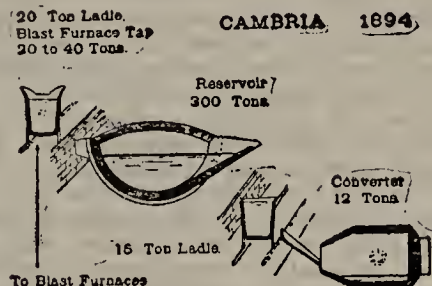
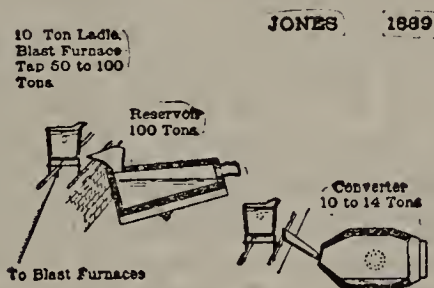
the molten metal *was tapped from the cu- [439] polas into the reservoir, and withdrawn for the converter, and as the intermediate ladle held considerably more than the amount of

metal necessary to charge a converter, there was some incidental mixing; but the main, and perhaps the only, purpose of the reservoir was for storage, and that if any quantity of metal were left in the reservoir it was by accident rather than by design. It will be noticed, too, that the reservoir was open at the top. It does not appear to have been made use of in carrying out what is known as the direct process, the difference being that the cupola practice furnished a metal for the Bessemer converter that was uniform in composition, or practically so, while the direct metal was largely variable in composition.

The testimony further shows that, after the installation of the Jones mixer at the Edgar Thomson works, Mr. Morgan, the defendant's mechanical engineer, visited and inspected these works, and obtained information as to their practical operation, and was advised by the superintendent as to the location and proper size of the mixer and its contiguity to the converters. Mr. Morgan does not deny this conversation, although he qualifies it by saying that he thought the Jones apparatus had grave defects. Shortly after this visit, and in the latter part of 1895, defendant installed an apparatus of its own for the operation of the direct process, which is herewith produced upon a small scale and in comparison with the Jones process. It consisted of a covered refractory lined and turtle-shaped

side of the mixer, which was not allowed to run below the floor, as a guide to the men who rotated or tilted the mixer, since, if the mark went below the floor and out of sight, they could not tell how much iron was left in the mixer. Under these instructions not to allow the chalk mark to go below the floor there was retained in the mixer about 175 tons of molten metal, amply sufficient for the purposes stated in the Jones patent. Its principle of construction was similar to that of the Jones mixer, and its operation identical. Indeed, defendant's engineer himself says: "With the exception of additions of cupola metal, I do not know that there is any material difference between our practice and that described in the second claim" of the Jones patent. We agree, in the opinion of the circuit court, that "it is quite clear, in view of these facts, that infringement takes place. That initial mixing rather than storage is the purpose of the reservoir is shown by the fact that the cupola metal is not stored, but served direct in ladles to the converter plant. And that the homogeneous mixture, once obtained, is used as a dominant pool to produce a graduated, nonabrupt product, is shown by the chalk line minimum limit of 175 tons. With such a permanent dominant pool in constant use, we are clear that respondent's practice infringes the second claim of the Jones patent in both letter and spirit."

If the contents of the mixer used by de-



[440] vessel of about 300 tons' capacity, arranged to tilt, and having a spout at either side for receiving and pouring out the metal. The metal was brought to the mixer and poured in at one end, and, *through a spout on the other side, was poured into a ladle, which supplied the Bessemer converters. The metal was supplied both from blast furnaces and cupolas, the former furnishing about two thirds, the latter about one third, of the metal used; but the metal from the cupola system was delivered by a ladle to the converter direct and not through the reservoir. The metal from the blast furnace entered the reservoir in about fifteen-ton ladle lots, and was withdrawn in approximately twelve-ton lots. The chief engineer of the company states that, "in accordance with the natural way of using the reservoir, it is ordinarily kept well filled up." That in the practical operation of the mixer or reservoir a large quantity of iron was retained for mixing purposes is evident from the fact that a chalk mark was made on the

defendant were allowed *habitually to become[441] empty in carrying out its process, there would be no infringement; but all the evidence contradicts this. In the Jones practice this *cannot* be done, since the mixer cannot be tilted beyond a certain point. In the defendant's mixer it *can* be done, but is *not*, since the operator is not allowed to tilt it beyond a certain point gauged by a chalk mark. This seems to be the only foundation for the charge so frequently reiterated, and in varying language, that the methods in use before the Jones process deprived that process of all novelty, and if novelty existed it was by reason of the varying modes of executing such methods: the inference from this being that, as the Jones method was old, it could only be treated as new because of the conduct of individuals in applying the method and their intentions, and that this reduces itself to the proposition that the Jones patent rests upon the mere intention or minds of persons. If we understand this argument correctly,

it is that the prior method contemplated storing only, and the mixing was but an incident, while the Jones patent contemplates mixing as its main object and storage only as an incident.

This proposition that the application of this patent depends upon the individual intent of the operator overlooks the essential nature of a process patent. The directions and specifications of such a patent are addressed to those engaged and skilled in the art. It professes to disclose a method of procedure, not the particular instrumentality that may be employed. It may be, as suggested, that one person may, and in ignorance of the patented method, make use of a reservoir *merely as such*, and without any desire to avail himself of the patented process; but such a fact would not deprive the discoverer of the process of the protection of his patent. Such a supposed case might present a question of fact for a court or jury, and if it were made to appear that the party charged with infringement had, as in this case, changed the instrumentalities used by him after a new method had been disclosed, and particularly if he had for the first time used a special device necessary to that process, a jury might well refuse to believe and find that the defendant was only following the old methods of procedure, and not seeking to avail himself of the plaintiff's invention.

[442] *But we think the difference in the two processes may be illustrated by a very simple example: Let us imagine a reservoir containing, say, three quarts, and filled with one quart each of three liquids of different constituent parts, and withdrawn for further treatment at the rate of one or two quarts at a time. Necessarily there would be some incidental mixing, but it would occur at once that the main object of the reservoir was a retention of a sufficient quantity of the mixture to supply the receptacle for further treatment, and if no necessity existed for a longer retention of the liquid in the reservoir, it could be very quickly emptied by two discharges into the receiving vessel. Now, let us substitute for this reservoir a cask of, say, sixty quarts, into which the liquids of different constituent parts are poured in at one end from a multitude of receptacles, and discharged at the other end after remaining a certain time in the cask, and that this cask could not be tilted so far but what a quantity of liquid would be left within it amounting, say, to half its capacity. Now, if there be no distinction between these two operations there would be little left to the Jones process, the very vitality of which consists in the size of the cask relative to the ladles and the mixing of the various liquids poured into it before they are withdrawn.

If, as insisted by the defendant and found by the court of appeals, the reservoir now used is the same in principle as the one which had been in use at the Cambria Iron Works ever since the Bessemer steel was first manufactured there, and the same were adequate for the purposes of the direct process, why was any change made? Therein

we think the court of appeals made its most serious error. The defendant had an unquestioned right to manufacture steel as it had been accustomed to do; but instead of that it abandons the Bessemer uncovered ladle of twelve to eighteen tons, and adopts a covered refractory lined reservoir of 300 tons' capacity, and makes use of it, not as before, for the storage of *cupola* metal, but for the mixing of *blast-furnace* metal according to the direct process. This, too, was done immediately after Mr. Morgan's visit to plaintiff's works.

It is true that with the growth of the production of furnaces *from fifty tons a day [443] in 1872 to four or five hundred tons in 1895 all apparatus would naturally be increased in size; but why was the open reservoir theretofore used for *cupola* metal provided with a cover and enlarged in its capacity from fifteen to three hundred tons—twentyfold—while the converter was little more than doubled in size? Why was it so operated that 175 tons were left in the mixer as a dominant pool, if no infringement were contemplated? In the face of these facts the question so earnestly pressed by the defendant, whether the "method of mixing molten metal," covered by the second claim, was one for securing a substantial homogeneous composition of metal, to the end of getting a practically uniform product, or was one simply for the purpose of preventing sudden variations in the compositions of successive small portions drawn from the reservoir, without attaining substantial uniformity, loses most of its significance. We do not know how the process can be better described than in the specification itself: "To provide means for rendering the product of steel works uniform in chemical composition." The variations in such composition are said to be "particularly in silicon and sulphur," and the process to be one of mixing, whereby the particles of metal "are diffused or commingled thoroughly among each other, and the entire charge is practically homogeneous in composition, representing in each part "an average of a variety of uniform constituent parts, all the charges of the converter from time to time will be substantially uniform." This, denuded of all hypereriticism, is the object of the Jones invention, which seems to be the only one yet devised for carrying on what is known as the direct process. If it be true that this process cannot be carried on without infringing the Jones patent, he is certainly entitled to a monopoly of the invention. If it can be, then every method theretofore known for carrying on such process was open to the defendant. But we think the change from the Bessemer intermediate ladle to the Jones mixer was a radical one, and was made for a purpose. That purpose was clearly the adoption of the Jones process.

It is true that before the facts were fully ascertained a stipulation was signed to the effect that the "amount of molten *metal in [444] said mixer (defendant's) varies from nothing to its full capacity, depending on the supply and demand, the supply being gen-

erally sufficient to keep the mixer more than half full of molten metal, which metal remains molten therein." It appears, however, that upon the facts being more fully ascertained, notice was given that, in so far as the stipulation varied from the facts appearing in the testimony of defendant's expert, it would be repudiated, and particularly that portion wherein it was said "that the amount of the molten metal in the mixer varies from nothing to its full capacity." As it clearly appears from the mouths of defendant's own witnesses (notably Mr. Morgan) that, in the usual operation of the mixer, the ordinary amount of metal kept in the reservoir was more than one half its capacity, we think that plaintiff's case should not be prejudiced by this stipulation. Stipulations are ordinarily entered into for the purpose of saving time, trouble, or expense, and in this case it recites that "as defendant's counsel is expected to sail for Europe in a few days, and may not be back for about four months, it is therefore stipulated by counsel for both parties, to save delay, as follows." But while the stipulation is undoubtedly admissible in evidence it ought not to be used as a pitfall, and where the facts subsequently developed show, with respect to a particular matter, that it was inadvertently signed, we think that, upon giving notice in sufficient time to prevent prejudice to the opposite party, counsel may repudiate any fact inadvertently incorporated therein. This practice has been frequently upheld in this and other courts. *The Hiram*, 1 Wheat. 440, 4 L. ed. 131; *Hurt v. Hollingsworth*, 100 U. S. 100, 103, 25 L. ed. 569, 570; *Malin v. Kinney*, 1 Cal. 117; *Barry v. New York Mut. L. Ins. Co.* 53 N. Y. 536.

In short, we are clearly of opinion that the reservoir now in use is used for entirely different purposes from the intermediate Bessemer ladle formerly employed: that the process carried on with it is identical with the Jones invention; and that its primary, if not its sole, use, is for mixing purposes, with necessarily incidental storage, while the Bessemer intermediate ladle was solely used for storage, with little, if any, thought of the advantages to be gained by an incidental mixing.

[445] * Disarding now all that does not bear directly upon the validity of the Jones patent, and dropping all superfluity of words, let us determine exactly what Jones has contributed, if anything, to the art of making steel. He undoubtedly found reservoirs of small size in use, in which were poured from receiving ladles enough molten metal to fill them, and from which a sufficient amount was discharged to supply a converter, usually about half the size of the reservoir. But in all these cases the fact whether any particular amount of metal was left in the reservoir was treated as a matter of indifference or accident, although there must have been necessarily some incidental mixing; and probably the metal as it ran into the converters approximated more nearly to uniformity than when it ran into the reservoir. The former methods were

adequate for cupola metal, uniformity in which had been largely secured by a careful selection and breaking up of the pigs, but it had not proved a success for blast-furnace metal, except that it had been used to a very limited extent in foreign countries where the peculiar character of the iron ore had rendered it possible to carry on a direct process, although apparently by methods quite other than those employed by Jones. The principal step employed by Jones was to magnify the capacity of the reservoir about twentyfold, provide it with a cover, and to arrange that it should not be tilted beyond a certain point, in order that a "considerable quantity" of molten metal might be retained in it for a sufficient time to accomplish a pretty thorough mixing, but little change having been made in the meantime in the size of the receiving ladles and converters. As the reservoir was designed to hold a large quantity of metal for a considerable time it must have been covered to obviate the contents being erusted over or sculled.

As soon as this method had proven to be successful by employment at the Edgar Thomson works, and had become so well known as to attract the attention of other manufacturers of steel, it found a ready sale, was adopted by all the leading manufacturers in this country, and was sold for use abroad for about \$50,000.

It should be borne in mind that this process was one not *accidentally discovered, [446] but was the result of a long search for the very purpose. The surprise is that the manufacturers of steel, having felt the want for so many years, should never have discovered from the multiplicity of patents and of processes introduced into this suit, and well known to the manufacturers of steel, that it was but a step from what they already knew to that which they had spent years in endeavoring to find out. It only remains now for the wisdom which comes after the fact to teach us that Jones discovered nothing, invented nothing, accomplished nothing.

We cannot better conclude this opinion than by the following extract from the opinion of Mr. Justice Bradley in *Webster Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. ed. 1177, 1181: "But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skilful persons. It may have been under their very eyes; they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. . . . Now that it has succeeded, it may seem very plain to anyone that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

The decree of the Circuit Court of Appeals is therefore reversed, and the case re-

manded to the Circuit Court for the Western District of Pennsylvania for further proceedings consistent with this opinion.

Mr. Justice **White**, with whom concurs Mr. Chief Justice **Fuller**, Mr. Justice **Harlan**, and Mr. Justice **Brewer**, dissenting:

To elucidate the reasons which constrain me to dissent, it is deemed essential to give a mere outline of the processes by which iron and steel were made prior to June 4, 1889, when the patent in suit was issued, in so far as such processes in some aspects [447] concern *the manufacture of steel by what is known as the Bessemer method, to which the court now declares the patent in suit solely relates.

Into the stack of a smelting furnace iron ore, with suitable fluxing material and fuel, was introduced. In the operation of the furnace the ore was reduced to a metallic state by the oxidizing action of carbon or gas containing carbon. This metallic iron melted in the lower part of the furnace, taking up a proportion of carbon and other ingredients, dropping to the bottom of the hearth as molten pig iron. The earthy impurities combined with the flux, and were also melted and descended into the hearth, resting upon the top of the molten metal. The molten metal was drawn from the hearth from time to time by tapping, and the molten impurities, combined with the flux, forming a cinder, were also drawn from the hearth at a higher level. As the molten iron was tapped it was run out into molds, and came to be known as pig iron or pigs. These pigs were not of uniform composition, because of the varying quantity of the constituents contained in the ore and the chemical changes wrought by irregularities incidental to the operation of the furnace.

To make foundry castings, pigs were selected, broken up, charged into a cupola furnace, reduced to a molten state, and the liquid was drawn off into a receiving ladle. From this the quantity desired was tipped into a smaller vessel known as a casting ladle, and was poured into the molds. Where more than one cupola furnace was employed, each was tapped, and the metal poured through a groove into a receiving ladle, common to the furnaces, where it was held for use, and drawn as required into a casting ladle, and carried to the molds, as already mentioned.

In 1855 and 1856 Sir Henry Bessemer obtained various patents covering his discovery for producing malleable iron and steel by forcing currents of air through molten iron. The appliance described was a refractory lined vessel, called by Bessemer a converting vessel, which came to be designated as the converter or the vessel. Without going into detail, it suffices to say that, for various reasons, the method of Sir Henry Bessemer [448] *proved not to be as advantageous as had been expected. Indeed, it was not until Mushet patented a method of decarbonizing iron by completely blowing it and adding ferromanganese or speigel-eisen

in a molten state that the difficulty of producing steel was solved and the process of Sir Henry Bessemer was rendered practical. Despite, however, the fact that Mushet's discovery was of immense value and rendered Bessemer's conceptions a commercial success, Mushet allowed his patent right to lapse through neglect to pay the requisite fees in the third year; and (to quote the language of the author of the article on Iron, contained in *Encyclopædia Britannica*, 9th ed. vol. 13, p. 342) "in consequence his name is all but forgotten in connection with his improvement on Bessemer's own process, the combination being ordinarily termed 'Bessemerizing.'"

In the manufacture of steel by the Bessemer-Mushet process two methods were followed, one termed the indirect, the other the direct. In the indirect, pigs were charged into a reverberatory furnace, for which, at a later date, a cupola furnace was substituted. In such furnace the pigs were melted and run into ladles or reservoirs, and thence the molten iron was conveyed to the converter for the necessary treatment. Without attempting to give accurately the variations in the size and consequent capacity of cupola furnaces and converters, it is unquestioned that the quantity of molten metal which could be drawn at a single tapping from the cupola was usually not adequate to supply a full charge to the converter. It followed that ordinarily more than one cupola furnace was used to supply a converter, and that the tappings from such cupolas were drawn into a common reservoir or ladle, and there stored until required to be carried to the converter. Indeed, irrespective of the necessity of storing the tappings, growing out of the difference between the capacities of the vessels in question, such storage was additionally required in order that the operation might be continuous, in case of delay resulting from accident to the converter or otherwise.

In the direct process the capacity of blast furnaces greatly exceeded that of cupola furnaces. The molten iron was tapped directly from the blast furnace into a number of receiving reservoirs or ladles, and carried for treatment to the converter.

*On October 31, 1888, William R. Jones [449] made application for two letters patent, one stated to be for a new and useful improvement in apparatus "for mixing molten pig metal," the other for a process declared to be "a new and useful improvement in methods of mixing molten pig metal." The application for the first or apparatus patent was several times rejected, and, after various amendments, was finally allowed. This patent may be dismissed from view, as it is not involved in this controversy. The first application for the process patent—which is the patent under consideration in this case—was rejected. Thereupon a new and amended application was presented. This was also rejected, when a second amendment was made, and the application was finally allowed.

As the opinion of the court has reproduced the specifications and claims of the

patent, it is unnecessary to repeat them in detail, and therefore a mere outline of them is now given. The patent was entitled "Method of Mixing Molten Pig Metal." The *primary* object of the invention was stated to be "to provide means for rendering the product of steel works uniform in chemical composition." It was also stated that: "My invention is not limited to its use in connection with converters, since similar advantages may be obtained by casting the metal from the mixing vessels into pigs for use in converters, puddling furnaces, or for any other uses to which pig iron may be put in the art." It was further stated that: "My invention may be practised with a variety of forms of apparatus,—for example, by merely receiving in a charging ladle a number of small portions of metal taken from several ladles or receiving vessels containing crude metal obtained at different times or from different furnaces, mixing being performed merely by the act of pouring into the charging ladle, and other like means may be employed."

It was, however, declared that it was preferable to use the device covered by the apparatus patent, and a description of the same was set out. That device may be thus described: It consisted of a covered tilting tank of large size, "holding, say, 100 tons of metal [more or less]," lined so as "to retain the heat of the molten contents [450] of the vessel and to prevent *chilling thereof," with receiving and charging spouts, a gas-heating appliance contained in the discharging spout, and so constructed that, after being fully charged with molten metal, drawn from the furnaces into ladles and poured into the reservoir, as the metal was poured out for use a considerable residue would remain in the reservoir to mix with an incoming charge.

The patent embodied two claims which read as follows:

"1. In the art of refining iron directly from the smelting furnace, the process of equalizing the chemical composition of the crude metal by thoroughly commingling or mixing together the liquid metal charge and subsequently refining the mixed and equalized charge, substantially as and for the purposes described.

"2. In the art of mixing molten metal to secure uniformity of the same in its constituent parts preparatory to further treatment, the process of introducing into a mixing receptacle successive portions of molten metal ununiform in their nonmetallic constituents (sulphur, silicon, etc.) removing portions only of the composite molten contents of the receptacle without entirely draining or emptying the same, and successively replenishing the receptacle with fresh ununiform additions, substantially as and for the purposes described."

On December 2, 1895, the Carnegie Steel Company, Limited, which had acquired full title to the Jones patents, commenced the present suit against the Cambria Iron Company for an alleged infringement of the foregoing process patent. The defenses made by the answer were substantially a
185 U. S.

denial of infringement and an averment of want of patentable novelty.

After the evidence for the defendant was all in and several witnesses had been examined in rebuttal, the complainant, on March 30, 1897, stated "that at the hearing of the cause he will urge infringement of the second claim only of the patent in suit." At the close of all the evidence the complainant filed what is termed a "petition for disclaimer," praying that the court would receive in evidence a certified copy of a disclaimer of portions of the specifications, which on that day had been sent to the Patent Office for filing. The trial court admitted the disclaimer in evidence. The portions of the specifications covered *by the [451] disclaimer are printed in italics in the patent as reproduced in the opinion of the court. The disclaimer need not be further noticed at this time.

It was shown beyond question that in November, 1895, the defendant had erected at its works a reservoir of the capacity of about 300 tons, for the storage of molten metal drawn from its blast furnaces, the metal so stored being held in the reservoir for the purpose of treatment in the converters. This reservoir was described by a witness in the following condensed manner: "It was cylindrical in shape, with slightly convex ends, and in turning [for the purpose of pouring out the metal] it revolves upon the center of the cylinder. It is supported upon cradles of rollers, and the motion is imparted to the reservoir by hydraulic cylinders." As this cause, as already stated, does not involve the Jones apparatus patent, no question of infringement of the mechanical device embraced in such patent can possibly arise. In this reservoir the molten metal as tapped from the furnaces was stored continuously, and the reservoir was drawn upon with like continuity to supply molten metal for treatment in the converters. While it is not asserted that the use of the reservoir, as just stated, caused the metal stored therein to become uniform in its chemical constituents, it is conceded that the method pursued counteracted the inconvenience of sudden variations in the metal as drawn for converter purposes.

There is controversy, however, whether the defendant, in reservoiring its molten metal, irrespective of the supply and demand, intentionally retained in the reservoir a considerable residuum. From the view taken by me, however, it is unnecessary to pass on this contention, since the principles deemed by me applicable to the cause will be wholly unaffected, even if it be conceded that the defendant, in operating its reservoir, in filling it with molten metal, and in drawing the same off for use in the converter, designedly held in the reservoir a considerable residuum of molten metal in order that the metal which was subsequently charged into the reservoir might commingle with that retained.

The cause was decided by the circuit court in favor of the *complainant. The [452] court held that the second claim of the pat-

ent referred alone to metal direct from the blast furnace intended to be Bessemerized in a converter, and that the object was, not the obtaining, by mixing, a molten metal substantially uniform in its chemical constituents, but the avoidance of abrupt variations between the various charges supplied to the converter. The patent was construed as not contemplating the mixing of batches of metal; that is, the filling up of the apparatus and a drawing down to a "residue" before replenishing. The gist of the Jones idea was stated to be "the creation and maintenance of a great pool of metal between the blast furnaces and converters, through which all the incoming and outgoing metal must pass," by which means abrupt variations were prevented, although neither a uniform molten metal nor a uniform product was thereby obtainable. Indeed, the court said: "In Jones, uniformity is a nonessential—in fact, a nonattainable—attribute of product, and is a necessary nonsequence of material used."

While the court found that reservoiring was well known in the art at the time the Jones patent was obtained, and that mixing necessarily resulted from such reservoiring, it held that the Jones method was patentable, because the reservoiring known to the art contemplated storage, and not the prevention of abrupt variations; that although a mixing of the metals was of course the inevitable result of the reservoiring, such fact did not preclude the validity of the Jones patent, because prior to its grant the mixing arising from reservoiring was incidental to storage, while under the Jones method the storage was incidental to the mixing. The court said:

"Now that mixing of some character took place in the ladle during these operations; that where it took place the resultant was a homogeneous average of all constituent ingredients contained,—are facts to gainsay which would be to question nature's laws; but the indisputable fact remains that such mixing was accidental, eccentric, and nonsystematic, and therefore not of a systematic, regular, functional type or for a systematic, functional purpose."

A decree was entered reciting that the patent in question was valid as to the second claim thereof; that the defendant, "by [453] reason *of the use of a certain method of mixing molten pig metal, as in the said complainant's bill set forth, has infringed the said recited letters patent as to the second claim thereof, and has violated the exclusive rights of the said complainant thereunder." It was adjudged that recovery be had of the gains and profits made by the defendant and the damages sustained by complainant, and a master was appointed to ascertain the amount of such gains, profits, and damages. The defendant was, in general terms, enjoined from any further infringement of the second claim of the letters patent and of the exclusive rights of complainant thereunder.

An appeal was taken to the circuit court of appeals. That court held that the second claim of the patent did not cover the

retention in reservoiring of a considerable residuum, even though the same was designated as a dominant pool, and if it did that the method was not patentable in view of the state of the art, and that the proceedings in the Patent Office demonstrated that this was in effect conceded by Jones. It was decided that the defendant had the right to reservoir its molten metal, and that its method of doing so did not infringe the patent. The court decided that the disclaimer was not warranted by the statute, but that in any event it was ineffective to alter the true meaning of the patent. Thereupon the decree of the circuit court was reversed.

This court now reverses the decree of the circuit court of appeals, adopts the views of the circuit court, and in effect affirms the decree of that court. The court expressly upholds the theory of a dominant pool, and decides that the Jones patent related, not to the obtaining of uniform molten metal by mixing in a reservoir, and a resultant uniform product, but solely to the procuring, by means of reservoiring, molten metal which would not abruptly vary in its chemical constituents when drawn from the reservoir for use in a converter. The opinion of this court now, as did that of the circuit court, expressly concedes that reservoiring of molten metal was well known in the art at the time the Jones patent was applied for, and that mixing was the inevitable result of such reservoiring; but it is decided that this fact did not operate to deprive the Jones *method of novelty or to relieve [454] the defendant from the charge of infringement.

My mind is unable to assent to the construction which the court affixes to the patent, and as it is conceded that the method used by the defendant does not infringe unless the patent has the import which the court has given to it, the reasons for my dissent would perhaps be most directly made manifest by stating what seems to me to be the true construction of the patent. Doing so, however, is for the moment pretermitted, for two reasons: 1. Because to my mind it seems that even if it be granted, *arguendo*, that the patent is susceptible of the construction which the court has placed upon it, on the face of the opinion, the conclusion reached is wrong; in other words, the opinion of the court to me seems self-destructive. 2. Because if the concession of the court be accepted, that reservoiring and mixing were well known in the art, then it follows, from a consideration of the record, that the patent, as construed by the court, was wanting in patentable novelty. That is to say, if the admissions of fact made in the opinion of the court are right, its conclusion is demonstrated by the record to be unsound.

Let me briefly advert to the opinions of this court and of the circuit court, to point out the reasons which constrain to the first proposition just stated. The circuit court concluded that the reservoiring of molten metal from cupola and blast furnaces for use in casting or in converters was well

known to the art at the time the Jones patent was applied for. It also declared as follows: "That mixing of some character took place in the ladle during these operations; that where it took place the resultant was a homogeneous average of all constituent ingredients contained,—are facts to gainsay which would be to question nature's laws." But this was held not to establish that at the time the Jones method was patented that method as now construed was known to the art or had been anticipated, because, in the prior practice, the mixing "was accidental, eccentric, and nonsystematic, and therefore not of a systematic, regular, functional type, or for a systematic, functional purpose;" that such mixing was incidental to storage, while in *the Jones method storage was incidental to mixing. This court approvingly adopts and elaborately restates these views.

[455]

Now, my reason does not enable me to conceive how, consistently with the view of the prior state of the art as to mixing and reservoiring which is admitted, the conclusion as to the patentability of the Jones method as construed can be sustained.

It would seem to be beyond question that, as it is held that the mixing resulting from the storage as practised prior to the grant of the Jones patent was the resultant, as stated, of a well-known law of nature, it must follow that the qualifying words "accidental, eccentric, nonsystematic, and functional type or purpose" could only relate to the conduct of the persons who practised the method prior to the Jones patent. This must be unless it can be said that a well-known law of nature was accidental, eccentric, nonsystematic, and nonfunctional. The qualifications, then, applying, not to the law of nature, but to the conduct of parties, the reasoning must come to this: Although the method attributed to the Jones patent was well known to the art at the time that patent was issued, and hence it was intrinsically wanting in patentable novelty, nevertheless such method must be held to have embodied invention because the well-known practice was carried out by individuals in a varying and irregular manner. But this is only to say that while the Jones method was old, it must be treated as new because of the conduct of individuals in applying the method and their intentions. And this reduces itself to the proposition that the Jones patent as construed covered the mere intention or mind of persons. The reasoning is equally applicable to the distinction which is asserted to exist between storing and the mixing incidental thereto, and mixing with incidental storage. The mere form of expression cannot create a distinction where none exists, or destroy a law of nature. As by me it cannot be conceived that various charges of molten metal can be stored in a common reservoir without resulting mixing, it follows necessarily, by the law of diffusion of fluids, the mixing is the secondary result arising from and created by the primary act of storage. It is impossible that the secondary force can be caused to become

[456] *the first and creating power by a mere col-

185 U. S.

location of words. If, then, the distinction has significance, as of course it must have, since the court makes it the basis of its decision, it can only mean this, that those who practised the reservoiring of molten metal before the grant of the Jones patent mainly contemplated storage, and did not in their minds take into view the inevitable mixing which would arise therefrom by a law of nature; therefore, in the minds of the person so reservoiring, the storage was the primary, and the mixing the incidental, consequence. But, on the contrary, as those reservoiring metal after the Jones patent must be considered to have contemplated, first, the advantages resulting from mixing, therefore, in their minds, the mixing is the principal and the storage the accessory. But this is only again to say that while the Jones method was old it is to be treated as new because it covered the intention of those who stored metal for the purpose of use.

Aside from this, it seems to me the concession that the placing of molten metal in a reservoir for use as required was well known at the time the Jones patent was issued is inconsistent with the ruling now made, that the Jones patent validly embraced the retention in a reservoir of a mass of such metal, now described by the court as a dominant pool. The elementary import of the right to reservoir, as applied, not only to molten metal, but other fluids, is the storing of the fluid for use as required, and this implies the drawing off as desired, the replenishing at will, and the keeping of such residuum or reserve supply as may be deemed best. It may not be doubted that to say that one who stores fluid for use is obliged, whenever he draws any off, to draw all off before replenishing, is to say that such party has not the right to reservoir. If it be meant by the court that the right to reservoir carries with it the right to draw off or to retain at will, unless the person reservoiring intends to retain a residuum for a particular purpose, the reasoning reduces itself again to the proposition that the Jones patent covers, not the process described therein, but the mind and intention of the individual who may exercise the right to reservoir molten metal. That is to say, my reason does not enable me to understand how the right to reservoir can be admitted, *and yet such right be at once denied by a [457] construction of the patent which imposes qualifications on the right to reservoir, which, in effect, renders its beneficial exercise impossible. In other words, I fail to see how the exclusive right can be conferred to do the very thing which the court admits was well known at the time the patent to Jones was issued. The conflict which my mind perceives between the facts admitted upon the face of the opinion and its conclusion is expressly pointed out by the opinion itself, where it is said: "If the contents of the mixer used by the defendant were allowed habitually to become empty in carrying out its process there would be no infringement." That is, if in the use of its reservoir the defendant did not habitually

retain a residuum there would be no infringement. But the admission that the occasional use of a residue would be no infringement concedes that the patent did not embrace the right to use a residue, for if it was covered by the patent it would be an infringement to avail of it even occasionally. Thus it must follow that the exclusive right which the court upholds is expressly declared to relate, not to the process, but to the mere habit of the defendant.

For the purpose of demonstrating the second proposition previously adverted to, let me now recur to the state of the art as depicted by the record, in order to point out that even if the Jones patent embodied the process which the court now attributes to it, that process was wanting in patentable novelty. In doing this, for convenience, the subject is thus divided: (a) The use of molten metal drawn from cupolas for foundry purposes, before the invention of Bessemer, as well as the foundry practice and the Bessemerizing practice by the indirect process after such invention and before the grant of the Jones patent; (b) the direct process of making steel from blast-furnace metal prior to the grant of the Jones patent.

Foundry and Indirect Bessemer Practice Before the Grant of the Jones Patent.

1. *The Whitney-Car-Wheel Practice:* At the Whitney car-wheel works in Philadelphia, commencing in 1847, remelted pig metal from several eupola furnaces was tapped at [458] intervals *into a large reservoir ladle having a capacity of from twelve to fifteen tons. From this the molten metal was poured into charging ladles having a capacity of but 600 pounds. A considerable residue was always maintained in the reservoir ladle. The principal purpose, as testified to by witnesses having personal knowledge of the subject, was to secure, as a consequence of the mixing resulting from the reservoiring, the production of a practically uniform product. Excerpts from the testimony of John R. Whitney contain a clear statement on the subject:

"When the [large] ladle was nearly full we began to pour from it into the smaller ladles, each one of which held enough for one wheel. If it was an ordinary size wheel it held enough for one wheel, and if the wheels were smaller ones it held enough for two or three. As that drew the molten iron from the ladle, and the iron continued to melt, the ladle was constantly being filled from the eupola, and it was kept full until all the iron charged in the three cupolas was melted and the bottoms dropped. Then the iron was continued to be poured out of the large ladle until it was all used, those two methods making the uniform mixture; that is, we mixed it in a solid state, first by our charges and then in the molten state in the large ladle.

"As the mixture [of selected iron] was charged into each eupola, as I have stated, it was made up of irons from various furnaces, some iron having one quality and

some another. As it is melted in each eupola, it did not all melt at the same time, and if we had drawn it directly from the eupola into the small ladle from which we poured the wheels, one wheel might have been poured out of very hard iron, another wheel out of very soft iron, and so every shade between. There would have been no uniformity in our work. But by taking it from the three cupolas, all melting the same charges of iron, and collecting them in a molten state, the inequalities of melting were all overcome and a uniform product produced."

2. *The Wheeling Foundry Practice:* Kirk on Foundry of Metals, 1875, thus described a foundry practice (italics not in original):

"*In melting iron I should recommend [459] melting it hot, and as fast as possible. A quantity of molten iron should be kept in the eupola or in a large ladle, so as to give the different brands of iron a chance to mix. In most all the foundries at Wheeling, West Virginia, the cupolas are never stopped from the time the blast is put on until the bottom is dropped. A large ladle is set on trestles in front of the eupola, in such a manner that the iron can run into it from the eupola and be poured out into the smaller ladles at the same time. The iron is all run out of the eupola as fast as it is melted, and is mixed in a large ladle. I think this is a good way of mixing iron. See alloys."

3. *The Altoona Practice:* At the Altoona wheel works of the Pennsylvania railroad, from 1871, the eupola metal was designedly stored and mixed. The early reservoir ladle, of seven tons' capacity, received the metal from two cupolas, and was thus described:

"A. The ladle turns on two trunnions, and has chains leading from these trunnions down to the hydraulic cylinder shown on the drawing, one chain being wound in one direction on one trunnion and other being wound in the other direction on the other trunnion, and the two chains being connected at opposite ends of the piston rod."

In describing the regular way of working each day the witness said (italics not in original):

"In the first place each eupola is charged with about forty tons of metal. We charged about forty tons in each eupola; then after we have this done we put the blast on and begin to melt, and as soon as ever the bed in the eupola is filled up with molten metal we tap it out into the receiving ladle or reservoir, which fills the reservoir about one-half full, then we stop the cupolas up again until the iron raises to the eyeholes, then they are tapped again, and this second tap generally fills the reservoir; then after the reservoir is full, we begin to pour the metal out into smaller ladles, then send it around to the molders for pouring into the wheel molds.

"The custom was to empty the receiving ladle about one half; then hold the remainder of iron in the reservoir until the cupolas *were ready to be tapped again; and after [460]

the reservoir is full we start and pour out into the smaller ladles again. The receiving ladle at all times is kept about one-half full, and it is this full when we tap the metal into it from the cupola."

In the London Engineering for 1877, describing the practice pursued at Altoona, when a ten-ton receiving ladle was used, it was said: "It was found advisable to employ a ladle of so large a capacity, because by doing so a more complete mixture of the different irons is effected than would be the case if a smaller vessel were employed."

And the methods of using cupola metal for foundry purposes above described were early applied to making Bessemer steel by the indirect process. The following excerpt from the testimony of a witness clearly states the subject:

"A. L. Holley, who built the Troy works, and made his first conversion in 1865, introduced into this original plant tipping accumulating ladle resting on scales. This ladle was patented by Bessemer in 1869, English patent 566, alluded to in the previous answer, but apparently was an American invention. It was introduced in some form or other in all the American works, and was used almost always in duplicate, holding about two heats each, or many cupola tappings. In the last works built in St. Louis by Holley, in 1876, there were three of these ladles. In all American works these ladles were turning or tipping ladles, and were placed on scales to weigh the converter charges."

In 1877, describing the Vulcan works, a plant designed and erected under Mr. Holley's supervision, that gentleman said (London Engineering, vol. 23, 1877):

"The cupola ladles *ff* facilitate the distribution of metal to the vessels. *They form reservoirs which make the smelting department and the converting department independent of each other, within limits. This advantage was not appreciated fully until the large productions of the last few years were attempted. Should any delay occur in casting, in preparing a vessel, or from any cause, the melting department keeps right on, for those three ladles will hold six vessel charges, which may be stored and converted when the converting department is ready for them. Cast-iron will 'live' in these thickly lined ladles,* when covered with charcoal, for several hours. But it is necessary to put these ladles upon weighing machines, so that either uniform vessel charges may be run out, or so that spiegel charges may be proportioned to such charges as are run out."*

These ladles were variously named. Holley called them cupola ladles, interposed ladles, and reservoirs. Hunt described them as "intermediate accumulating ladles."

A witness thus testified respecting the extent of use in this country of the receiving ladle as follows:

"Early American steel works, commencing with Troy in 1864, Pennsylvania in 1867, Cleveland in 1868, Cambria and Union in 1871, North Chicago in 1872, Joliet and 185 U. S.

Bethlehem in 1873, Edgar Thomson and Lackawanna in 1875, and Vulcan in 1876, used receiving ladles, two in number, holding about two heats each, with the exception of Bethlehem, which used a single ladle on a car to mix taps from four cupolas, and Vulcan, which used three receiving ladles, holding two heats each. These ladles were used for storing and measuring the heats."

It is shown that from 1879 to 1888 the capacity of the accumulating ladle used at the works of the defendant was 28,000 pounds, and the converter charge 15,500 pounds, leaving 12,500 pounds in the ladle after a charge was supplied to the converter. The cupola taps of from 4,000 to 6,000 pounds passed into and filled such ladle.

Describing the mode of use of the ladle, Price, a witness, said:

"It was the custom to leave in the ladle an amount of metal equal to the difference between the converter charge and the full ladle capacity. . . . This ladle was again filled to its full capacity by retapping the cupolas. . . ."

"The metal from the several cupolas necessarily varied from time to time considerably, both in chemical and physical conditions; at times the metal being such from one or two of the cupolas that in themselves they would be unfit for converter use. But by the means which was afforded by the intermediate ladle the metal from this one, or the two, cupolas, would be averaged with the better adapted metal for converting from the others."

*Speaking of the beneficial effects resulting [462] from the use of the accumulating ladle at the works of the defendant, another witness (Cabot) said:

"The mixing of cupola metal at Cambria was accomplished by the tapping of a number of cupola furnaces into one large receiving ladle, from which converter charges were poured off, and the supply in this ladle again increased by further tapping. The practice at the Bellaire steel works was similar to that. The purpose was to obtain a supply of metal for the converters to equalize the different streams of metal from the different cupolas, and that was its effect. It accomplished that."

Yet another witness (Hunt) declared "it was recognized as one of the great features of the intermediate ladle, that it made the work so much more uniform in results from mixture or evening up of the various grades of pig iron used."

What distinction can be drawn between these methods and the patent as now construed? This court and the circuit court did put aside the Whitney method on the ground that it provided for obtaining absolute uniformity of product, while the Jones method was held to provide simply for avoidance of abrupt variations. While it is clear that a method which had for its purpose merely the prevention of abrupt variations would not necessarily include one for the obtaining of a uniform product, how a method of reservoiring molten metal as such metal is produced in the furnace and drawing it off from the reservoir for use, which

produced uniformity of product as the result of the reservoiring, can be said not to have embraced the prevention of abrupt variations, is to my mind absolutely unthinkable, since the greater must necessarily include the lesser. For, of course, as there cannot be abrupt variations in the constituent elements of a molten metal which is uniform, it must follow that a process of reservoiring which in the continuous operation of a plant will obtain a uniform metal must necessarily exclude abrupt variations in the quality of the metal.

[463] The court now, in addition, disposes, not only of the Whitney practice, but of the others to which reference has just been made, by certain general considerations which it is held applies to them all. These considerations are, first, an assertion that although *all such practices included reservoiring and the incidental mixing arising therefrom, none of them contemplated mixing as a necessary and inherent attribute, and none of them embraced the retention in the reservoir of a considerable mass of metal, a dominant pool, as a part of the process of reservoiring; and, second, as the practices in question related to molten metal drawn from cupolas, therefore they did not establish that reservoiring and mixing were known to the art so far as concerns the molten metal drawn directly from blast furnaces.

The first proposition, it is submitted, is absolutely in conflict with the express and uncontroverted proof in the record, as manifested by the references which I have already made. Let me recur to the practices under consideration to show that this is the case. Take the Whitney practice as testified to by Whitney. After saying that withdrawals were not made from the reservoir until "it was nearly full," and describing the drawing off of the molten metal from the reservoir, he said:

"And [as] the iron continued to melt [in the cupolas] the ladle was constantly being filled from the cupolas, and it was kept full until all the iron charged in the three cupolas was melted and the bottoms dropped."

The witness thus clearly showed, not only the constant retention of molten metal in the reservoir, but that such retention was recognized in the practice as essential to secure "desired uniformity of molten metal." I cannot see how there can be doubt on this subject, in view of the fact that the witness added:

"If we had drawn it [the molten metal] directly from the cupola into the smaller ladles from which we pour the wheels, one wheel might have been poured out of very hard iron, and another wheel out of very soft iron, and so every shade between. There would have been no uniformity in our work. But by taking it from the three cupolas, all melting the same charges of iron, and collecting them in a molten state, the inequalities of melting were all overcome and a uniform product produced."

Take the wheel foundry practice as portrayed in Kirk's publication. The statement is made that "a quantity of molten

iron should be kept in the cupola, or in a large ladle, so as to *give the different brands [464] of iron a chance to mix." Again: "The iron is all run out of the cupola as fast as it is melted, and is mixed in a large ladle." The publication thus clearly pointed out the advisability of retaining a residuum in the cupola or in the reservoir, for the purpose of better mixing.

Recurring to the Altoona practice, doubt on the subject seems to me to be in reason impossible. It is not gainsaid that such practice embraced reservoiring and mixing. It cannot, it is submitted, be affirmed that it did not embrace the retaining in the reservoir of a large residuum of metal for the express and necessary purpose of making the mixing more perfect, if the proof as to the practice pursued is not wholly disregarded. What was that practice? When the metal in the cupolas began to melt, it was drawn off into the reservoir until the reservoir was half full; then the withdrawals from the cupolas were stopped. But the metal in the half-full reservoir was not, however, then made use of. Why was it not so used, although already in the reservoir? The answer is because it was deemed best, in order to obtain beneficial results from mixing, to hold the half-full reservoir for a subsequent tapping therein from the furnace, of a quantity of molten metal sufficient to fill the reservoir. Only when the reservoir was thus filled did they commence to draw the metal therefrom, and when by such use the quantity in the reservoir was reduced to about one half, then the drawing off was stopped, so as to retain about the one half until there was a further replenishing from the furnace, and thus the operation continued. How, by a mere affirmation, it can be held that the process which has just been described did not contemplate the constant retention of a considerable residuum in the reservoir is to my mind inexplicable. Let me quote again from the record the uncontradicted testimony as to the practice in question:

"The custom was to empty the receiving ladle about one half; then hold the remainder of iron in the reservoir until the cupolas were ready to be tapped again; and after the reservoir is full we start and pour out into the smaller ladles again. The receiving ladle at all times is kept about one-half full, and it is this full when we tap the metal into it from the cupola."

*The irresistible conclusion thus arising [465] from this proof is, it seems to me, rendered if possible clearer, when it is recalled that as early as 1877 the London Engineering, in a reference to this practice, declared:

"It was found advisable to employ a ladle of so large a capacity, because by doing so a more complete mixture of the different irons is effected than would be the case if a smaller vessel were employed."

And what has just been said applies equally to the practice of making Bessemer steel from cupola furnaces. That the excerpts which I have given on this subject clearly show that mixing by the use of a residue was the result of the employment of

the accumulating ladle, and a result that was well known and intended, it seems to me cannot be gainsaid. How the Jones method, as construed, can be declared to have been novel—because in cupola metal there was no variation requiring mixing—in face of the fact that the very patent which is sustained, in various forms of expression, expressly declares that such variation exists, is not by me comprehended.

Besides, the proposition involves an unsound deduction, since it in effect not only disregards the fact that the practices in question were availed of with the avowed purpose of correcting the inequalities found to exist in cupola metal, but also the erroneous assumption that there could be patentable novelty in merely applying to blast furnaces the well-known practices as to cupola metal.

It may well be conceded, without affecting the case, that the variation is greater in metal drawn from blast furnaces than in that drawn from cupolas, but this mere difference in the degree of variations between the two affords no ground for construing the Jones patent in such a way as to cause it to cover the well-known prior methods.

Nor does the example given in the opinion of the court for the purpose of illustrating the difference which is found to exist between the practices to which I have referred and the Jones patent, as now construed, enable my mind to discover the difference. The court says (*italics mine*):

[466] “Let us imagine a reservoir containing, say, three quarts, and *filled with one quart each of three liquids of different constituent parts, and withdrawn for further treatment at the rate of one or two quarts at a time. Necessarily there would be some incidental mixing, but it would occur at once that the main object of the reservoir was a retention of a sufficient quantity of the mixture to supply the receptacle for further treatment, and if no necessity existed for a longer retention of the liquid in the reservoir, it could be very quickly emptied by two discharges into the receiving vessel. Now, let us substitute for this reservoir a cask of, say, sixty quarts, into which the liquids of different constituent parts are poured in at one end from a multitude of receptacles, and discharged at the other end after remaining a certain time in the cask, and that this cask could not be tilted so far but what a quantity of liquid would be left within it amounting, say, to half its capacity. Now, if there be no distinction between these two operations there would be little left to the Jones process, *the very vitality of which consists in the size of the cask relative to the ladles* and the mixing of the various liquids poured into it before they are withdrawn.”

In the first place, this example fails to notice the fact that in the accumulating ladle the metal was received from several—in some instances as many as four or five—cupolas; and that in practice a residue was constantly maintained, and for the purpose of mixing, and that these ladles could not be drained of metal unless there was an in-

tention to do so. The only distinction afforded by the example is that resulting from the difference in sizes of the two supposed receptacles in which the mixing was accomplished. But this would reduce the patentable novelty in the Jones process to the size of the reservoir. Indeed, it is so expressly stated, since in the opinion it is declared that “there would be little left to the Jones process, the very vitality of which consists in the size of the cask relative to the ladles and the mixing of the various liquids passed into it before they are withdrawn.” The mixing having been disposed of by what I have already said, it follows that the “*very vitality*” of the patent is found to be the size of the cask relative to the ladles, which in reason is a direct abandonment of the whole theory of a dominant pool previously expounded as the source of vitality *in the [467] patent. But the size of the reservoir—called by the court a cask—relative to the capacity of the plant is clearly shown not to have been novel by what has been previously said, and will be further demonstrated beyond peradventure by the consideration which it is now proposed to give to—

The Manufacture of Bessemer Steel by the Direct Process.

The use of the direct process for Bessemerizing, it would seem, was at once resorted to on the continent of Europe, and there is testimony in the record giving rise to the inference that the greater uniformity of the ores used in the blast furnaces on the continent caused such processes to be there at once quite successful. However, it may not be doubted that on the continent the use of a reservoir or accumulating ladle sometimes obtained, and the advantages which it afforded of bringing about a desirable mixture of the metals from several furnaces was known. Thus Kohn, in the *Journal of the Iron and Steel Institute*, 1871, speaking of the practice at Terre-Noire, in France, said:

“The iron is first run into a ladle, as explained by Mr. Menelaus, and so taken to the converter. The ladle is brought to the back of one furnace, and half filled; it is then run to the next furnace and filled up. In this way the Terre-Noire Company always obtain a mixture of the metals, and therefore the greatest regularity is secured through the rest of the work. The furnaces are kept in regular working order, and by carefully managing the charges of the blast furnaces, and watching them as much as possible, the practical result is that there is no inconvenience as regards the furnaces themselves in tapping frequently. The same thing is done at Mr. Schneider’s place at Creuzot, but he believed they do not there go so far as to mix the iron.”

In England the direct process was not made use of until about 1877, and it is shown that this largely resulted from the fact that the Bessemer plants in the early use of the process were not connected with blast furnaces.

In this country, though the manufacture

of Bessemer steel was commenced in the [468] early sixties, and in one or two of the *early experimental plants a brief use was made of direct metal, the indirect process was in general use until the year 1882, when the first large plant equipped for direct use of blast-furnace metal began operations at the new South Chicago works of the Illinois Steel Company, and later in the same year the Edgar Thomson works (the Carnegie Company), with five new furnaces, also commenced such work. These plants were still producing steel by the direct process, with the use of the accumulating ladle, when the Jones patent was granted in 1889, and it was not until the year 1892 that a large storage tank was installed at the South Chicago works.

A number of patents having relation to the making of steel by the Bessemer direct process were from time to time granted before the Jones patent was issued, and I shall now notice the most important of such inventions, as also some other publications embodied in the literature of the art.

In the British patent to Deighton of 1873 the purpose of the inventor, among others, was declared in the specifications to be to keep a steel-works plant or apparatus in nearly uninterrupted work, thus very considerably increasing the production of such plant. It was said:

"Instead of manufacturing Bessemer iron or steel from pig iron which has to be melted in cupolas, my invention also consists in taking the molten metal directly from the blast furnace to the converter, in which case I prefer to arrange the Bessemer plant in a line at a right angle to a row of two or more blast furnaces, and place a vessel to receive the molten metal tapped from two or more blast furnaces *to get a better average of metal which will be more suitable for making Bessemer steel or metal of uniform quality*, the vessel or receiver being placed on a weighing machine so that any required weight may be drawn or tapped from it and charged into the converter."

The apparatus was then described in detail, and consisted of blast furnaces, arranged in a line, with channels from each furnace to a common reservoir or mixer, and with a connection from the mixer to a converter, so that the molten metal in running from the blast furnaces might go into the reservoir and be mixed, and might be [469] drawn off as desired to the converter. *It was stated that the receiving vessel "is placed low enough to give fall for the molten metal to flow from the blast furnaces to this receiver *m*, which forms a receptacle for mixing the molten metal from two or more of the smelting furnaces. From the receiver *m* the mixed molten metal is tapped and flows down the swivel through *n* into the converter *a*. By placing the vessel *m* on a weighing machine it can be readily ascertained when the exact quantity required has been tapped from it into the converter."

In 1885, a few years prior to the grant of the Jones patent, two United States patents were issued to James P. Witherow (1) for apparatus for the manufacture of iron

and steel; and (2) steel-plant appliance, which patent showed a blast furnace, an intermediate storage vessel of large size, and a converter. In brief, the purpose of the Witherow reservoir apparatus was to receive and store the molten metal for the purpose of preventing the detention incident to the necessity of discharging the contents of the blast furnaces when there is no converter ready to receive it. The advantages of the large storage receptacle was thus stated in the specification of one of the patents:

"The metal is usually tapped from a blast furnace once in every six hours, and the quantity thus cast is many times in excess of the charge of a converter. . . . The charge of a converter is from one to five tons, and in the case of a blast furnace usually runs from ten to fifty tons. . . . The time between charges of the converter is usually twenty minutes and upward, and the metal from the furnace must be kept in condition to be tapped from time to time into the converter as needed."

The evidence establishes that the Deighton and Witherow reservoirs were each of a capacity of 100 tons.

Commenting, in June, 1877, upon the merits and demerits of the use, then just commenced in England, of direct metal,—that is, the conversion of molten metal direct from the blast furnace, without remelting in a cupola or storing it in a large reservoir,—A. L. Holley said (*italics mine*):

"It has not yet been practicable to work the blast furnace with sufficient regularity to realize approximately the theoretical advantages of the direct process.

"*Fourth. The obvious remedy is to mix a [470] number of blast-furnace charges, so as to reduce the irregularity to a minimum. Two systems of doing this are on the eve of trial: The one is simply mixing so few charges in a tank that the metal will be drawn out before it chills; the other is to store a larger number of charges in a heated tank,—that is to say, in an immense open-hearth furnace."

The first of these two systems of mixing would seem to be that embodied in the following portion of Mr. Holley's description of the West Cumberland practice:

"In order to get a more uniform metal, Mr. Snelus is about trying the experiment of placing a twenty-ton ladle on a hydraulic lift at the 'A' pit, so arranged as to store, mix, and pour, say, three six-ton to seven-ton blast-furnace taps, or to mix blast furnace and cupola metal. No doubt this body of metal will 'live' if the ladle is thickly lined and well covered. Mr. Snelus has another object also: tapping half or a third of a vessel heat out of the blast furnace—in other words, tapping so often—wears out the tap hole more rapidly; slag gets into the walls and weakens them. It is preferable in every way, as blast-furnace men well understand, to tap a full hearth. At the same time improvements in working the furnace are gradually developing. More care is taken as to the selection of ores, the size of ore and limestone, the distribution of ma-

terials in the furnace, the temperature of the blast, and all elements of uniformity.

" . . . Uniform results in the Bessemer department can hardly be expected unless a number of blast-furnace charges are mixed. This would seem to be the theoretical solution of the problem."

The second of the two systems of mixing is undoubtedly the one then being erected at Moss Bay, England, viz., a sixty-ton reverberatory coal-fired furnace or two forty-ton furnaces. The ladles of blast-furnace metal were to be "tapped out into the large reverberatory furnace," in which "it is the intention to store and keep hot some sixty tons of iron from all the blast furnaces." This method, for some reason not stated, perhaps an economical one, was not successful. Mr. Holley, in the article just noticed, referring to the arrangements in connection [471] with "the use of this 'large furnace,' said: "The complex manipulations due to the arrangement described seem likely to take unnecessary amount of time and labor."

After reviewing the practice in the various English and continental steel works using direct metal, Mr. Holley summed up his conclusions, and recommended the American works to continue for the present to select and remelt the pig metal, and confine their efforts for some time "to the preliminary department of the direct process,—to increasing our uniformity of blast-furnace working and product." We excerpt the following passages from the conclusions contained in the report:

"Fourth. But if the storage of a large quantity of iron in a reverberatory furnace or other reservoir should prove successful, then a few blast furnaces making even an irregular product, and, if necessary, working in connection with cupolas, would largely economize the Bessemer manufacture.

"In fact, this mixing of irregular irons on a very large scale, thus avoiding the expensive niceties of ore selection and the necessity of many furnaces, is the theoretical key to the situation. When the way to its successful adoption is demonstrated, the direct process will undoubtedly have great advantages, even over the present practice on the continent, which employs manganiferous ores. But until this large-scale mixing is developed it should not appear that the use of our comparatively irregular blast-furnace and part cupola metal can result in any substantial saving.

"But the mixing problem is not such a difficult one. A small amount of flame spread over a large surface of metal should certainly keep it hot for a long time, seeing that the metal will keep hot in a ladle exposed to air for an hour or more. And should there be any trouble about stopping the tap hole in a large storing furnace, it would not be a very difficult or expensive matter (considering the Pernot revolving-hearth experience) to tip the whole hearth to pour a charge."

Without stopping to comment in detail upon all the matters just referred to, there can be no question that they demonstrate that if the vitality of the Jones patent de-

pend upon the size of the reservoir, it was clearly anticipated. They also further establish that the advisability of the use of a large reservoir for the purposes of storage and mixing was well known; and that it was deemed to be an obvious and desirable expedient is also apparent.

It is not denied that the Deighton and Witherow patents each provided for a reservoir, the former (Deighton) laying stress upon the advantages resulting from the mixing in such reservoir. Both patents, it seems to me, in effect contemplating as they did the continuous operation of the plant, and, in view of the relative capacities of the furnace or furnaces, the reservoir and the converters, necessarily embraced the presence in the reservoir of a considerable residuum, without which residue the proposed continuity was impossible. As it is to me apparent, I do not stop to refer to the testimony showing that this must necessarily be the case. The argument that the Deighton reservoir had no cover, and therefore it is not the Jones process, ignores the fact that Jones in his process patent does not provide for the operation of his method in a covered receptacle, but, on the contrary, in the specifications of that patent, it is declared that the process may be carried on in a charging ladle, an uncovered receptacle. Further, it is to be borne in mind that the record overwhelmingly establishes that it was a well-known expedient to cover a ladle or other receptacle for molten metal when the metal was required to be retained longer than the customary time. The inappropriateness of the suggestion that the Deighton patent ought not to be given any weight as showing the state of the art, because the patentee allowed the patent to lapse for the nonpayment of fees, cannot be better illustrated than by this case, when it is recalled that the patent to Mushet, which made Bessemerizing commercially practicable, was allowed to lapse because the Patent Office fees were not paid.

The demonstration of want of novelty in the patent as construed, which arises from the previous considerations, entirely disposes of the case, as it is, as already observed, conceded that, unless the patent means what it is now held to mean, there was no infringement by the defendant. It is to me equally clear, however, that even if the state of the art be, *arguendo*, put out of view, the patent cannot be held to signify what it is now decided to mean (a) without [473] repudiating the true meaning of the patent, which is—properly deducible from the proceedings in the Patent Office, that is, the file-wrapper and contents, and without refusing to give effect to the express declarations and admissions of the patentee (Jones) as to the significance of the patent, which is also shown by the proceedings in question; and (b) without misconceiving and misconstruing the patent. Let me briefly demonstrate these propositions.

As I have said at the outset, the application for the patent in suit when first made was rejected by the Patent Office, on the ground of the prior state of the art, as evi-

denced by the Witherow patents and the Kirk publication. An amended application was thereupon filed, which beyond all question eliminated from the patent all claim to an exclusive right to reservoir or store the molten metal. When this amendment was presented to the Patent Office, counsel for the applicant submitted a written argument to demonstrate the patentability of the method covered by the amended application, in which no reference whatever was made to the importance of a residue, whether of small or considerable size, but the purpose of the inventor was thus declared (*italics mine*) "to have a receptacle capable of holding metal in a molten condition, into which metal, it may be, from several blast furnaces, is run from time to time, and from which metal is drawn for treatment in the converters, or otherwise, as required. This continuous pouring into and drawing out of a common receptacle produces such a mixture of the charges as results in an uniform average quality of metal, whether treated in the converters or used for casting without such treatment, as is very desirable, but has hitherto been found unattainable." But the amended application was rejected, and the examiner—evidently having in mind the statement in the argument of counsel above referred to—called the attention of the applicant to the fact that the continual pouring into and drawing out of the molten metal to produce a mixture was anticipated by the Kirk publication. The examiner said (*italics mine*):

"The process, as now claimed, seems to be fully met by the description in Kirk's Metal [474] Founding, heretofore referred to, *which states that the metal is run continuously from the cupola and mixed in the ladle, from which it is tapped into the smaller ladle. See also the additional references of British patents No. 859, Broman, March 23, 1866, page 5, lines 25-35, and No. 2382, Stewart, May 10, 1883, page 5, lines 9 and 10."

When it is borne in mind that the Kirk publication thus referred to provided expressly for a continuous inflowing and outdrawing of the metal, and besides expressly said "*a quantity of molten metal should be kept . . . so as to give the different brands of iron a chance to mix*," the conclusion cannot by me be escaped that the examiner pointed out to Jones that the conception of a continuous inflow and outflow, and the keeping of a residue for the purpose of mixing, was not patentable.

The presumption cannot be indulged in that the amendment was not intended to obviate the objection on account of which the Patent Office had rejected the application, and, moreover, it cannot be assumed that the Patent Office issued the patent for a method which it declared was not patentable. But now the patent is construed by the court as covering the continuous flowing into and withdrawal from a reservoir of molten metal, and as alone referring to the prevention of abrupt variations in the metal drawn from the reservoir for use in a converter, while Jones himself declared to the

Patent Office that the patent as amended related to metal drawn (from a reservoir) for treatment in a converter, or otherwise, as required. Besides, it was expressly stated that what the patent contemplated was the production of a uniform quality of metal, intended for further treatment in the converters, or to be used for casting without such treatment. It is submitted that this demonstrates that the construction now given by the court to the patent is directly repugnant to the meaning which Jones affixed to it, and besides is in conflict with the ruling of the Patent Office, in which Jones acquiesced, and upon which the patent was issued; and therefore that the construction which the patent now receives amounts, it seems to me, to a grant by judicial decision of a new and different patent from that which the Patent Office allowed.

Conclusive as is the view just stated, it is made, if possible, *more so if the correct construction of the patent be ascertained. [475] This it is proposed to demonstrate by an analysis of the patent as originally applied for, by a consideration of the amendments made to it, and by its text in its final form. Considering these matters, it will, I think, appear that the patent was not, as now held to be, solely one for the prevention of abrupt variations in the metal drawn from the receptacle for use in a converter. On the contrary, the true purport of the patent was this, and this only: The selection of separate portions of molten metal, pouring the same into a reservoir, mixing such aggregated portions of molten metal thoroughly until it, the commingled metal, became uniform, so that the equalized metal might be used, not alone in the making of steel in a converter, but in any other process of making steel, in a foundry, or in any other mode where a uniform product was desired. Having thus provided for equalizing the contents of the reservoir when filled with selected metal and mixing had been accomplished, the patent contemplated that this equalized molten metal present in the reservoir should be drawn off for any desirable purpose down to an undetermined residue, so that when a fresh supply of selected metal was charged into the reservoir the metal thus newly supplied might be mixed with the residuum, and thus not only a further supply of equalized metal might be obtained, but also, as a result, abrupt variations between the freshly equalized metal and that of the preceding batch discharged from the reservoir would be avoided.

To demonstrate the correctness of this construction, which, as already shown, was undoubtedly the view taken by the Patent Office, let me come to consider the application for the patent, the amendments, and the patent as granted.

The application, as originally filed, contained a statement of the *primary* object of the invention, which is excerpted in the margin.†

†"The primary object of the invention is to provide means for insuring uniformity in the product of a Bessemer steel works or similar plant, in which the metal from more than one

[476] *This was followed by a statement of the secondary objects designed to be attained as follows:

"My invention, however, is not limited to its use in connection with converters, since similar advantages may be obtained by casting the metal from the mixing vessel into pigs for use in converters, puddling furnaces, or for any other uses to which pig iron may be put in the art."

A description was then given of the apparatus, which it was previously stated had been invented "for practising my invention," and the mode of operation of such apparatus was stated. The claim read as follows:

"The process hereinbefore described, which consists in storing charges of molten metal in a covered receptacle provided with a heat-retaining lining, removing portions only of the molten contents of the said receptacle without entirely draining or emptying the same, and successively replenishing the receptacle with fresh additions of molten metal, whereby the character of the several charges of metal so treated is equalized; substantially as described."

Considering the application as thus made, what support does it lend to the theory now [477] announced that it was the purpose of *the Jones invention merely to prevent abrupt variations between each charge of metal drawn from a reservoir for treatment in a converter? Such purpose is nowhere declared, unless it be inferred from certain statements in the patent descriptive of the mode of operation of the appliance covered by the apparatus patent, to which, hereafter, I shall more particularly advert. The conception that the patent solely related to abrupt variations in metal drawn from a reservoir and supplied to a converter is absolutely excluded by the fact that the secondary object is pointed out to be to secure a pig metal so uniform in its chemical constituents that it might be used "in puddling furnaces or for any other use to which pig iron might be put in the art." It cannot be conceived that the patent provided for making the metal uniform in the reservoir, and, by the same language, provided merely against the occurrence of abrupt variations in the equalized metal when drawn off to a converter. If made uniform,

(subsequently amended to read 'one or more') blast furnaces is employed to charge the converters. The product of the different furnaces, or of the same furnace at different times, varies in quality, the variation depending on the kind of ore employed, and on many other conditions well known to those skilled in the art, so that when the converters are charged at one time with the output from one furnace, and at another time with the output from another furnace or furnaces, the manufactured steel lacks uniformity in grade. To avoid this I employ suitably constructed reservoirs or vessels, into which the molten metal from the blast furnaces is put, the vessels being of proper capacity to hold a considerable charge of metal from a single furnace, or from a number of furnaces, and being adapted to retain the metal in a

there could not, in the nature of things, be abrupt variations. It being, then, certain that the process patent, as originally filed, in and of itself not only contained even no intimation of the claim which the court now attributes to the patent, it must follow that if the patent covered such a claim it was one not in the mind of Jones, but must have been in some way evolved in the passage of the application through the Patent Office.

This original application, as I have said, was rejected by the Patent Office as being "completely anticipated" by the Witherow patents, and reference was made to the Kirk publication.

To meet this objection a change was made by which the assertion of an exclusive right to store charges of molten metal was eliminated, the amendment being as follows:

"The process hereinbefore described, which consists in running successive charges of molten metal into a covered receptacle provided with a heat-retaining lining, removing from time to time from said receptacle for subsequent treatment a portion only of its molten contents, and successively replenishing such receptacle with fresh additions of molten metal, for the purpose of equalizing the character of the several charges of metal drawn therefrom, substantially as described."

*Accompanying this paper was the argument of the attorney, already referred to, in which it was expressly declared, as has been seen, that the patent related to uniformity of molten metal for further treatment in converters, *or otherwise*; that is, as declared in the argument, the obtaining of a metal of such uniform quality that it might not alone be used in converters, but might be "used for casting without such treatment."

As the application, as amended, was asserted to embody a claim for the continuous operation of a plant by reservoiring metal, by inflowing and outflowing, with mixing,—a method construed by the Patent Office as identical with that described in the Kirk publication,—the patent, as already stated, was again rejected. It was again amended, and, as thus finally amended, the patent was allowed. The new amendments consisted, first, of a substituted statement of the primary object of the invention, which

molten state for sufficient time to enable the different charges to mix and become homogeneous. The advantage which I thus obtain in securing uniformity and homogeneity in the total product will be readily understood by those familiar with the operations of a steel works and the frequent loss which is caused by the lack of such uniformity. Such apparatus possesses also an additional advantage in that it makes it possible to dispense with cupola furnaces for remelting the pigs preparatory to charging the converters. The metal may be tapped from the blast furnaces into ladles or trucks, carried to and discharged into the mixing reservoir or vessel, and there retained in a molten state until sufficient metal has been accumulated to charge the converters."

is excerpted in the margin.† It will be ob-
 [479]served, *from the concluding sentence in the first paragraph, that it was clearly implied that the applicant deemed that inequalities were present in cupola metal as well as in blast-furnace metal.

There was substituted for the single claim as originally presented and amended the two claims embodied in the patent as finally issued, and which have been previously set out.

It plainly results from the amendment that it was drawn to meet the objection of the examiner and to make clear the fact that the character of the mixing contemplated by the Jones process was not that resulting from a continuous operation of a reservoir by the inflowing and outdrawing of metal with the constant retention of a residuum, but was a distinct character of mixing by thorough commingling of batches of metal, in order to produce in a reservoir a molten metal which would be homogeneous and uniform, of a character deemed to be unattainable by the continuous process; the purpose of securing this reservoir of uniform metal being to obtain a mixed metal so uniform in its chemical constituents that it might be, with greater advantage than theretofore, subjected to further treatment in the converters or be run into pigs, which, by reason of the uniform quality of the metal, might then be used for any purpose where such a metal was desired. In other words, the amendment was drawn for the purpose
 [480]of satisfying the Patent *Office that the method which was claimed should not be rejected because the prior art provided against the mere variations in the metal drawn from the reservoir, as the patent went further and described a process of mixing which would bring about the greater re-

sult of a uniform molten metal and consequent uniform product.

This conclusion is rendered clear by the fact that the amended application not only retained in substance all the prior declarations as to the purpose of obtaining a uniform mixed molten metal, and as to the use of such uniform metal in converters, or otherwise, but emphasized the same by adding the following:

"To this end my invention may be practised with a variety of forms of apparatus. For example, by merely receiving in a charging ladle a number of small portions of metal taken from several ladles or receiving vessels containing crude metal obtained at different times or from different furnaces, the mixing being performed merely by the act of pouring into the charging ladle, and other like means may be employed."

And to make the object of the amendment perfectly clear, the prior description of the method was supplemented by stating that the "commingling of the contents may be aided by agitation of the vessel on its trunnions, so as to cause the stirring or shaking of its liquid contents."

True it is that on the trial below the complainant presented a disclaimer, which the court now upholds, by which he sought to eliminate from the patent the amendments which had been inserted to meet the objections of the Patent Office examiner, and which indubitably fixes the meaning of the patent. I do not deem it necessary, however, to stop to refer to authorities to show that a disclaimer which, in effect, has for its object the making of a new patent by striking out the essential representations upon which the patent was granted, is without legal warrant. This, it is submitted, is

†"The primary object of my invention is to provide means for rendering the product of steel works uniform in chemical composition. In practice it is found that metal tapped from different blast furnaces is apt to vary considerably in chemical composition, particularly in silicon and sulphur; and such lack of uniformity is observable in different portions of the same cast, and even in different portions of the same pig. [Here follows table of analyses said to have been made of metal contained in different ladle charges from one cast of a blast furnace.] . . . The consequence of this tendency of the silicon and sulphur to segregate or form pockets in the crude metal is that the product of the refining process in the converters or otherwise in like manner lacks uniformity in these elements, and therefore often causes great inconvenience and loss, making it impossible to manufacture all the articles of a single order of homogeneous composition. Especially is this so in the process of refining crude iron taken from the smelting furnace and charged directly into the converter without remelting in a cupola, and, although such direct process possesses many economic advantages, it has on this account been little practised.

"For the purpose of avoiding the practical evils above stated, I use in the refining process a charge composed not merely of metal taken at one time from the smelting furnace, but of a number of parts taken from different smelting furnaces, or from the same furnace at different

casts, or at different periods of the same cast, and subject the metal before its final refining to a process of mixing whereby its particles are diffused or mingled thoroughly among each other, and the entire charge is practically homogeneous in composition, representing in each part the average of the unequally diffused and segregated elements of silicon and sulphur originally contained in each of the several parts or charges. By proceeding in this way not only is each charge for the refining furnace or converter homogeneous in itself, but, as it represents an average of a variety of uniform constituent parts, all the charges of the converter from time to time will be substantially uniform, and the products of all will be homogeneous. To this end my invention may be practised with a variety of forms of apparatus,—for example, by merely receiving in a charging ladle a number of small portions of metal taken from several ladles or receiving vessels containing crude metal obtained at different times or from different furnaces, the mixing being performed merely by the act of pouring into the charging ladle, and other like means may be employed. I prefer, however, to employ the apparatus shown in the accompanying drawings, and have made it the subject of a separate patent application, serial No. 289,673, and, without intending to limit the invention to the use of that specific apparatus, I shall describe it particularly, so that others skilled in the art may intelligently employ the same."

the obvious result of the authorities to which the opinion of the court refers.

But even if the patent as it is now made over, as I think, by the effect which is given by the court to the disclaimer, be alone considered, it plainly results that the patent as so changed did not contemplate, as now decided, solely the prevention of *abrupt variations in the metal drawn from the reservoir for use in the converter, since the patent yet provides: "Instead of discharging the metal into the cars 12, and carrying it in the cars to the converters or *casting house*, the vessel 2 may be so situate relative to the other parts of a furnace plant as to deliver its contents immediately to the converters or *other place where it is to be utilized*." I fail to see how it can be held, even giving the fullest effect to the disclaimer, that the patent provides only for metal to be supplied to a converter, when it expressly points out that the metal may be used "*in the casting house, in the converters, or other place where it is to be utilized*."

I come now to the statements found in the patent to which I have previously alluded, which the court thinks give support to the claim that the patent had reference merely to the avoidance of abrupt variations in metal supplied to the converters. The statements thus relied upon are contained in that portion of the patent where the mode of operation of the appliance covered by the apparatus patent is described. These passages are excerpted in the margin.†

When the passages in question are properly considered, it becomes, I submit, incontrovertible that, instead of sustaining, *they are antagonistic to, the construction which has been given by the court to the patent, and hence sustain the construction which has been presented in this dissent.

Referring to the excerpted matter in the margin, it will be *seen that in the second

paragraph is described the mode of filling the reservoir. Various portions of metal, termed "charges," are drawn "either from a number of furnaces or at different times from a single furnace," and such charges are introduced into the reservoir until the vessel is full; that is, to use the language of the patent, until a "sufficient charge" has been supplied to the reservoir, the result being, as stated in the patent, that the charges of metal thus accumulated in the reservoir "constitute a homogeneous molten mass, whose quality may not be precisely the same as that of any one of its constituent charges, but represents the average quality of all of the charges." Thus it appears that the patentee had in mind the cure of the inequalities or variations present in the "charges" of metal poured into the reservoir to make up the "sufficient charge," and thereby to cause such sufficient charge "to constitute a homogeneous molten mass, whose quality may not be precisely the same as that of any one of its constituent charges, but represents the average quality of all the charges." And the production of this homogeneous mass, it is further observed, "may be aided by the agitation of the vessel on its trunnions, so as to cause the stirring or shaking of its liquid contents." Manifestly, not only the obtaining of the homogeneous molten mass is absolutely incompatible with the theory that the patent related to mere variations, but the statement about the agitation of the vessel on its trunnions is likewise a negation that the conception of the patent related to the continuous inflowing and outflowing of molten metal from the reservoir. The construction now put upon the patent by the court disregards the provision that the variation which was to be cured was that existing between the "charges" as they were poured in, and assumes—contrary to the language of the patent—that the purpose was to cure variations

†Referring now to the drawings, 2 represents the reservoir before mentioned. It consists of a covered hollow vessel having an outer casing 3 of iron or steel, which is suitably braced and strengthened by interior beams and tie-rods, as shown in the drawings. The whole exterior of the vessel is lined with fire brick or other refractory lining, which should be of sufficient thickness to retain the heat of the molten contents of the vessel and to prevent chilling thereof. The vessel is strongly braced and supported by braces and tie-rods, and may be of any convenient size, holding, say, 100 tons of metal (more or less), and its shape is preferably such as shown in the drawings, being rectangular, or nearly so, in cross section, and an irregular trapezium in longitudinal section, one end being considerably deeper than the other. At the top of the deeper end, which I call the 'rear' end, is a hopper 5, into which the molten metal employed in charging the vessel is poured, and at the front end is a discharge spout 6, which is so located that the bottom of the spout is some distance above the bottom of the vessel,—say 2 feet in a hundred-ton tank, and more or less, according to the capacity of the vessel,—the purpose of which is that when the metal is poured out of the spout a considerable quantity may always be left remaining and unpoured, and that whenever the vessel is replen-

ished there may already be contained in it a body of molten metal with which the fresh addition may mix. *I thus secure, as much as possible, uniformity in character of the metal which is fed to and discharged from the tank, and cause the fluctuations in quality of the successive tappings to be very gradual.*

"The mode of operation of the apparatus is as follows: When the vessel is in the backwardly inclined position shown in Fig. 1, it is ready to receive a charge of metal from the car 7. Before introducing the first charge, however, the mixing vessels should be heated by internal combustion of coke or gas, and when the walls of the vessel are sufficiently hot to hold the molten metal without chilling it, it is charged repeatedly from the cars 7 with metal obtained either from a number of furnaces or at different times from a single furnace. *The charges of metal introduced at different times into the vessel, though differing in quality, mix together, and when the vessel has received a sufficient charge its contents constitute a homogeneous molten mass, whose quality may not be precisely the same as that of any one of its constituent charges, but represents the average quality of all the charges.* If desired, the commingling of the contents may be aided by agitation of the vessel on its trunnions so as

which would exist in the mass of molten metal, when, by a sufficient charge, the reservoir had been filled. And this, although it is expressly declared in the patent that by the operation of the reservoir, in the mode described, the variations existing in the metal before the pouring in would be destroyed by the mixing, which would cause the mass from which withdrawals were to be made to become homogeneous.

[484] *The error becomes more manifest upon an examination of the last of the excerpted paragraphs, wherein is contained directions as to the withdrawals of the equalized metal from the sufficient charge; that is, the filled reservoir of equalized metal and the replenishing of the reservoir with new charges to make another sufficient charge. It will be seen that the patent contemplated the discharge of the mass of homogeneous metal by tilting the tank down to a residue, and that no reference is made to replenishing the reservoir until provision is made for the retention of a residue. Then the reservoir is to be replenished by the addition of new charges which mix with these parts of previous charges, which have been equalized and which remain in the reservoir as a residue. Obviously, in this subsequent addition of charges it was intended that a "sufficient charge" of metal should be contained in the reservoir, which, when thoroughly mixed, would form another homogeneous mass of molten metal, it being declared "by which means any sudden variations in the quality of the metal supplied to the converter is avoided." "By which means" is clearly meant the bringing into existence of the homogeneous mass referred to in the patent. In other words, the patent points out that by making all the "constituent charges" of a "sufficient charge" homogeneous there would be no variations in the withdrawals from that equalized mass. And this is, besides, made more manifest by the following sentence in which attention is called to the fact that the equalized metal thus drawn off might be carried to the converters or be cast into pigs without treatment in the converters.

Moreover, turning to the first paragraph in the excerpt, it will be perceived that it is stated that the operation of the mixer as described will "secure, as much as possible, uniformity in the character of the metal

which is fed to and discharged from the tank [meaning the equalized mass], and cause the fluctuations in the quality of the successive tappings to be very gradual." That is to say, the patent contemplated that each distinct full reservoir or sufficient charge, constituting a batch of metal, would be homogeneous in itself and substantially uniform in its chemical constituents, and the successive "sufficient charges" or "full reservoirs" would, by means of the residuum, vary but "slightly between each other. The[485] words "successive tappings" can have no other meaning than successive batches, for it is impossible to conceive that they could refer to the separate withdrawals of metal taken from one full reservoir or sufficient charge, because it had been declared that the "constituent charges" of each full reservoir of metal by the operation described would become homogeneous; that is, practically uniform.

Certainly, this construction of the patent gives effect to all of its provisions, and harmonizes with its plain letter, while the contrary construction, now approved by the court, reads out of the patent the repeated statements as to the purpose of the patent being to secure a uniform molten metal, and disregards the fact that the patent expressly provides that what it aims to secure is such uniform metal as is fit, not only for use in converters, but for castings and any other mode by which such a metal can be utilized. (Certainly, what has been previously stated is a demonstration that the construction previously given by me accords with the express declaration made by the patentee when he applied for his patent, and is strictly in harmony with the action of the Patent Office in allowing the patent. It is equally clear that the construction of the patent, which has been by me elucidated, is, besides, in accord with the conception entertained by the Patent Office of the meaning of the patent long after it had been issued. Thus, the Commissioner of Patents, in a report bearing date January 1, 1896, reviewing the advance in the industrial arts, said (*italics mine*):

"A process now commonly used in steel manufacture is that of patent No. 404,114, January 4, 1889, to Jones, in which he described a means of *getting a uniform product of metal by mixing together in a suit-*

to cause the stirring or shaking of its liquid contents. The mixing chamber being deeper at its rear than at the front end, as before described, and its normal position when not discharging metal for the purpose of casting being with the bottom inclined upward toward the front or discharging end, and the bottom of the spout being situate above the bottom of the vessel at its forward end, it is adapted to receive and hold a large quantity of molten metal without its surface rising high enough to enter the discharge spout."

"After the vessel is properly charged, the metal is drawn off into the cars 15 from time to time, as it is needed, by opening the door or cover 16 of the spout 6 and driving the engine 12, so as to elevate the rear end of the vessel and tilt it forward, and thus to discharge any required amount of its contents in the manner

before explained into the ears 15, which are transported to the converters, or the metal is cast into pigs or otherwise used. The tilting of the vessel does not, however, drain off all the contents thereof, a portion being prevented from escaping by reason of the elevated position of the spout 6, and as the vessel is replenished from time to time each new charge mixes with parts of previous charges remaining in the vessel, *by which means any sudden variations in the quality of the metal supplied to the converter is avoided.* Instead of discharging the metal into the cars 12, and carrying it in the ears to the converters or casting house, the vessel 2 may be so situate relatively to the other parts of a furnace plant as to deliver its contents immediately to the converters or other place where it is to be utilized."

able receptacle *batches of metal* from different furnaces, so that the mixture when drawn off will be the average of the different charges."

[486] As the views hereinbefore expressed sufficiently make manifest the reasons for my dissent, it is unnecessary to stop to notice many matters considered in the opinion of the court. Lest, however, if they are not referred to, it may be assumed that assent is given to them, the more important of such statements *are briefly adverted to. First, it is said that the making of steel by the direct process was commercially impracticable before the grant of the Jones patent, and that that patent operated a revolution in the art. The proposition, in my opinion, finds no support in the record. On the contrary, it is affirmatively established that not only on the continent, but in England and in this country, long prior to the grant of the Jones patent, Bessemer steel was made by the direct process, upon a large scale, continuously and successfully. So far as revolution in the art is concerned by the alleged enormous saving rendered possible by the use of the Jones method, it is not perceived how such a statement is compatible with the unquestioned proof in the record that, although the complainants at their Edgar Thomson works erected several of the Jones mixers about the time of the grant of the Jones patent, they did not introduce them into their other works until more than seven years afterwards. Indeed, to my mind it is established by the record that the Jones method, when put into practical operation by the complainant, proved not to be a commercial success, and the apparatus was continued in use despite this fact because of the means which it afforded of securing on a larger scale the benefits of storage hitherto well known in practice, and that the use of this larger storage vessel became more and more advantageous as the capacity of blast furnaces was enlarged and improvements took place in the mode of their operation.

The statement that upon the grant of the Jones patent the so-called mixer was at once adopted by steel works generally in this country is also unwarranted by the facts, in evidence, which establish without any conflict that storage reservoirs of like capacity to that of the Jones apparatus were in use at the time of the hearing of this cause in but three steel works in the United States outside of those operated by the complainant, and that their introduction long after the grant of the Jones patent in such outside works is shown to have been coincident with the increase in blast-furnace output and the necessity which had thus arisen for greater reservoir capacity to hold the enormous supply of molten metal which was then being produced by the operation of blast furnaces. The record, moreover, es-

[487] tablishes *that in the works in question, where, long after the grant of the Jones patent, large reservoirs were first employed, this was done, not because better results were secured by means of mixing than had been obtained by the mixing theretofore re-

sorted to, but because the larger output of blast furnaces pointed to the necessity for the construction of a larger reservoir than those previously employed.

The effect of the decision now rendered, it seems to me, is, therefore, to put the patentee in a position where, without invention on his part, and without the possession by him of lawful letters patent, he is allowed to exact tribute from the steel and iron-making industry, whenever those engaged in such industry desire to increase their plants or to more conveniently and satisfactorily conduct their operations so as to keep pace with the natural evolution of modern industrial development.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice **Harlan**, and Mr. Justice **Brewer** concur in this dissent.

THOMAS SWAFFORD, *Plff. in Err.*,
v.

W. A. TEMPLETON and S. H. Pearcey.

(See S. C. Reporter's ed. 487-494.)

Jurisdiction of circuit court—Federal question—case involving right to vote for member of Congress.

An action to recover damages from state election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the House of Representatives, at a national election held in the district where he resided, is one arising under the Constitution of the United States, of which a circuit court of the United States has jurisdiction.

[No. 487.]

Submitted April 14, 1902. Decided May 19, 1902.

IN ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment dismissing a suit to recover damages for the refusal by election officers to permit the plaintiff to vote for a member of the House of Representatives. *Reversed.*

See same case below, 108 Fed. 309.

Statement by Mr. Justice **White**:

*This action was begun by Swafford, plain-[488] tiff in error, in the circuit court of the United States for the southern division of the eastern district of Tennessee. Templeton and Pearcey, defendants in error, were made defendants to the action, the object of which was to recover damages for an asserted wrongful refusal by the defendants to permit the plaintiff to vote at a national election for a member of the House of Representatives, held on November 6, 1900, in the district of the residence of the plaintiff. The declaration expressly charged that

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7, and Bailey v. Mosher, 11 C. C. A. 308.

the plaintiff was a white man, a natural-born citizen of the United States, and was such on November 6, 1900, and had been for many years prior thereto a resident and duly qualified voter in the county of Rhea, state of Tennessee, and, as such, entitled, under the Constitution and laws of the United States and of the state, to vote for members of Congress, and that he had been illegally deprived of such right by the defendants, when serving as election officers at an election held on November 6, 1900, in the district of the residence of the plaintiff, in said county of Rhea.

The declaration specified the manner in which the right which it was asserted existed under the Constitution and laws of the United States and of the state had been violated, as follows: That for a number of years there had been in force in Tennessee certain special registration and ballot laws, which were operative only in counties containing a population of 50,000 inhabitants or over, and in cities, towns, and civil districts having a population of 2,500 inhabitants or over; that Rhea county was not, prior to 1899, affected by the legislation in question, because it did not have a population of 50,000 or upwards, and had no town, city, or civil district within its borders containing a population of 2,500; that, not being subject to the operation of the statutes in question, the elections in Rhea county, as in other counties similarly situated, were governed by, and conducted in accordance with, the general election laws prevailing in the state of Tennessee; that in 1899 the legislature of Tennessee passed a law known as chapter 163 of 1899, by which the civil [489]*districts or subdivisions theretofore existing in Rhea county were diminished in number, and so arranged as to cause the civil district in which the plaintiff lived and was entitled to vote to contain a population of over 2,500 inhabitants, and therefore to become subject to the aforesaid special registration and election laws, if the redistricting law in question was valid. It was further averred that at the election held on November 6, 1900, for a member of Congress, the defendants, who were a majority of the election judges conducting such election, when the complainant presented himself to vote, insisted that he mark his ballot, and fold it in a particular way without assistance, as required by the special ballot law. It was asserted that this demand by the election officers was lawful if the special ballot law applied to the conduct of the election, but was unlawful if the election in Rhea county was not subject to such special law, and was controlled by the general election law of the state. Averring that he was an illiterate person, and unable to mark or fold his ballot unassisted, and was therefore not able to comply with the provisions of the special ballot law referred to, it was alleged that the vote of plaintiff was rejected by the defendants, despite the insistence of the plaintiff that the election ought legally to have been conducted according to the requirements of the general law, and not by those

of the special law, for the reason that the redistricting act of 1899 was absolutely void.

The grounds upon which it was alleged that the act of 1899 redistricting Rhea county was void may be thus summarized: Because it was "class legislation in violation of the Federal Constitution," it being asserted that said law was enacted for partisan purposes, and that, although there were other counties in the state similarly situated as was Rhea county, the civil districts as laid out by the county courts in such other counties, pursuant to statutory authority, were left undisturbed by the legislature. In other particulars, also, the act in question was averred to constitute special or class legislation. It was specially averred that, as prior to the adoption of the 14th Amendment to the Constitution of the United States, plaintiff enjoyed *the elective franchise, by virtue of that amendment and of enumerated provisions of the state Constitution "plaintiff became, and was, possessed of the right of suffrage as an immunity or privilege of citizenship, of which he could not be deprived by the enactment of chapter 163 (the law of 1899) under the circumstances aforesaid." [490]

The defendants filed a demurrer questioning the sufficiency of the declaration upon various grounds.

After hearing upon the demurrer, the court filed an opinion in which it said that it clearly appeared from the declaration that the action did not really and substantially involve a Federal question, and that the court was without jurisdiction or power to entertain the suit. 108 Fed. 309. An entry was made sustaining the demurrer and dismissing the suit, and it was recited that the dismissal was solely because of the want of jurisdiction. A certificate of the judge, moreover, was filed, which is as follows:

"In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no Federal question was involved, and that the declaration, in my opinion, disclosed the infraction of no right arising under or out of the Federal laws or Constitution; and that treating the demurrer as presenting this question of jurisdiction, and acting also independently of the demurrer, and on the court's own motion, the suit is dismissed only for the reasons above stated; that is, that the controversy not arising under the laws and Constitution of the United States, there is consequently no jurisdiction of the circuit court of the United States.

"This certificate is made conformably to act of Congress of March 3, 1891, chapter 517, and the opinion filed herein April 30, 1901, is made a part of the record, and will be certified and sent up as a part of the proceedings, together with the certificate."

Mr. Frederick Lee Mansfield submitted the cause for plaintiff in error:

The right to vote for members of the Congress of the United States has its founda-

tion in the Constitution of the United States.

Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

When, therefore, the declaration averred that plaintiff was deprived of the elective franchise, and that such denial was the result of the wilful, deliberate, wrongful, and illegal action of the defendants, it stated a case of which the circuit court had jurisdiction.

Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17.

Mr. **Jerome Templeton** submitted the cause for defendants in error:

The United States Constitution and laws do not confer upon the citizen the right to vote, but only the right not to be discriminated against as a voter.

Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *Cooley*, Principles of Const. Law, 291; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Re Coy*, 127 U. S. 749, 32 L. ed. 277, 8 Sup. Ct. Rep. 1263.

As the Congress had not passed laws regulating national elections, except so far as to prevent discriminations or intimidation, in the absence of an averment that plaintiff was discriminated against or intimidated no question arises under the Federal Constitution or laws.

[491] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The sole question is, Did the circuit court err in dismissing the action, on the ground that it was not one within the jurisdiction of the court? An affirmative answer to this question is rendered necessary by the decision in *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17. In that case the action was brought in a circuit court of the United States against state election officers to recover damages in the sum of \$2,500 for an alleged unlawful rejection of plaintiff's vote at a Federal election. A demurrer was filed to the complaint. One of the grounds of the demurrer was that the court had no jurisdiction of the action, because it did not affirmatively appear on the face of the complaint that a Federal question was involved. The demurrer, however, was sustained, not because of the want of jurisdiction, but solely upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The cause was brought directly to this court, under that provision of the act of March 3, 1891, which confers power to review the judgment or decree of a circuit court, among others, in any case involving the construction or application of the Constitution of the United States. In this court the contention was renewed, that the circuit court was without

jurisdiction, and this contention involved necessarily, also, a denial of the power of this court to review, since the right directly to do so was sustainable alone upon the ground that the cause was one involving the construction or application of the Constitution of the United States. The argument advanced to sustain the asserted want of jurisdiction was this, that, as the Constitution of the United States did not confer the right of suffrage upon anyone, but the same was a privilege which the elector enjoyed under the Constitution and laws of the state in which he was entitled to vote, therefore the denial of the right to vote at an election for a member of Congress did not and could not involve the construction or application of the Constitution of the United States. The court, however, decided otherwise, and, speaking through Mr. Justice Gray, said that the case "involves the construction *and [492] application of the Constitution of the United States;" that "the right to vote for members of the Congress of the United States . . . has its foundation in the Constitution of the United States;" that "the circuit court of the United States has jurisdiction, concurrent with the courts of the state, of any action under the Constitution, laws, or treaties of the United States, in which the matter in dispute exceeds the sum or value of \$2,000;" and that, the action being "brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States, the complaint, by alleging that the plaintiff was, at the time, under the Constitution and laws of the state of South Carolina and the Constitution and laws of the United States, a duly qualified elector of the state, shows that the action is brought under the Constitution and laws of the United States." In concluding its examination of the question of jurisdiction, it was declared that "the circuit court, therefore, clearly had jurisdiction of this action." The conclusion thus expressed, by necessary implication, decided the power of this court to review, which would not have obtained, unless jurisdiction of the circuit court had been found to rest on the constitutional right.

It is manifest from the context of the opinion in the case just referred to that the conclusion that the cause was one arising under the Constitution of the United States was predicated on the conception that the action sought the vindication or protection of the right to vote for a member of Congress, a right, as declared in *Ex parte Yarbrough*, 110 U. S. 655, 664, 28 L. ed. 275, 278, 4 Sup. Ct. Rep. 152, 158, "fundamentally based upon the Constitution [of the United States], which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors." That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Consti-

[493] tutation or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the *United States had adopted, as the qualifications of electors for members of Congress, those prescribed by the state for electors of the most numerous branch of the legislature of the state.

It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim. It is obvious from an inspection of the certificate that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States.

True, it has been repeatedly held that, on error from a state court to this court, where the Federal question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error should be dismissed. *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, ante, 936, 22 Sup. Ct. Rep. 691, and authorities cited. This doctrine, however, relates to questions arising on writs of error from state courts where, aside from the Federal status of the parties to the action or the inherent nature of the Federal right which is sought to be vindicated, jurisdiction is to be determined by ascertaining whether the record raises a bona fide Federal question. In that class of cases not only this court may, but it is its duty to, determine whether in truth and in fact a real Federal question arises on the record. And it is true, also, as observed in *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, ante, 936, 22 Sup. Ct. Rep. 691, that a similar principle is applied in analogous cases originally brought in a court of the United States. *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925. But the doctrine referred to has no application to a case brought in a Federal [494] court where the *very subject-matter of the controversy is Federal, however much wanting in merit may be the averments which it is claimed establish the violation of the Federal right. The distinction between the cases referred to and the one at bar is that which must necessarily exist between controversies concerning rights which are created by the Constitution or laws of the United States, and which consequently are in

their essence Federal, and controversies concerning rights not conferred by the Constitution or laws of the United States, the contention respecting which may or may not involve a Federal question depending upon what is the real issue to be decided or the substantiality of the averments as to the existence of the rights which it is claimed are Federal in character. The distinction finds apt illustration in the decisions of this court holding that suits brought by or against corporations chartered by acts of Congress are cases *per se* of Federal cognizance. *Osborn v. Bank of United States*, 9 Wheat. 817, 6 L. ed. 223; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1123, 17 Sup. Ct. Rep. 703. It may not be doubted that if an action be brought in a circuit court of the United States by such a corporation, there would be jurisdiction to entertain it, although the averments set out to establish the wrong complained of or the defense interposed were unsubstantial in character. The distinction is also well illustrated by the case of *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526, where, finding that jurisdiction obtained in a circuit court, this court held that it was error to dismiss the action for want of jurisdiction because it was deemed that the record established that the cause of action asserted was not well founded.

It follows that the court below erred in dismissing the action for want of jurisdiction. Of course, in reaching this conclusion we must not be understood as expressing any opinion as to the sufficiency of the declaration.

The judgment of the Circuit Court is reversed, and the action is remanded for further proceedings, in conformity with this opinion.

And it is so ordered.

*UNITED STATES, Plff. in Err., [495]
v.

COPPER QUEEN CONSOLIDATED MINING COMPANY.

(See S. C. Reporter's ed. 495-499.)

Appeal—review of weight of evidence—bill of exceptions must contain all the evidence.

A judgment entered on the verdict of a jury will not be reversed by the Supreme Court of the United States on writ of error, upon the ground that there is absolutely no evidence to sustain it, where the bill of exceptions does not show that the evidence contained therein is all the evidence that was given on the trial.

[No. 218.]

Argued April 11, 14, 1902. Decided May 19, 1902.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the Dis-

triet Court entered upon the verdict of a jury in favor of defendant. *Affirmed.*

See same case below, 60 Pac. 885.

The facts are stated in the opinion.

Mr. Marsden C. Burch argued the cause and filed a brief for plaintiff in error. **Messrs. William Herring and John C. Chaney** argued the cause and filed a brief for defendant in error.

Mr. Justice Peckham delivered the opinion of the court:

The government has brought this case here by writ of error for the purpose of reviewing a judgment of the supreme court of Arizona, affirming a judgment entered upon the verdict of a jury in favor of the defendant. The action was to recover \$183,000, being the alleged value of about 5,900,000 feet of timber, said to have been wrongfully cut and taken by the defendant from the surveyed and unsurveyed public lands of the United States in a cañon in the Chiricahua mountains, 60 miles from the town of Wilcox on the Southern Pacific Railroad in the territory of Arizona.

The answer joined issue upon the allegations of the complaint, and also set up that the timber was cut by one Ross from public mineral lands of the plaintiff, and was so cut and removed from those lands under the authority of the act of Congress of June 3, 1878 (20 Stat. at L. 88, chap. 150) the material portion of which reads as follows:

[496] "That all citizens of the United States and other persons, bona fide residents of the state of Colorado, or Nevada, or either *of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agriculture, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations."

The answer further set up that Ross had good right and lawful authority to cut and remove the timber, and that it was cut and removed from such lands in good faith, and at the time that he so cut and removed the timber Ross was a citizen of the United States of America and a bona fide resident of the territory of Arizona.

A trial was had in the district court before a judge and jury, and upon the close of the evidence counsel for the government made a motion that the court instruct the jury to find on the evidence a verdict for the government, which was refused and an exception taken

185 U. S.

Among other things the court charged the jury as follows:

"It is also incumbent upon the defendant, in order to avail itself of the permission granted by said act of June 3d, 1878, and in order to justify its purchase and consumption of said timber, to show by a preponderance of the evidence that Daniel D. Ross, at the time of the cutting and removal of said timber from the lands of the plaintiff, was a citizen of the United States and was a bona fide resident of the territory of Arizona. And should the evidence in this case fail to establish that, at the time of the cutting and removal of said timber, the said Daniel D. Ross was a citizen of the United States, and a bona fide resident of the territory of Arizona, you must find for the plaintiff, without regard to the mineral or nonmineral character of the land."

*The jury found a verdict for the defendant, after which a motion for a new trial was made and denied by the trial judge. An appeal from the judgment entered upon the verdict was then taken to the supreme court of the territory, where it was affirmed.

It thus appears that the judge held, and so charged the jury, that Ross, who did the cutting, must have been, not only a bona fide resident of the territory, but also a citizen of the United States, and if he were not, then the plaintiff was entitled to a verdict. The government now says there was no evidence in the case that Ross was a citizen of the United States, nor any tending to show he was a bona fide resident of Arizona at the time the cutting was done, and that unless Ross were such citizen, and also a bona fide resident of the territory, his cutting of the timber was wrongful, and the government was entitled to a verdict. The verdict must be regarded as a finding that Ross was a citizen of the United States and a bona fide resident of the territory when the cutting was done. If he were, there is no question made about his right to cut. The motion on the part of the government at the close of the evidence, to direct a verdict for the government upon all the evidence, and the exception to the refusal of the court so to do, would raise the question whether there was any evidence of the citizenship of Ross and of his residence in the territory when the cutting was done, upon which to base a verdict, were it not that the bill of exceptions lacks an essential statement for that purpose.

It does not appear from the bill that it contains all the evidence given upon the trial. It may be that it does, but we cannot, in the absence of any statement in the bill to that effect, presume it does for the purpose of reversing the judgment herein, upon the assumption that the proper construction of the act of Congress requires such citizenship as well as residence. When this court is asked to reverse a judgment entered upon a verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill

1009

of exceptions must embody a statement, or there must be a stipulation of counsel declaring that the bill contains all the evidence [498] given upon the trial, so that the *record shall affirmatively show the fact. *Russell v. Ely*, 2 Black, 575, 580, 17 L. ed. 258, 260. In the cited case the court, after remarking that the bill of exceptions did not purport to give all that a certain witness had testified to, said that, according to a well-known rule, the court, under such a condition of the record, was bound to presume that there was that in the witness's testimony which justified the instruction. It was then added by the court: "What purports to be the entire deposition of Baker is sent up by the clerk of the district court, and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless encumbrance of the transcript, and an expense to the litigating parties." The court thus refused to look at the deposition, which purported to be the entire deposition of the witness, because it was not made a part of the bill of exceptions.

In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and we cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did.

So, in *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. ed. 829, 833, 12 Sup. Ct. Rep. 905, 909, which was an action to recover damages against the company for the death of plaintiff's husband, resulting from the negligence of the company, it was remarked, in regard to the evidence in the case, that "the bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed."

It is true there is printed herein, together with the bill of exceptions, the statement that a motion for a new trial was made, and the remarks of the court are set forth upon his denial of the motion. The court said that, if the verdict were to be set aside, it would have to be based solely upon the failure of evidence to show that Ross was a citizen of the United States; but the court also remarked that at the time when he gave the [499] *instruction to the jury, that Ross must have been, not only a bona fide resident of the territory, but a citizen of the United States, when the cutting of the timber was done, he believed it to be a true expression of the law applicable to the case under the pleadings. It is plain that, in the view of the judge when the case was submitted to the jury, he thought there was evidence upon which a jury might find the fact of the citizenship of Ross. His subsequent statement made upon the refusal to grant a new trial, which inferentially, perhaps, admits that there was not sufficient evidence to show that Ross

was such citizen, leaves a foundation for the belief that there was room upon the evidence for a difference of opinion in regard to that fact. However that may be, the record is in such a state that we cannot say that all the evidence given upon the trial is contained in the bill of exceptions, and, therefore, we cannot say that there was no evidence of the residence, and of the citizenship of Ross, upon which the verdict of the jury might be sustained. If there were evidence that Ross was a citizen and a bona fide resident, it is admitted that the verdict could not be disturbed by this court. There may have been evidence upon both propositions sufficient to sustain the verdict.

The judgment must therefore be affirmed.

SOUTHWESTERN COAL AND IMPROVEMENT COMPANY *et al.*, *Appts.*,

v.

HYRAM Y. McBRIDE *et al.*

(See S. C. Reporter's ed. 499-504.)

Statutes—retrospective operation of act prohibiting collection of royalties under Indian coal leases.

The collection of royalties due and owing to the lessors of coal mines in the Choctaw Nation for coal mined under valid leases prior to the Curtis act of June 28, 1898, was not prohibited by the provisions of § 16 of that act, making it unlawful for any person after the passage of such act to demand or receive any such royalty, or for anyone to pay any such royalty to any individual.

[No. 230.]

Argued April 21, 1902. Decided May 19, 1902.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment affirming a judgment of the Court of Appeals for the Indian Territory which affirmed a judgment of the United States Court for the Indian Territory, Central Judicial District, in favor of plaintiff in a suit to recover royalties due under an Indian coal lease. *Affirmed.*

See same case below, 43 C. C. A. 683, 104 Fed. 1007.

Statement by Mr. Justice White:

This litigation was begun in the United States court for the Indian territory, central judicial district, sitting at Atoka, by *the fil-[500] ing of a bill in equity on behalf of Hiram Y. McBride, a citizen of the Choctaw Nation. The defendants named in the bill were the National Bank of Denison, the Southwestern Coal & Improvement Company (hereafter referred to as the coal company) and J. A. Randell, as administrator of the estate of G. G. Randell, deceased. The coal company is an appellant in this court, while McBride

NOTE.—That statutes are generally prospective in operation—see note to *Stewart v. Vandervort* (W. Va.) 12 L. R. A. 796.

and Randell are the appellees. It was averred in the bill that on April 6, 1894, the complainant (McBride) was the owner of a $\frac{3}{32}$ share in a certain coal or mining interest situated in the town of Coalgate, Indian territory, which coal claim was being operated, under royalty contracts, by the coal company; that, to secure an indebtedness due by the complainant to the National Bank of Denison, complainant had executed and delivered a mortgage upon his aforesaid share; and that, under the assumed authority of a power of sale contained in the mortgage and pursuant to a combination between the bank and one G. G. Randell, a purported sale of said share of complainant was made to said Randell, but that said pretended sale, for various stated reasons, was illegal and void. It was further averred that from the time of said pretended sale the coal company had failed to make payments of royalties due upon said share of complainant, and was liable to account therefor. The prayer of the bill was, in substance, that the sale in question be declared a nullity, and that the various defendants account to complainant in respect to the royalties received and retained.

The bank filed its answer, and therein disclaimed having any interest in the unpaid royalties claimed by complainant and J. H. Randell, as administrator of G. G. Randell. In its answer the coal company, among other things unnecessary to be stated, admitted that it had withheld payments from March 1, 1897, of royalties on the coal mining share referred to in the complaint, and averred that the amount of said unpaid royalties aggregated \$2,617.29. The coal company also further specifically pleaded in its answer as follows:

[501] "Defendant coal company further states that on the 28th day of June, 1898, the President of the United States approved an act entitled 'An Act for the Protection of the People of the *Indian Territory, and for Other Purposes,' and which said act of Congress is commonly known as the 'Curtis bill,' and by § 16 of said act it was provided that it should be unlawful for any person, after the passage of said act, except as otherwise provided therein, to claim, demand, or receive for his own use, or the use of anyone else, any royalty on coal, or any rents on any lands or property belonging to any one of said tribes or nations in said territory, or for anyone to pay to any individual any such royalty or rents or any consideration therefor, whatsoever.

And that by virtue of the provisions of said act of Congress hereinabove referred to, on and after the 28th day of June, 1898, no royalties accrued to any person upon this said interest claimed by the plaintiff in said mines; and that by virtue of the provisions of said act of Congress, hereinabove referred to, the royalty which accrued upon said interest so claimed by the plaintiff in said mines and which said coal company had not paid over to said defendant bank in accordance with plaintiff's instructions, is no longer due and payable to the said plaintiff

or any person claiming under him, and cannot be claimed, demanded, or received by the plaintiff, or any other person; and that by virtue of § 18 of said act of Congress, hereinabove referred to, any person claiming, demanding, or receiving any of the royalties which the plaintiff claims accrued upon the interest claimed by him in said coal mines, becomes guilty of a misdemeanor, which is punishable by a fine of not less than one hundred dollars (\$100.00), and is liable to forfeit possession of the property in question."

A written stipulation was thereafter entered into between the complainant and the defendant Randell, administrator, wherein it was agreed that the complainant was entitled to \$900 of the sum admitted by the coal company to be unpaid, and that the said defendant administrator was entitled to the remainder, or the sum of \$1,717.29. Upon the pleadings in the cause and the stipulation referred to, a motion for judgment against the coal company for \$2,617.29 was filed on behalf of the complainant and said defendant administrator. The motion was granted, and a judgment was entered accordingly. An *appeal was taken to the court [502] of appeals for the Indian territory, and that court affirmed the judgment. 54 S. W. 1099. The judgment of affirmance was in favor of McBride and Randell, administrator, against the coal company and the sureties on its supersedeas bond (Clarence W. Turner and Homer B. Spaulding), for the amount of the original judgment, with interest and costs. An appeal was then prosecuted by the coal company and Turner and Spaulding to the United States circuit court of appeals for the eighth circuit. That court affirmed the judgments (43 C. C. A. 683, 104 Fed. 1007), and the cause was then appealed to this court.

Mr. James Hagerman argued the cause, and, with Messrs. Clifford L. Jackson and Joseph M. Bryson, filed a brief for appellants.

No counsel for appellees.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The sole question presented for the consideration of the courts below and necessary to be passed upon by this court was, and is: Did the act of Congress, approved June 28, 1898, known as the Curtis act, operate to deprive the lessors of coal mines in the Choctaw Nation of the royalties due and owing to them for coal mined under valid leases prior to the date named? The question necessarily requires a construction of § 16 of the act, which reads as follows:

"Sec. 16. That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or

property belonging to any one of said tribes or nations in said territory, or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under [503] such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong: *Provided*, That where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him: *Provided, further*, That nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her, or their allotment." [30 Stat. at L. 501, chap. 517.]

A particular consideration of § 18 of the act, referred to in the answer of the coal company, is not required, as the section merely provided for the punishment of any person convicted for violating any of the provisions of §§ 16 and 17 of the act.

On the part of the appellants, it is contended that the section in question is retrospective in its operation, and inhibits the collection of royalties due and owing at the time of the approval of the Curtis act, even though such royalties, had the statute in question not been passed, might lawfully have been collected by the lessors to whom it had been agreed the same should be paid. The circuit court of appeals, however, sustained the contention that the provisions of the section in question had only a prospective operation, and in so doing we think no error was committed. We adopt the reasoning of the court below on the subject. The court said (43 C. C. A. 652, 104 Fed. 473):

"The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If Congress had intended to deprive lessors of the royalties due and owing to them at the date of the act it would [504] have used appropriate language to express that intention, and would necessarily have made some provision for the disposition of such royalties. But it is clear from the language of the act that it does not deal with royalties already paid, or already due and owing to lessors under leases for coal already mined. . . . Congress, by the Curtis act, neither attempted nor intended to interfere with the rights of lessors to royalties due them under their leases at the date of the passage of the act."

It is asserted in the brief of counsel for the appellants that the contract under which the royalties in question became due was made under authority of a tribal law of the Choctaw Nation, and we are asked to assume that the authority to make the lease in question was not either directly or indirectly conferred by Congress, and that in consequence the contract was of no validity by reason of § 2116 of the Revised Statutes, wherein, among other things, it is declared that "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." We do not decide this contention, in view of the fact that it does not appear to have been raised or considered in the courts below, and it is besides entirely inconsistent with the answer of the coal company, wherein it is substantially conceded that the lease in question was valid in its inception, and that the unpaid royalties would have been due and owing to the lessor or his assigns, but for the effect of the alleged nullifying provisions of § 16 of the Curtis act.

Judgment affirmed.

*W. P. McFADDIN and McFaddin's Execu-[505]
tors, *Plffs. in Err.*,

v.

EVANS-SNIDER-BUEL COMPANY *et al.*

(See S. C. Reporter's ed. 505-514.)

Constitutional law—due process of law—retroactive statutes—act curing defectively recorded mortgages.

1. Mortgages of personal property, executed by a nonresident of the Indian territory and recorded, before the passage of the curative act of February 3, 1897, in that judicial district of the Indian territory in which the property was situated at the time of their execution, were validated by the provision of that act, that all mortgages of personal property in the Indian territory theretofore so executed and recorded were thereby validated.
2. Attaching creditors who had actual knowledge of the existence of a mortgage covering the property attached, before suing out the attachment, acquired no property rights therein by virtue of a default judgment in the attachment suit in their favor and against their judgment debtor, of which they were deprived without due process of law by the act of February 3, 1897, validating mortgages

NOTE.—As to the power of the legislature to pass curative statutes—see note to *Steele County v. Erskine*, 39 C. C. A. 180.

As to the constitutionality of a statute legalizing an invalid private contract—see note to *Lowe v. Harris* (N. C.) 22 L. R. A. 379.

That statutes are generally prospective in operation—see note to *Stewart v. Vandervort* (W. Va.) 12 L. R. A. 50.

On the validity of retrospective statutes—see note to *Otoe County v. Baldwin*, 28 L. ed. U. S. 331.

recorded like the one in question, which enactment went into effect while the issue in such attachment suit between the attaching creditors and the mortgagees, who had intervened claiming the property, was still pending and undetermined.

[No. 217.]

Argued April 10, 11, 1902. Decided May 19, 1902.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which reversed a judgment of the United States Court of Appeals for the Indian Territory, and affirmed a judgment of the United States Court for the Northern District of the Indian Territory in favor of the interpleader in an attachment suit. *Affirmed.*

See same case below, 44 C. C. A. 494, 105 Fed. 293.

Statement by Mr. Justice **Shiras**:

In the United States court for the northern district of the Indian territory, in April, 1897, an issue was tried between the Evans-Snider-Buel Company, a corporation organized under the laws of the state of Illinois, and William McFaddin & Son. One J. R. Blocker was the owner and in possession of 6,775 head of cattle pasturing in the Indian territory. McFaddin & Son were judgment creditors of Blocker, and, as such, levied an attachment on said cattle. The Evans-Snider-Buel Company filed a proceeding by way of interpleader in the attachment suit, claiming to have a prior lien on said cattle by means of certain mortgages given by said Blocker, who, as shown by the mortgages themselves, as well as the testimony in the [506] case, was a *resident of Bexar county, Texas, in which county some of the mortgages relied on had been duly executed and recorded. The cattle in question were grazing in the Creek Nation, Indian territory, and the mortgages were again recorded in the northern district of the Indian territory, at Muskogee and in the Creek Nation. The cattle at the time of the levy were in the possession of Blocker, the mortgagor.

After the filing of the interpleader, and on January 29, 1897, a judgment was entered against the defendant Blocker, in the sum of \$55,875.71, and sustaining the attachment. There were several trials in the case, but at the last trial in the northern district, where the plaintiffs, McFaddin & Son, for the second time lost their suit, it was agreed that in case the judgment should be reversed by the United States court of appeals for the Indian territory, judgment should be rendered against the Evans-Snider-Buel Company, the interpleader. The judgment was reversed by that court, and, pursuant to said agreement, on the 4th day of January, 1900, judgment was entered against the interpleader and its bondsmen for the sum of \$72,250.35. From that judgment the interpleader prosecuted its writ of error to the United States court of appeals for the eighth circuit.

185 U. S.

At the time the attachment was levied upon the cattle in controversy, the following laws in relation to the registration of chattel mortgages were in force in the Indian territory, being §§ 4742 and 4743 of Mansfield's Digest:

"Sec. 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded,—if for lands, in the county or counties in which the lands lie, and if for personal property, in the county in which the mortgagor resides.

"Sec. 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property, from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

*As before stated the attachment in this [507] case was sustained on the 29th day of January, 1897. On February 3, 1897, Congress amended the law above quoted by an enactment which reads as follows:

"Section 4742 of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian territory, is hereby amended by adding to said section the following: Provided, that if the mortgagor is a non-resident of the Indian territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated." 29 Stat. at L. 510, chap. 136.

On November 19, 1900, the United States circuit court of appeals for the eighth circuit filed an opinion and judgment, Sanborn, J., dissenting, reversing the judgment of the United States court of appeals in the Indian territory, and affirming the judgment of the United States court for the northern district of the Indian territory. Whereupon a writ of error was allowed and the cause brought to this court.

Mr. William T. Hutchings argued the cause, and, with *Mr. Napoleon B. Marcy*, filed a brief for plaintiffs in error:

February 3, 1897, was the first time the mortgage of a nonresident could have legally been put on record, and from that moment only could life be put into those lifeless ones hitherto written on the books of record.

Neugass v. Atlantic & D. R. Co. 56 Fed. 676.

The main law is clearly prospective in terms, and the validating clause following it must be similarly construed. It ratified what was void, and cured the defect from the date of ratification.

Black, Constr. & Interpretation of Laws, p. 253.

Both new statutes and amendments must be construed prospectively unless the language is imperatively to the contrary.

Merchants' Bank v. Ballou, 98 Va. 112, 44 L. R. A. 306, 32 S. E. 482; Black, Constitutional Prohibitions, § 179; Wade, Retroactive Laws, §§ 34-39; 3 Am. & Eng. Enc. Law, p. 758, note; 7 Am. & Eng. Enc. Law, pp. 681, 758, 761; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Rogers v. Lynch*, 44 W. Va. 94, 29 S. E. 507; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5; *Parsons v. Paine*, 26 Ark. 124; *Fayetteville Bldg. & L. Asso. v. Bowlin*, 63 Ark. 573, 39 S. W. 1046; *Boylan v. Kelly*, 36 N. J. Eq. 331; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Gaston v. Merriam*, 33 Minn. 278, 22 N. W. 614; *Bernier v. Becker*, 37 Ohio St. 72.

Congress cannot pass laws which have the effect of divesting vested rights.

Weimer v. Bunbury, 30 Mich. 201; Wade, Retroactive Laws, §§ 156, 157, 159, 191, 261, 264; *Pacific Mail S.S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Memphis v. United States*, 97 U. S. 293, 24 L. ed. 920; 7 Lawson, Rights, Rem. & Pr. § 3850; Black, Constitutional Prohibitions, §§ 176, 183, 207; Sutherland, Stat. Constr. § 480; 3 Am. & Eng. Enc. Law, pp. 759, 760; *Society for Propagation of Gospel v. New Haven*, 8 Wheat. 493, 5 L. ed. 669; *Wilkinson v. Leland*, 2 Pet. 657, 7 L. ed. 553, 10 Pet. 294, 9 L. ed. 430; *Ferguson v. Williams*, 58 Iowa, 717, 13 N. W. 49; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 335; *Merchants' Bank v. Ballou*, 98 Va. 112, 44 L. R. A. 306, 32 S. E. 481; *Randall v. Kreiger*, 23 Wall. 137, 23 L. ed. 124.

As to what is a vested right, see *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; Wade, Retroactive Laws, § 157, p. 190; Black, Const. Law, § 154. See also *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162 and note; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 134; *Low v. Harris*, 112 N. C. 472, 22 L. R. A. 379, 17 S. E. 539; *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 79; 3 Am. & Eng. Enc. Law, p. 758.

An attachment lien perfected by judgment is a vested right.

1 Shinn, Attachm. § 452; Waples, Attachm. 2d ed. §§ 17, 736; *Frellson v. Green*, 19 Ark. 376; *Bergman v. Sells*, 39 Ark. 97; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *National Bank of Commerce v. Riethmann*, 25 C. C. A. 101, 49 U. S. App. 144, 79 Fed. 582; *Richardson v. Adler*, 46 Ark. 49; Wade, Retroactive Laws, §§ 171, 173; *Ryan v. Vasey*, 14 Mont. 81, 35 Pac. 515; *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212; *Freiberg v. Singer*, 90 Wis. 608, 63 N. W. 754; Endlich, Interpretation of Statutes, § 281; *Hannahs v. Felt*, 15 Iowa. 141; *Brinton v. Scovors*, 12 Iowa, 389; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 392; *Kelly v. Dill*, 23 Minn. 435; *Tillotson v. Millard*, 7 Minn. 513, Gil. 419, 82 Am. Dec. 112; *Williamson*

v. New Jersey Southern R. Co. 29 N. J. Eq. 311; *Goore v. M'Daniel*, 1 McCord L. 480; *People v. Cameron*, 7 Ill. 468; *Lyon v. Sandford*, 5 Conn. 547; Myer, Vested Rights, pp. 138 *et seq.*; *Chestnut v. Shanc*, 16 Ohio, 599, 47 Am. Dec. 387; 1 Am. & Eng. Enc. Law, 2d ed. p. 564; 3 Am. & Eng. Enc. Law, 2d ed. p. 218; 1 Freeman, Judgm. § 298; 1 Black, Judgm. § 298; *Hamilton County v. Rosche Bros.* 50 Ohio St. 103, 19 L. R. A. 584, 33 N. E. 88; *Lackey v. Seibert*, 23 Mo. 85; *Tyrell v. Rountree*, 7 Pet. 464, 8 L. ed. 749.

An attachment lien, even before judgment, cannot be affected by a subsequent repeal of the law.

Mulnix v. Spratlin, 10 Colo. App. 390, 50 Pac. 1078; *Day v. Madden*, 9 Colo. App. 464, 48 Pac. 1053; *Willis v. Crooker*, 1 Pick. 204; *Grigg v. Banks*, 59 Ala. 311; *Harrison v. Trader*, 29 Ark. 92.

The lien of an execution is a vested right.

McKeithan v. Terry, 64 N. C. 25; Herman, Executions, § 172; Wade, Retroactive Laws, § 168; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 333; *Warren v. Jones*, 9 S. C. N. S. 288; *Kennerly v. Swarts*, 83 Va. 704, 3 S. E. 348; *Merchants' Bank v. Ballou*, 98 Va. 112, 44 L. R. A. 306, 32 S. E. 481.

Curative acts are always restricted to the parties and those having no higher equities.

Meighen v. Strong, 6 Minn. 177, Gil. 111, 80 Am. Dec. 441; *Green v. Drinker*, 7 Watts & S. 440; *Bigelow v. Topliff*, 25 Vt. 273, 60 Am. Dec. 264; *Barrett v. Barrett*, 120 N. C. 127, 36 L. R. A. 226, 26 S. E. 691, 7 Lawson, Rights, Rem. & Pr. § 3868; Wade, Retroactive Laws, § 260; Black, Constitutional Prohibitions, § 207; Black, Const. Law, § 199, p. 545; *Deininger v. McConnel*, 41 Ill. 227; *Drake, Attachments*, § 262; *Hill v. Baker*, 32 Iowa, 311, 7 Am. Rep. 193.

They are designed to affect only the mode of proof.

Grove v. Todd, 41 Md. 633, 20 Am. Rep. 79; Black, Const. Law, § 154, p. 434; *Conrad v. Smith*, 6 N. D. 337, 70 N. W. 815; *Summer v. Mitchell*, 29 Fla. 179, 14 L. R. A. 815, 10 So. 562; Black, Constitutional Prohibitions, § 210; Wade, Retroactive Laws, § 258; *Halbert v. Hendrix* (Tex. Civ. App.) 26 S. W. 911; Underhill, Ev. § 136; *Simpson v. Montgomery*, 25 Ark. 370, 99 Am. Dec. 228.

A lien is a right of property, not a mere matter of procedure.

The Lottawanna, 21 Wall. 558, *sub nom.* *Rodd v. Heartt*, 22 L. ed. 654.

If the curative act went further it would be a usurpation of judicial power.

Ogden v. Blackledge, 2 Cranch, 272, 2 L. ed. 276; *Chestnut v. Shanc*, 16 Ohio, 599, 47 Am. Dec. 387; *Lawson v. Jeffries*, 47 Miss. 686, 12 Am. Rep. 342; *Burt v. Williams*, 24 Ark. 91; *Atkinson v. Dunlap*, 50 Me. 111; *Charles Baumbach Co. v. Singer*, 86 Wis. 329, 56 N. W. 873; *Allison v. Louisville, H. C. & W. R. Co.* 9 Bush, 248; *Menges v. Dentler*, 33 Pa. 495, 75 Am. Dec. 616; *Burch v. Newbury*, 10 N. Y. 374; Black,

Constitutional Prohibitions, §§ 199, 209; Wade, Retroactive Laws, § 158; *Sidway v. Lawson*, 58 Ark. 121, 23 S. W. 648; 3 Am. & Eng. Enc. Law, p. 682; *Ratcliffe v. Anderson*, 31 Gratt. 105, 31 Am. Rep. 720.

The amendment was a partial repeal of the old statute, and liabilities incurred under it remained unaffected.

Thacher v. Steuben County, 21 Misc. 271, 47 N. Y. Supp. 124; *Sutherland*, Stat. Constr. § 133. See also *Ely v. Holton*, 15 N. Y. 595; U. S. Rev. Stat. § 13; Wade, Retroactive Laws, §§ 292, 297, 298; *Fabry v. Murphy*, 95 U. S. 191, 24 L. ed. 468; *Files v. Fuller*, 44 Ark. 281; *Daggy v. Bull*, 7 Ind. App. 64, 34 N. E. 246; *United States v. Williams*, 8 Mont. 85, 19 Pac. 288.

If retroactive, it impaired a contract.

Waples, Homestead & Exemption, p. 279; 2 Beach, Modern Law of Contracts, § 1633; *Ratcliffe v. Anderson*, 31 Gratt. 105, 31 Am. Rep. 721; Black, Constitutional Prohibitions, §§ 130, 131; Bishop, Contr. § 556.

Messrs. J. P. Clayton, Napoleon B. Mawey, and *William T. Hutchings* filed a reply brief for plaintiffs in error.

Mr. U. M. Rose argued the cause, and, with *Messrs. W. E. Hemingway* and *G. B. Rose*, filed a brief for defendants in error:

The curative act of Congress is retrospective.

People ex rel. Huntington v. Crennan, 141 N. Y. 239, 36 N. E. 187; *People ex rel. Collins v. Spicer*, 99 N. Y. 233, 1 N. E. 680; *Sampeyreac v. United States*, 7 Pet. 222, 8 L. ed. 665; *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736.

All presumptions are in favor of its constitutionality.

Nichol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

Curative statutes are liberally construed. *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Larkin v. Saffarans*, 15 Fed. 150.

The power of Congress over the territories is plenary.

Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 42, 34 L. ed. 490, 10 Sup. Ct. Rep. 792; *Laramie County v. Albany County*, 92 U. S. 310, 23 L. ed. 554; *Benner v. Porter*, 9 How. 242, 13 L. ed. 122; *McAllister v. United States*, 141 U. S. 184, 35 L. ed. 696, 11 Sup. Ct. Rep. 949; *Shively v. Bowlby*, 152 U. S. 48, 38 L. ed. 349, 14 Sup. Ct. Rep. 548; *Koenigsberger v. Richmond Silver Min. Co.* 158 U. S. 48, 39 L. ed. 892, 15 Sup. Ct. Rep. 751; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 542, 7 L. ed. 255; *Rogers v. Burlington*, 3 Wall. 663, 18 L. ed. 82; *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. ed. 659; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. ed. 966; 2 Story, Const. §§ 1324, 1325.

Especially with regard to the Indian tribes.

United States v. Kagama, 118 U. S. 380, 30 L. ed. 230, 6 Sup. Ct. Rep. 1109.

The act of Congress extending the Constitution and Federal laws over the Indian

territory is subject to modification and repeal, the same as other statutes.

Cooley, Const. Lim. 146; *District of Columbia v. Hutton*, 143 U. S. 18, 36 L. ed. 60, 12 Sup. Ct. Rep. 369.

The curative act applies to pending suits.

United States v. The Peggy, 1 Cranch, 103, 2 L. ed. 49; *Sidway v. Lawson*, 58 Ark. 122, 23 S. W. 648, Overruling *Wright v. Graham*, 42 Ark. 140; *Pelt v. Payne*, 60 Ark. 637, 30 S. W. 426; *Cooley*, Const. Lim. pp. 442, 469; *Johnson v. Richardson*, 44 Ark. 372; *Rcid v. Hart*, 45 Ark. 50; *Re Hall*, 167 U. S. 38, 42 L. ed. 69, 17 Sup. Ct. Rep. 723; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Penniman's Case*, 103 U. S. 720, sub nom. *Vial v. Penniman*, 26 L. ed. 605; 1 Kent, Com. 455.

There is nothing to prevent Congress from passing the curative act.

Curtis v. Whitney, 13 Wall. 70, 20 L. ed. 514; *Townsend v. Townsend*, Peck (Tenn.) 1, 14 Am. Dec. 722; *Larkin v. Saffarans*, 15 Fed. 147; *Sampeyreac v. United States*, 7 Pet. 239, 8 L. ed. 665; *Williams v. Paine*, 169 U. S. 79, 42 L. ed. 668, 18 Sup. Ct. Rep. 279.

The attaching creditor acquires no property in the thing attached.

Ladd v. North, 2 Mass. 514; *Bigelow v. Willson*, 1 Pick. 492; *Dobbins v. Hanchett*, 20 Ill. App. 396; *Davidson v. Beatty*, 3 Harr. & M'H. 594; *Owings v. Norwood*, 2 Harr. & J. 96; *Miller v. Babcock*, 25 Mich. 137; *Goddard v. Perkins*, 9 N. H. 488; *Snell v. Allen*, 1 Swan, 208; *Starr v. Moore*, 3 McLean, 354, Fed. Cas. No. 13,315; *Tenant v. Watson*, 58 Ark. 255, 24 S. W. 495; *Atkins v. Swope*, 38 Ark. 536; *Green v. Abraham*, 43 Ark. 420; *Pratt v. Law*, 9 Cranch, 497, 3 L. ed. 805; *Steers v. Kinsey*, 68 Ark. 360, 58 S. W. 1050; *Butler v. Pennsylvania*, 10 How. 416, 13 L. ed. 478; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 88, 35 L. ed. 946, 12 Sup. Ct. Rep. 142; *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; *Randall v. Kreiger*, 23 Wall. 149, 23 L. ed. 124; *Little Rock v. Merchants' Nat. Bank*, 98 U. S. 314, 25 L. ed. 110; *St. Louis, I. M. & S. R. Co. v. Alexander*, 49 Ark. 190, 4 S. W. 753; *Doe ex dem. Phillips v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Files v. Fuller*, 44 Ark. 281; *South Carolina v. Gaillard*, 101 U. S. 433, 25 L. ed. 937; *Memphis v. United States*, 97 U. S. 293, 24 L. ed. 920; *Webster v. Cooper*, 14 How. 488, 14 L. ed. 510; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; *Cooley*, Const. Lim. 457; *Conkey v. Hart*, 14 N. Y. 28; *John S. Hanes & Co. v. Wadey*, 73 Mich. 178, 2 L. R. A. 498, 41 N. W. 222; *Bangor v. Goding*, 35 Me. 73, 56 Am. Dec. 688; *Ex parte McCordle*, 7 Wall. 506, 19 L. ed. 264; *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 25 L. ed. 231; *Norris v. Crocker*, 13 How. 438, 14 L. ed. 210; *Sherman v. Grinnell*, 123 U. S. 679, 31 L. ed. 278, 8 Sup. Ct. Rep. 260; *Gurnee v. Patrick County*, 137 U. S. 141, 34 L. ed. 601, 11 Sup. Ct. Rep. 34; *National Exch. Bank v. Peters*, 144 U. S. 570, 36 L. ed. 545, 12 Sup. Ct. Rep. 767; *Hornhall v.*

The Collector, 9 Wall. 560, *sub nom. Hornthall v. Keary*, 19 L. ed. 560; *The Assessor v. Osborne*, 9 Wall. 567, *sub nom. Gates v. Osborne*, 19 L. ed. 748; *Campbell v. Iron-Silver Min. Co.* 27 C. C. A. 646, 55 U. S. App. 150, 83 Fed. 643; *Mechanics' & T. Bank v. Union Bank*, 22 Wall. 298, 22 L. ed. 873; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Curtis v. Whitney*, 13 Wall. 70, 20 L. ed. 514; *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854; *Satterlee v. Matthewson*, 2 Pet. 407, 7 L. ed. 467; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876; *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 544, 18 L. ed. 542; *Norris v. Crocker*, 13 How. 439, 14 L. ed. 214; *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153; *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395, 13 L. ed. 469; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Maynard v. Hill*, 125 U. S. 210, 31 L. ed. 658, 8 Sup. Ct. Rep. 723; *Richards v. Bellingham Bay Land Co.* 47 Fed. 854; *Exwell v. Daggs*, 108 U. S. 150, 27 L. ed. 684, 2 Sup. Ct. Rep. 408; *Woodruff v. Scruggs*, 27 Ark. 26, 11 Am. Rep. 777; *McCormick v. Alexander*, 2 Ohio, 74; *Sturges v. Crowninshield*, 4 Wheat. 201, 4 L. ed. 550; *Von Hoffman v. Quincy*, 4 Wall. 553, *sub nom. United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 409; *Hynson v. Taylor*, 3 Ark. 555; *Edwards v. Cooper*, 28 Ark. 469; *Watson v. New York C. R. Co.* 47 N. Y. 157; *Morey v. Lockhart*, 123 U. S. 56, 31 L. ed. 68, 8 Sup. Ct. Rep. 65.

The validity of such laws has been fully recognized, even where they affected existing claims or judgments.

Watson v. New York C. R. Co. 47 N. Y. 157.

Courts of chancery cannot, in correcting mistakes in written documents, divest vested rights.

Davidson v. Davidson, 42 Ark. 362; *Woodworth v. Cook*, 2 Blatchf. 151, Fed. Cas. No. 18,011; *Gibson v. Cook*, 2 Blatchf. 144, Fed. Cas. No. 5,393; *Molony v. Rourke*, 100 Mass. 190; *Green v. Abraham*, 43 Ark. 420.

But the supreme court of Arkansas has held that such correction might be made against a purchaser with notice.

Simpson v. Montgomery, 25 Ark. 365, 99 Am. Dec. 228.

And against a purchaser under execution having notice.

Steward v. Pettigrew, 28 Ark. 372; *Blackburn v. Randolph*, 33 Ark. 126; *Allen v. McCaughey*, 31 Ark. 253; *Williams v. McIlroy*, 34 Ark. 85; *Ft. Smith Milling Co. v. Miles*, 61 Ark. 123, 32 S. W. 493.

And against a judgment creditor having a lien.

Brewster v. Clamfit, 33 Ark. 76. See also *Wadsworth v. Wendell*, 5 Johns. Ch. 224; *Bernards Twp. v. Stebbins*, 109 U. S. 341, 27 L. ed. 956, 3 Sup. Ct. Rep. 252; *Cooley*, Const. Lim. p. 457.

The moral aspect of the case is not only important; it is decisive. No one has a vested right to do wrong.

Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; *Foster v.*

Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; *Freeborn v. Smith*, 2 Wall. 160, 17 L. ed. 922; *Sampeyreac v. United States*, 7 Pet. 222, 8 L. ed. 665; *Goshorn v. Purcell*, 11 Ohio St. 641; *Cuyahoga Falls Real Estate Asso. v. McCaughey*, 2 Ohio St. 155; *Beard v. Dansby*, 48 Ark. 184, 2 S. W. 701; *Leighton v. Young*, 18 L. R. A. 266, 3 C. C. A. 176, 10 U. S. App. 298, 52 Fed. 444; *Phillips, Mechanics' Liens*, § 23; *Best v. Baumgardner*, 122 Pa. 17, 1 L. R. A. 356, 15 Atl. 691; *Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612; *Bolton v. Jones*, 5 Pa. 145, 47 Am. Dec. 404; *South Carolina v. Gailard*, 101 U. S. 433, 25 L. ed. 937; *National Bank of Commerce v. Reithmann*, 25 C. C. A. 101, 49 U. S. App. 144, 79 Fed. 582; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Penniman's Case*, 103 U. S. 720, *sub nom. Vial v. Penniman*, 26 L. ed. 605; 1 Kent, Com. 455.

As to curative acts the question is one of reasonableness.

Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365.

The fact that an act is retrospective leads to no inference that it is void.

Stephens v. Cherokee Nation, 174 U. S. 446, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Gross v. United States Mortg. Co.* 108 U. S. 488, 27 L. ed. 798, 2 Sup. Ct. Rep. 940.

As the plaintiff in error does not claim as against the intervenor under any contract, it is clear that his lien does not give him any vested right.

Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211; *Louisiana ex rel. Nelson v. Police Jury*, 111 U. S. 716, 28 L. ed. 575, 4 Sup. Ct. Rep. 648; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; *Chase v. Curtis*, 113 U. S. 463, 28 L. ed. 1042, 5 Sup. Ct. Rep. 554; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 292, 32 L. ed. 244, 8 Sup. Ct. Rep. 1370.

It is only when a right of action is based on a contract so far perfected that "nothing remains to be done by the party asserting it" that it can become vested.

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 457, 17 L. ed. 807; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; *Chase v. Curtis*, 113 U. S. 463, 28 L. ed. 1042, 5 Sup. Ct. Rep. 554.

A judgment is not a contract.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 288, 27 L. ed. 937, 3 Sup. Ct. Rep. 211; *Garrison v. New York*, 21 Wall. 203, 22 L. ed. 614.

Mr. H. M. Pollard also argued the cause and filed a brief for defendants in error:

The act of Congress of February 3, 1897, is not in derogation of the 5th Amendment of the Constitution, and is retroactive, and it made interpleader's mortgages just as effective as if that act had been in force at the time of their execution.

Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876:

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; *Cooley*, Const. Lim. 464; *Drake*, Attachm. § 228; *Johnson v. Richardson*, 44 Ark. 365; *Hannahs v. Fell*, 15 Iowa, 143; *Story*, Const. § 1957; 3 Parsons, Contr. 552; *Green v. Abraham*, 43 Ark. 420; *Reid v. Hart*, 45 Ark. 41; *Newton v. Tibbatts*, 7 Ark. 159; *Cupp v. Welch*, 50 Ark. 294, 7 S. W. 139; *Sidway v. Larson*, 58 Ark. 117, 23 S. W. 648; *Sammoner v. Jacobson*, 47 Ark. 40, 14 S. W. 458; *Shinn*, Attachm. §§ 429, 440; *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. Rep. 899; *Atkins v. Swope*, 38 Ark. 537; *Tenant v. Watson*, 58 Ark. 255, 24 S. W. 495; *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458.

Mr. Justice Shiras delivered the opinion of the court:

The controversy in this case is between mortgagee creditors and judgment creditors of John R. Blocker. The mortgages were given to secure the payment of notes executed by Blocker to the amount of about \$130,000, which were held by the Evans-Snider-Buel Company, and represented money that had been advanced by that company to Blocker to enable him to purchase the cattle embraced in the mortgage. The [508] mortgages were "recorded, within a day or two after their execution, in the clerk's office of the United States court for the northern district of the Indian territory, that being the district in which the mortgaged property was situated.

William McFaddin & Son had obtained a judgment against Blocker in Jefferson county, Texas, in May, 1887, and on June 17, 1896, they sued out an attachment on that judgment in the United States court for the northern district of the Indian territory, and levied on the cattle described in the mortgages.

It is not denied that McFaddin & Son had actual knowledge of the existence of the mortgages at the time they sued out their writ of attachment. Indeed, it appears that the description of the cattle was taken by their attorneys from the record of the mortgages before the attachment was issued.

But it is claimed that, under the laws of the state of Arkansas, in force by act of Congress in the Indian territory, as construed by the supreme court of Arkansas, the mortgages as recorded did not constitute a lien on the property described as against third parties, although they had actual notice of their existence, and that as McFaddin & Son had levied their attachment and obtained judgment against Blocker before the act of Congress of February 3, 1897, validating the mortgages and their record, was passed, such legislation was invalid and ineffectual to postpone the lien of the attachment and judgment to the lien of the mortgages.

Elaborate arguments, oral and written, have been advanced, *pro* and *contra*, on the propositions that an attaching creditor is not a purchaser for value; that an unrecorded deed or mortgage creating a lien will take precedence over a subsequent attach-

ment; that notice to a subsequent purchaser of an unrecorded mortgage is conclusive evidence of mala fides on his part; that a chattel mortgage, not fraudulent as to creditors, made in good faith to secure an honest debt, is at common law superior to a subsequent attachment of the same property by a creditor of the mortgagor; that actual notice is equivalent in law to constructive notice. But as we are of opinion that the judgment of the circuit court of appeals, sustaining the validity *of the act of February 3, 1897, [509] as applicable to the present case, is sound, we do not consider it necessary to discuss the other propositions urged upon us by the counsel of the defendants in error.

The 5th Amendment to the Federal Constitution, which declares that "no person shall be deprived of life, liberty, or property, without due process of law," is a limitation on the power of Congress, and the question is open whether the act in question, held applicable by the circuit court of appeals to the present case, deprived the plaintiffs in error of property within the meaning of that amendment.

We think it is impossible to successfully contend that the act of Congress, when it in terms declared that "all mortgages of personal property in the Indian territory *heretofore* executed and recorded in the judicial district thereof in which the property was situated *at the time they were executed*, are *hereby* validated," can be construed as intended to apply only to mortgages made *after* the passage of the act, and had no retroactive effect. Such a construction was adopted by the court of appeals of the Indian territory, and was approved by the dissenting judge in the circuit court of appeals for the eighth circuit. But the language of the enactment is too express to permit such a view. The plain purpose of Congress was to give effect to mortgages of nonresidents which had been, *before* the passage of the act, recorded in the judicial district in which the property was situated at the time the mortgages were executed.

We think, therefore, that the trial court and the circuit court of appeals were right in holding that the act of February 3, 1897, was applicable to the mortgages of the defendants in error, and we are to inquire whether the act, as so construed and applied, was a valid exercise of congressional power.

The contention on behalf of the plaintiffs in error is that by the judgment in default against Blocker on January 29, 1897, they obtained a vested interest in the cattle seized under the writ of attachment, which could not be impaired by the subsequent legislative enactment of February 3, 1897.

But it is to be observed that the only issues determined by *that judgment were [510] those between McFaddin & Son, the attaching creditors, and Blocker, the judgment debtor. Thereby any controversy as to the indebtedness and the existence of proper grounds of attachment were, as to those parties, concluded. But this judgment by default did not preclude the Evans-Snider-Buel Company from denying the right of the at-

taching creditors to a lien prior to that of the mortgages. That was an issue that was still pending and undetermined when the act of February 3, 1897, was approved. Accordingly, when the issue between the two classes of creditors came on to be tried in the United States court for the northern district of the Indian territory the only question was as to the priority of the respective liens. It was not denied that the mortgages constituted valid liens as against Blocker, the mortgagor, nor was it denied that the mortgages had been recorded in the district in which the mortgaged property was situated, before the attachment was levied on the mortgaged property. That the money secured by the mortgages was advanced to Blocker and used by him in the purchase of the cattle, and that the attaching creditors had actual knowledge of the existence of the mortgages before they sued out the writ of attachment, were also admitted facts.

What was claimed was, that the record of the mortgages was ineffective as notice thereof to the attaching creditors, because the mortgagor was a nonresident of the Indian territory when the mortgages were given, and that, under the registry law then in force, the mortgages of a nonresident, though in fact recorded, did not constitute liens as against third parties.

To this contention the mortgagees pleaded the curative act of February 3, 1897, whereby it was provided that mortgages of nonresidents of the Indian territory should be recorded in the judicial district in which the property was situated, and that all mortgages of personal property in the Indian territory theretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed were thereby validated.

[511] As we have already stated, the trial court and the circuit court of appeals of the eighth circuit held that the act of February 3, 1897, was applicable to the case in hand, and, as a valid exercise of power, was decisive of the controversy.

The condition of the plaintiffs in error is very different from that of a purchaser for a valuable consideration without notice of an alleged prior encumbrance. It cannot be said that they parted with any money or other valuable consideration in reliance upon the disclosures of the registry record. The indebtedness of Blocker to them had accrued years before; and if the record did not, under the decisions of the Arkansas supreme court, give them constructive notice of the existence of the mortgage debts, it is admitted to have given them the actual knowledge upon which they proceeded in suing out the writ of attachment. The judgment in their favor in the attachment suit, though conclusive as against Blocker, gave them no property rights in the cattle as against the mortgagees, and if their attempt to appropriate the mortgaged property is defeated, they are in no worse position than if the defendants in error had not advanced the money with which the cattle were purchased. If the problem were made to turn upon the equi-

ties between the two classes of creditors, the solution would be an easy one. With the legal title to the property in the common debtor, no court of equity would prefer the lien of a mere attachment to that of a prior mortgage given to secure the money advanced to purchase the property, if the attachment creditor had actual knowledge of the existence and nature of the mortgage.

And we agree with the circuit court of appeals, that while it is not necessary to enter into the question of the comparative equities of the parties, yet, when the validity of the curative act is to be passed upon, that, in circumstances like those of the present case, the act cannot be justly impugned as depriving the attaching creditor of property within the meaning of the Constitution.

In *Freeborn v. Smith*, 2 Wall. 160, 17 L. ed. 922, the facts were these: Smith had obtained a judgment against Freeborn in the supreme court of the territory of Nevada. To this judgment a writ of error went from this court, under the law organizing the territory, and the record of the case was filed in this court, December term, 1862. After the case was thus removed the territory* was [512] admitted by act of Congress, March, 1864, into the Union as a state. The act admitting the territory contained, however, no provision for the disposal of cases then pending in this court on writ of error or appeal from the territorial courts. Motion was made, in behalf of the defendants in error, to dismiss the writ, on the ground that the territorial government having been extinguished by the formation of a state government in its stead, and the act of Congress which extinguished it having in no way saved the jurisdiction of the court as previously existing, nothing further could be done here. It was urged that the territorial judiciary had fallen with the government of which it was part; and that the jurisdiction of this court had ceased with the termination of the act conferring it. It being suggested, on the other side, that a bill was pending in Congress supplying the omissions of the act of March, 1864, the hearing of the motion for dismissal was suspended till it was seen what Congress would do. Congress finally acted, and on February 27, 1865, passed an act providing that all cases of appeal or writ of error theretofore prosecuted, and then pending in the Supreme Court of the United States from the supreme court of the territory of Nevada, might be heard and determined by the Supreme Court of the United States, and providing for mandatory process, etc. The motion to dismiss the writ for want of jurisdiction was then renewed, on the ground that the amendatory act was a retrospective enactment interfering with vested rights, and as an attempt to confer on this court jurisdiction to review a judgment which, by law, at the time of its passage, was final and absolute. This court, through Mr. Justice Grier, thus disposed of the contention:

"It is objected to the act of February 27, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act, interfering directly with vested rights;

that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise.

[513] "But we are of opinion that these objections are not well *founded. . . . What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition, a state may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. . . . Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power."

The power of a legislature to pass laws giving validity to past deeds which were before ineffectual is well settled. Thus, in *Watson v. Mercer*, 8 Pet. 100, 8 L. ed. 881, the title to land in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to the husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of May 30, 1785. It was fatally defective as to the wife, in not having been acknowledged by her in conformity with the provisions of the statute of Pennsylvania of 1770, touching the conveyance of real estate by *femes covert*. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises, and recovered. The supreme court of the state affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledgment of Margaret Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. 185 U. S.

This judgment was also affirmed by the supreme court of the state, and that judgment of affirmance was affirmed by this court.

Watson v. Mercer was cited and followed by this court in *Randall v. Kreiger*, 23 Wall. 137, 23 L. ed. 124, where it was held that it was *competent for the legislature to validate a defective power of attorney to convey land. [514]

Similar principles were recognized in *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; *Baker v. Kilgore*, 145 U. S. 487, *sub nom. Neilson v. Kilgore*, 36 L. ed. 786, 12 Sup. Ct. Rep. 943; *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211. The case of *Green v. Abraham*, 43 Ark. 420, was cited in the opinion of the circuit court of appeals. There a mortgage improperly acknowledged had been placed of record, which by reason of the defective acknowledgment was not notice to subsequent purchasers or lienors. Afterwards the mortgaged property was attached under a writ against the mortgagor, and thereafter the legislature validated the record of the mortgage. The mortgagee having proceeded in replevin to recover the attached property from one who claimed it under the attachment, it was held by the supreme court of Arkansas that the interest of the attaching creditor in the attached property was not vested, but could be, and that it was in fact displaced by the subsequent enactment validating the record of the mortgage.

Without pursuing the subject further our conclusion is that no property rights of the plaintiffs in error were impaired by the act of February 3, 1897. Their judgment against Blocker remained unaffected, and the lien of the writ of attachment was not destroyed, but continued to hold any surplus that might have remained after the satisfaction of the mortgage liens. They have no just ground in constitutional law to complain of the action of Congress in giving legal effect to the equitable lien of the mortgages.

Approving the careful opinion of the Circuit Court of Appeals for the Eighth Circuit, reported in 44 C. C. A. 494, 105 Fed. 293, the judgment of that court is affirmed.

Mr. Justice Gray and Mr. Justice White took no part in the decision.

CASES

ARGUED AND DECIDED

IN THE

S U P R E M E C O U R T

OF THE

UNITED STATES

AT

OCTOBER TERM, 1901.

Vol. 186.

REFERENCE TABLE

OF SUCH CASES
DECIDED IN U. S. SUPREME COURT,
OCTOBER TERM, 1901,
AND REPORTED HEREIN,

VOLUME 186,

AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 186 U. S.	Title.	Here in.	Off. Rep. 186 U. S.	Title.	Here in.
1-2	The Styria v. Morgan		82-83	Bement v. National Harrow Co.	
	The Styria v. Parsons			("E. Bement & Sons v. Na-	
	The Styria v. Malcolmson			tional Harrow Co.")	1064
	The Styria v. Munroe	1027		" "	1065
2-4	" "	1028	83	" "	1066
4-7	" "	1029	83-86	" "	1067
7-8	" "	1030	86-88	" "	1068
9-11	" "	1033	88-91	" "	1069
11-14	" "	1034	91-93	" "	1070
14-16	" "	1035	93-95	" "	1071
16-19	" "	1036	95	Murphy v. Utter	1072
19-21	" "	1037	96-98	" "	1073
21-24	" "	1038	98	" "	1074
24-26	Montana Min. Co. v. St.		98-100	" "	1075
	Louis Min. & M. Co.		100-103	" "	1076
	Montana Min. Co. v. St.		103-105	" "	1077
	Louis Min. & M. Co.	1039	105-108	" "	1078
26-29	" "	1040	108-111	" "	1079
29-31	" "	1041	111-113	" "	1080
31-32	" "	1042	113	" "	1081
33	Emsheimer v. New Orleans	1042	114-116	Beyer v. Le Fevre	1082
33-36	" "	1043	116-117	" "	1083
36-39	" "	1044	118-120	" "	1084
39-41	" "	1045	120-123	" "	1085
41-43	" "	1046	123-125	" "	1086
43-46	" "	1047	125-126	" "	1088
46-48	" "	1048	126-127	Felsenheld v. United States	1089
49-50	McClaghry v. Deming	1049	127-130	" "	1090
50-53	" "	1050	130-132	" "	1091
53	" "	1051	132-134	" "	1092
53-56	" "	1052	134-135	" "	1093
56-58	" "	1053	135-137	Bowker v. United States	1094
58-61	" "	1054	137-138	" "	1095
61-64	" "	1055	138-140	" "	1098
64-66	" "	1056	140-142	" "	1099
66-69	" "	1057	142	Ward v. Joslin	1100
69-70	" "	1058	142-145	" "	1101
70	Bement v. National Harrow Co.		145-147	" "	1102
	("E. Bement & Sons v. Na-		147-150	" "	1103
	tional Harrow Co.")	1058	150-152	" "	1105
70-71	" "	1059	152-153	" "	1106
71-74	" "	1060	153-154	Nesbitt v. United States	1107
74-76	" "	1061	154-157	" "	1108
76-79	" "	1062	157-159	Williams v. Gaylord	1109
79-82	" "	1063	159-161	" "	1110
			161-162	" "	1111

REFERENCE TABLE.

Off. Rep. 186 U. S.	Title.	Here In.	Off. Rep. 186 U. S.	Title.	Here In.
162-165	Williams v. Gaylord	1106	268-269	Minneapolis & St. L. R. Co. v. Minnesota	
165-168	" "	1107		("Minneapolis & St. L. R. Co. v. Minnesota ex rel. Rail- road & W. Commission")	1158
168	" "	1108	269-270	New York Central R. Co. v. New York	
168-170	Lee Lung v. Patterson	1108		("New York C. & H. R. R. Co. v. New York")	1158
170-172	" "	1109	270-271	" "	1159
172-175	" "	1110	271-273	" "	1160
175-177	" "	1111	273	Hoffeld v. United States	1160
177-178	Galloway v. Ft. Worth Bank ("Galloway v. State Nat. Bank")	1111	273-274	" "	1161
178-180	Hatfield v. King	1112	274-276	" "	1162
180-181	" "	1113	276-279	" "	1163
181-182	Hanover Nat. Bank v. Moyse	1113	279	" "	1164
182-184	" "	1114	279-280	Pine River Logging Co. v. United States	
184	" "	1117		("Pine River Logging & Im- prov. Co. v. United States")	1164
184-186	" "	1118	280-283	" "	1165
187-189	" "	1119	283	" "	1166
189-192	" "	1120	283-284	" "	1167
192	" "	1121	284-287	" "	1168
193-194	Chin Bak Kan v. United States	1121	287-290	" "	1169
194	" "	1122	290-292	" "	1170
194-197	" "	1124	292-295	" "	1171
197-200	" "	1125	295-297	" "	1172
200-201	" "	1126	298-300	United States v. Nichols ("United States v. Austin Nicholls & Co.")	1173
202	Chin Ying v. United States	1126	300-302	" "	1174
202	" "	1127	302-303	" "	1175
202-204	Denver First Nat. Bank v. Klug ("First Nat. Bank v. Klug")	1127	304-305	Kennard v. Nebraska	1175
204-205	" "	1128	305-307	" "	1176
206	Clark v. Herington	1128	307-308	" "	1177
206-207	" "	1129	309	United States v. Freel	1177
207-209	" "	1130	309-310	" "	1178
209-212	" "	1131	310-313	" "	1179
212-214	Bienville Water Supply Co. v. Mobile	1132	313-315	" "	1180
214-216	" "	1133	315-318	" "	1181
216-217	" "	1134	318-319	" "	1182
217-220	" "	1135	320	Interstate Commerce Commis- sion v. Chicago, B. & Q. R. Co.	1182
220-222	" "	1136	320-322	" "	1185
222-223	" "	1137	322-325	" "	1186
224	Hardy v. United States	1137	325-328	" "	1187
224-226	" "	1138	328-329	" "	1188
226-228	" "	1139	330-332	" "	1189
228-230	" "	1140	332-335	" "	1190
230	Jenkins v. Neff	1140	335-337	" "	1191
230-233	" "	1141	337-340	" "	1192
233-235	" "	1142	340-342	" "	1193
235-238	" "	1143	342	Fidelity & D. Co. v. Courtney	1193
238-239	Chesapeake & P. Teleph. Co. v. Manning	1144	343-344	" "	1194
239-241	" "	1145	344-345	" "	1195
241-244	" "	1146	345-348	" "	1196
244-246	" "	1147	348-350	" "	1197
246-249	" "	1148	350-353	" "	1198
249-252	" "	1149	353-356	" "	1199
252-254	" "	1150	356-358	" "	1200
254-256	" "	1151	358-361	" "	1201
257	Minneapolis & St. L. R. Co. v. Minnesota ("Minneapolis & St. L. R. Co. v. Minnesota ex rel. Rail- road & W. Commission")	1151	361-363	" "	1202
257-259	" "	1152	363-364	" "	1203
259-260	" "	1153	365-367	Warner v. Godfrey	1203
260-262	" "	1155	367-369	" "	1204
262-265	" "	1156	369-371	" "	1205
265-268	" "	1157	371-374	" "	1206

REFERENCE TABLE.

Off. Rep. 186 U. S.	Title.	Here In.	Off. Rep. 186 U. S.	Title.	Here In.
374-376	Warner v. Godfrey	1207	426	Hagan v. Scottish Ins. Co.	
376-379	" "	1208		("Hagan v. Scottish Union &	
379-380	" "	1209		Nat. Ins. Co.")	1231
380	Compagnie Francaise de Nav-		426-429	" "	1232
	igation a Vapeur v. Louisi-		429-431	" "	1233
	ana State Board of Health		431-434	" "	1234
	("Compagnie Francaise De		434	Farmers' Loan & T. Co. v.	
	Navigation A Vapeur v.			Penn Plate Glass Co.	1234
	State Board of Health")	1209	434-436	" "	1235
380-383	" "	1210	436-438	" "	1236
383-384	" "	1211	438-441	" "	1237
384-387	" "	1213	441-443	" "	1238
387-389	" "	1214	443	" "	1239
389-392	" "	1215	444	" "	1241
392-395	" "	1216	444-447	" "	1242
395-396	" "	1217	447-450	" "	1243
397-399	" "	1218	450-452	" "	1244
399-401	" "	1219	452-455	" "	1245
401-402	Capital City Light & F. Co. v.		455-457	" "	1246
	Tallahassee	1219	457-458	" "	1247
402-404	" "	1220	458-460	Lander v. Mercantile Bank	
404-405	" "	1221		("Lander v. Mercantile Nat.	
405-408	" "	1223		Bank")	1247
408-411	" "	1224	460-462	" "	1248
411-413	" "	1225	462	" "	1249
413	Hotema v. United States	1225	463-464	" "	1251
414-415	" "	1226	464-466	" "	1252
415-418	" "	1227	466-469	" "	1253
418-420	" "	1228	469-472	" "	1254
420-422	" "	1229	472-474	" "	1255
423	Hagan v. Scottish Ins. Co.		474-477	" "	1256
	("Hagan v. Scottish Union &		477	" "	1257
	Nat. Ins. Co.")	1229	479-481	Memorandum Cases	1259-1267
423-425	" "	1230			
186 U. S.					1025

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1901.

[1]THE STEAMSHIP STYRIA, Antonio G. Scopinich, Claimant, *Petitioner*,

v.

JAMES L. MORGAN *et al.*

[No. 72.]

THE STEAMSHIP STYRIA, Antonio G. Scopinich, Claimant, *Petitioner*,

v.

SCHUYLER L. PARSONS.

[No. 73.]

THE STEAMSHIP STYRIA, Antonio G. Scopinich, Claimant, *Petitioner*,

v.

ALFRED S. MALCOLMSON.

[No. 74.]

THE STEAMSHIP STYRIA, Antonio G. Scopinich, Claimant, *Petitioner*,

v.

JOHN MUNROE *et al.*

[No. 75.]

(See S. C. Reporter's ed. 1-24.)

War—discharge of contraband goods—discretion of master—duty to reship.

1. The discharge and warehousing at Port Empedocle, Sicily, by the master of an Austrian vessel bound from Trieste to New York *via* Sicilian ports, of sulphur shipped at that port, which had become contraband of war by reason of the outbreak of the war between Spain and the United States and by the Spanish proclamation of April 23, 1898,

NOTE.—As to what articles are contraband of war—see note to *Haigh v. United States*, 18 L. ed. U. S. 200.

186 U. S.

without awaiting the result of the rumored efforts of the Italian government to induce the Spanish government to exempt sulphur from the list of the contraband of war, was a reasonable exercise of the discretion vested in him by the bills of lading, having due regard to the interests of the ship and cargo, both contraband and innocent.

2. No duty to reship a lot of sulphur properly unloaded and warehoused at Port Empedocle, Sicily, because it had become contraband of war by reason of the existence of war between Spain and the United States and the Spanish proclamation of April 23, 1898, was imposed upon the master of the vessel before sailing to New York *via* Sicilian ports, by his knowledge that the Sicilian newspapers reported that a temporary verbal arrangement had been made between the Italian and Spanish governments under which sulphur might go free.

[Nos. 72-75.]

Argued and Submitted November 22, 25, 1901. Decided May 19, 1902.

ON WRITS of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review decrees modifying decrees of the District Court for the Southern District of New York in favor of the libellants in suits in admiralty. *Reversed in part, and affirmed in part.*

See same case below, 41 C. C. A. 639, 101 Fed. 728.

Statement by Mr. Justice Shiras:

Four libels in admiralty were filed in the district court of the United States for the southern district of New York against the steamship Styria, to recover damages for the failure duly*to deliver at New York dif-[2]ferent lots of sulphur, owned by the libellants, shipped on board the Styria at Port Empedocle, the port of the town of Girgenti, in Sicily, April 21-24, 1898, and shortly

afterwards relanded at the port of shipment because it had become contraband of war. The facts were substantially undisputed, and were as follows:

The Styria was an Austrian steamship, owned by the Austro-Americana Steamship Company, and Burrill & Sons of Glasgow were her managing agents. She sailed April 16, 1898, with some cargo, from Trieste via Sicilian ports for New York, and on April 21 reached Port Empedocle, Sicily, her second loading port. Her master began at once to load on board the sulphur in question, and by April 24 it was all on board, bills of lading therefor (containing the provisions copied in the margin†) had been signed, and the vessel cleared from the custom-house, and ready to proceed on her voyage to Messina and Palermo for a cargo of fruit, and thence to New York.

In the meantime, unknown to the master, war had broken out between the United States and Spain. On April 20, Congress passed, and the President approved, the joint resolution recognizing the freedom and independence of Cuba, and demanding that the government of Spain relinquish its authority in the island and withdraw its land and naval forces. 30 Stat. at L. 738. On the same day the Spanish minister in Washington demanded and received his passports.

[3] On April 21, the American *minister at Madrid was informed that the diplomatic relations between the two governments were broken off, and he left that same day. On April 22, the first overt act of war, the capture of the Spanish merchant steamship, the Buena Ventura, was committed. *The Buena Ventura v. United States*, 44 L. ed. 206, 20 Sup. Ct. Rep. 148. On April 25, Congress passed an act declaring that war had existed since April 21. 30 Stat. at L. 364, chap. 189. On April 23, the Queen Regent of Spain issued a decree announcing the existence of war with the United States; authorizing the Royal Navy, "in order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag and contraband of war under any flag," to exercise the right of search on the high seas and in the territorial waters of the enemy: including, under the denomination of contraband, "powder, sulphur, saltpetre, dynamite, and every kind of explosive;" and charging the Minister of State and the Minister of Marine with the fulfilment of this decree.

On April 23, the master of the Styria received a telegram from Burrill & Sons, her managing agents, directing him not to sail until further orders; and on April 25 an

other telegram directing him "to discharge whole cargo as quickly as possible." The master had by this time learned that war existed, and that sulphur was contraband. He knew that his course would take him within a few miles of the Spanish coast, in order to sight the lighthouses; and he had seen in an Italian newspaper that Spanish men-of-war were looking for contraband goods, and that a sulphur ship had been taken. In obedience to the instructions from the managing agents, as well as because he saw in the newspapers that the sulphur was contraband of war and he considered it unsafe to carry it, the master began to reland the sulphur at Port Empedocle on April 27, and had it all unloaded and warehoused by May 7. At the beginning of the unloading on April 27, he gave notice in writing to the shippers, and to the consignees named in the bills of lading, that "on finding risky my passage to New York with the actual sulphur cargo, for facts of war," he was discharging the cargo for the account and risk of the shippers, "under care of the mercantile agent, Mr. William Peirce, depositing the same in the *ware-[4] houses of Mr. Zenobia Urso here, and, if these are not sufficient, in the warehouses of the British consulate, faculty which I have in force in the bills of lading." On the same day he gave notice in writing to the Austrian consul at Girgenti "that, by order of the representative of my owners, for facts of war," he was discharging and warehousing the sulphur from the Styria, for whom it might concern; and also gave notice in writing, through the Austrian consul, to the director general of the customs at Girgenti, that, having loaded the sulphur on the Styria, "and sulphur being declared contraband of war, war actually existing between Spain and the United States of America, in behalf of the present laws, I deem it in the interest of all whom it might concern to discharge the whole sulphur here on receiving the necessary permit from the customs;" and asking that duties might be remitted on reshipment. On April 30 and May 2, the shippers of the sulphur protested against the unloading; and on May 3 and 5, respectively, the master replied that he, "in discharging the goods, acted as was his right, and in the best interest of the goods, which is confirmed by the fact, published in the papers, and discussed in the Italian Parliament, that sulphur had been declared contraband of war by one of the belligerent powers." And at the conclusion of the unloading, on May 7, the master gave notice to the shippers that, as soon as they paid the expense incurred on their account, the sul-

†To be delivered at the port of New York, "restraints of princes and rulers or people" and other specified perils "excepted; with liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer."

"In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe, for

any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the postoffice, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

phur would be delivered to them; and to the consignees that the sulphur was lying in the warehouses at Port Empedocle, at the risk and expense of whom it might concern.

The exportation of sulphur is one of the principal industries of the island of Sicily, and immediately after the declaration of war Sicilian merchants urged the Italian government to request Spain to exempt it from the list of contraband. The *Giornale di Sicilia*, a newspaper of Palermo, each issue of which had a double date, and was read by the master of the *Styria* on the day of its publication, contained, according to the translations in the record, the following information on the subject: On April 24-25, 1898, it was stated that the merchants of Messina had requested their deputy in [5] the Italian Parliament to *urge the government to induce Spain to exclude sulphur from being considered contraband of war; and that the deputy had been assured that the Minister for Foreign Affairs would telegraph to the Italian ambassador in Madrid to obtain what was required from the Spanish authorities. On April 26-27, it was stated that Spain included sulphur in the list of contraband of war, and that the Italian Council of Ministers had decided to induce Spain to revoke its decision. On April 27-28, it was stated that an Italian deputy had asked the Minister of Foreign Affairs in Parliament whether sulphur had been excluded from the list of contraband of war. On April 29-30, it was stated that the Spanish government had not yet pronounced itself upon the Italian demand to exclude sulphur from the list of contraband of war; that the Italian ambassador had been promised an immediate decision; that the Spanish Minister of Marine seemed decidedly adverse to the demand; but that it was hoped it would be conceded. The paper of May 1-2 contained, under date of May 1, from an anonymous correspondent at Rome, these statements: "Although the official advice has not yet arrived, I assure you absolutely that the Spanish government has determined to exclude sulphur from the list of contraband of war. The *Popolo Romano*, confirming my information, says that the relative decree is imminent which has been provoked by the insistence of our ambassador in Madrid, who obtained from Sagasta that he should unite the Council of Ministers, in which, notwithstanding the opposition of the Minister of Marine, the opinion prevailed to exclude sulphur from contraband." The *Official Gazette* will publish the decision regarding sulphur. Meantime the Spanish government has already ordered the commanders of its ships to allow sulphur to pass free." The paper of May 3-4 contained, under date of May 3, from its Roman correspondent, this statement: "The Department of Foreign Affairs decided not to publish in the *Official Gazette* the Spanish government's decision regarding the exclusion of sulphur from contraband of war. But the Minister of the Interior sent a circular to all the prefects in Sicily, informing them of the orders re-

lative to the free navigation of cargoes of sulphur."

The *Giornale di Sicilia* of May 5-6, 1898, contained, under the heading "Sulphur is [6] not War Contraband," the following: "From the Minister of Agriculture, Industry, and Commerce, the following telegram has been sent: 'Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23d of the Spanish government are considered, as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre, dynamite, explosives, uniforms, ornaments, saddles, engines for ships, derricks, screws, boilers, and all that is necessary for the construction, repair, and armament of men of war. I would also state that, in consequence of our request, the Spanish government has given notice to the commanders of its vessels to let sulphur pass free.

"The Minister, Cocco Ortú,."

The master also testified that on the evening of May 7 he saw a notice from the Austrian consul, saying that there had been a communication from the prefect that it was agreed between Spain and Italy that the Spanish ships had instructions to let sulphur go free; but "it was not given officially, only a matter of verbal arrangement. Of course, the verbal arrangement you can't believe."

Early in the morning of May 8, the master sailed, without the sulphur, to Palermo, and thence to Messina, took on board at each place a cargo of fruit, and on June 3 arrived at New York. Soon after the arrival there, these libels were filed.

The *Giornale di Sicilia* of May 7-8, 1898 (which did not reach the master before he sailed from Port Empedocle), contained, under the heading "The Exportation of Sulphur may be continued," the following: "The *Prefettura* also with its communication confirms to us that the exportation of sulphur, notwithstanding the Spanish-American war, may continue. Indeed, the Spanish government has officially declared, in the circular to the commandants of their ships, that sulphur is not to be considered as contraband of war. An official and public declaration is lacking, but there is no doubt that sulphur will pass freely."

On May 10, 1898, the Foreign Office in London, answering a telegram from Burrill & Sons, wrote them: "Spanish government state that decree already issued cannot be altered, but that *as temporary measure [7] Naval Departments have been ordered not to treat sulphur as contraband of war. They lay stress on the fact that the measure is temporary only."

It appeared from inquiries made by the Foreign Office in London, and by the American Embassy in Italy, in June and July, 1898, that the actual state of facts was as follows: The Spanish Minister for Foreign Affairs verbally stated to the Italian ambassador at Madrid, on April 29, 1898, and to the British ambassador at Madrid, on May 6, 1898, that while the decree of April 23 could not be altered.

orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war. On May 31, 1898, the Spanish Minister, in a note to the British ambassador at Madrid, stated that the treatment of sulphur as contraband of war would be temporarily suspended; that the orders which had been given to that effect would not be revoked without due notice; and that the eventual revocation of the orders would not, in any case, apply to vessels at sea in ignorance of it, while the necessary time would be given for the execution of pending contracts. It did not appear that Spain ever made any public announcement of the modification of her intentions in regard to the treatment of sulphur, or ever agreed to let sulphur go free permanently.

A vessel which lay alongside the Styria at Port Empedocle, loading sulphur, sailed before she did, and arrived at New York in safety on May 19. Two other vessels laden with sulphur came safely from the Sicilian port of Licata to the United States about the same time. And no sulphur ships were taken by Spain during the war.

Presently after the signing of the Peace Protocol between the United States and Spain on August 12, 1898, the parties to these cases stipulated in writing that the steamship company should forward the sulphur from Port Empedocle by the first available vessel to New York, and deliver it to the consignees, upon the terms and for the freight specified in the original bills of lading; that the sulphur, upon arrival, should be sold at current market rates, and the proceeds, less charges incurred, be credited on account of the damages, if any, recovered by the libellants; that, if the Styria was justified in relanding and storing the sulphur as was done, the company should have a lien upon the sulphur for the charges against it in Sicily; and that, if it was not so justified, the sulphur should be free from any charges except freight.

Under this stipulation, the steamship company paid the expenses of storage in Sicily, and reloaded the sulphur and brought it to New York in its steamship Abazzia, sailing September 4, and arriving September 30, and there delivered it to the consignees, who paid the freight as agreed, and sold the sulphur at the current market rates. And the company filed cross libels for the charges in Sicily.

The district court found for the libellants, holding that the discharge of the cargo was too hasty and precipitate, and not justified by the facts of the case; and entered decrees for the libellants in small amounts, and dismissed the cross libels. 93 Fed. 474, 95 Fed. 698.

Both parties appealed to the circuit court of appeals, which held that the sulphur was rightly discharged, but should have been reloaded before the Styria left Port Empedocle; and entered decrees for the libellants for increased damages, and upon the cross libels for the expenses of unloading, warehousing, and reloading in Sicily. 41 C. C. A. 639, 101 Fed. 728.

The cases were then brought to this court by writs of certiorari, granted on petitions of both parties. 179 U. S. 683, 45 L. ed. 385, 21 Sup. Ct. Rep. 926, 179 U. S. 685, 45 L. ed. 386, 21 Sup. Ct. Rep. 917.

Mr. J. Parker Kirlin argued the cause, and, with Mr. Charles R. Hickox and Messrs. Convers & Kirlin, filed a brief for petitioner:

In every contract of shipment it is implied that the cargo is lawful merchandise, not contraband.

Boyd v. Moses, 7 Wall. 316, 19 L. ed. 192.

The sulphur had become unlawful cargo under the laws of war, by reason of the outbreak of hostilities between Spain and the United States.

3 Kent. Com. *267.

Not only was sulphur of the class of cargo known as "absolutely contraband" under the law of nations, but it had been specifically designated as contraband in the Spanish proclamation of war, in which orders had been given to the Spanish authorities to search vessels for it and confiscate it wherever found.

2 Halleck, International Law, Baker's ed. 224, 225; Holland, Naval Prize Law, 19; *The Panama*, 176 U. S. 535, 44 L. ed. 577, 20 Sup. Ct. Rep. 480.

The Styria, as a common carrier, could have refused to accept the sulphur if her master had known that a state of war existed when the sulphur was tendered for shipment.

Boyd v. Moses, 7 Wall. 316, 19 L. ed. 192; *Weston v. Minot*, 3 Woodb. & M. 436, Fed. Cas. No. 17,453; Carver, Carriage by Sea, 3d ed. § 244.

According to the ancient law and the usage among nations, if a ship was captured with contraband on board the vessel was condemned as well as the cargo.

Bynkershoek, *Quaestionum Juris Publici* (1737) liber 1, chap. 10, p. 77; Heineccius, *Operum ad Universum Juris Prudentiam de Navibus ob Veeturam Velitarum Mercium Commissis* (1746) chap. 2, § 3, p. 342.

In later times the rigor of this procedure has been lessened.

Pratt, *Cases on Contraband of War*, 68. 69. See also *The Panama*, 176 U. S. 535, 44 L. ed. 577, 20 Sup. Ct. Rep. 480.

Though the vessel herself may not be condemned if captured, yet the transportation of contraband goods to a belligerent destination is not a lawful trade for a neutral vessel.

The Peterhoff, 5 Wall. 28, sub nom. *The Peterhoff v. United States*, 18 L. ed. 564; *The Bermuda*, 3 Wall. 514, sub nom. *Haigh v. United States*, 18 L. ed. 200; Davis, International Law, pp. 339, 353; Owen, Declaration of War, p. 187.

The master was bound to take reasonable care of all the goods that had been intrusted to him, and he would have failed to discharge his duty in this respect if he had omitted to reland the sulphur.

Carver, Carriage by Sea, 3d ed. § 294; *Nobel's Explosives Co. v. Jenkins* [1896] 2

Q. B. 326. See also *Holladay v. Kennard*, 12 Wall. 254, 20 L. ed. 390.

The rule that the contract of carriage is dissolved where, by reason of the outbreak of war, the cargo has become contraband and subject to capture, is approved and followed under many of the maritime codes.

Raikes, Mar. Code of German Empire, London, 1900, p. 38; Raikes, Mar. Codes of Holland & Belgium, London, 1898, pp. 42, 149; Italy, art. 551; Raikes, Code of Italy, p. 30; Belgium, art. 90; Spain, art. 690; Portugal, art. 547; Raikes, Codes of Spain & Portugal, pp. 47, 154; France, art. 276; 2 Valroger, p. 231, §§ 710, 711; 3 Desjardins, pp. 505, 506.

If it should be considered that a contract existed under the bills of lading to carry the sulphur after it became contraband of war, then the master was justified by the provisions of the bills of lading in relanding the sulphur and storing it at Port Empedocle.

Carver, Carriage by Sea, 3d ed. § 82, p. 96; Abbott, Shipping, 13th ed. pp. 503, 504; Scrutton, Charter Parties & Bills of Lading, 4th ed. p. 177; *Nobel's Explosives Co. v. Jenkins* [1896] 2 Q. B. 326.

An actual physical taking of the goods is not necessary to constitute a restraint of princes.

Rodoconachi v. Elliott (1874) L. R. 9 C. P. 518; *Geipel v. Smith* (1872) L. R. 7 Q. B. 404; *Nobel's Explosives Co. v. Jenkins* [1896] 2 Q. B. 326.

If the master was justified in believing that there was reasonable probability that the *Styria* would be stopped and searched by the war vessels of Spain if she attempted to carry the sulphur to New York, then there was a restraint of princes and rulers, and the ship was justified in refusing to carry it.

Nobel's Explosives Co. v. Jenkins [1896] 2 Q. B. 326; *The San Roman*, L. R. 3 Adm. & Eccl. 583.

If the carrier has reasonable grounds for believing that his voyage will be attended with danger to the cargo, whether by reason of restraint of princes or otherwise, it is clearly his duty to exercise due care to avoid loss. For breach of this duty he will be held liable.

Holladay v. Kennard, 12 Wall. 254, 20 L. ed. 390.

Substantially the same rule was adopted in the English cases that arose during the Franco-Prussian war, where vessels were uniformly held justified in taking steps by deviations and delays to avoid the risk of capture.

The Express, L. R. 3 Adm. & Eccl. 597; *The San Roman*, L. R. 3 Adm. & Eccl. 583, Affirmed in L. R. 5 P. C. 301; *The Teutonia*, L. R. 4 P. C. 171; *Gaudet v. Brown*, L. R. 5 P. C. 134; *Geipel v. Smith*, L. R. 7 Q. B. 404. See also *Bruee v. Nicolopulo*, 11 Exch. 129; *Esposito v. Bowden*, 7 El. & Bl. 763.

The result is not always a true criterion whether a man pursued a prudent course or not.

186 U. S.

Holladay v. Kennard, 12 Wall. 254, 20 L. ed. 390.

The master had the right, under the transshipment clause of the bill of lading, to reland and transship the goods. As this was done ultimately at the ship's expense and, so far as appears, within a reasonable time, she should not be liable for damages that were incident to delay in the transshipment.

The Surrey, 26 Fed. 791, 40 Fed. 90; *Stuart v. British & A. Steam Nav. Co.* 32 L. T. N. S. 257; *Carali v. Xenos*, 2 Fost. & F. 740.

Mr. Charles C. Burlingham argued the cause, and, with Mr. Harrington Putnam and Messrs. Wing, Putnam, & Burlingham, filed a brief for Morgan *et al.*:

The master as the agent of all concerned is bound to a prudent regard for the interests of the cargo, and "must endeavor to hold the balance evenly" between ship and cargo, when their interests conflict.

The Julia Blake, 107 U. S. 418, *sub nom. Bank of St. Thomas v. The Julia Blake*, 27 L. ed. 595, 2 Sup. Ct. Rep. 692; *The Gratitude*, 3 C. Rob. 240; *The Onward*, L. R. 4 Adm. & Eccl. 38; *Notara v. Henderson*, L. R. 7 Q. B. 225.

Even when excepted perils may have required the goods to be landed and stored, the carrier cannot leave them and abandon the voyage.

The Maggie Hammond, 9 Wall. 435, *sub nom. The Maggie Hammond v. Morland*, 19 L. ed. 772.

Mr. Latham G. Reed argued the cause, and, with Mr. John M. Bowers and Messrs. Bowers & Sands, filed a brief for Parsons:

The ship is bound absolutely to deliver the goods which it shipped and for which it issued its bill of lading, unless relieved by some plain exemption in the bill of lading, or by a strict judicial preecedented construction of some exception actually in the bill of lading and excusing performance.

The Harriman, 9 Wall. 162, *sub nom. The Harriman v. Emerick*, 19 L. ed. 629; *Spence v. Chodwick*, 10 Q. B. 517.

The common carrier is regarded as a practical insurer of the goods against all losses of whatever kind, with the exception of (1) those arising from what is known as the act of God; (2) those caused by the public enemy; to which in modern times have been added: (3) those arising from the act of public authority; (4) those arising from the act of the shipper; and (5) those arising from the inherent nature of the goods.

Hutchinson, Carr. § 170a.

The law making the carrier a practical insurer of the safety of the goods intrusted to him for carriage, except in those cases in which he is exempt, it is settled that whenever he claims that a loss occurring from such causes has entitled him to exemption, the burden of proving the fact rests upon him.

Hutchinson, Carr. §§ 185, 259a; 3 Kent, Com. 12th ed. 295; *Park v. Preston*, 108 N. Y. 434, 15 N. E. 705; *The Delaware*, 14

Wall. 579, *sub nom. The Delaware v. Oregon Iron Co.* 20 L. ed. 779.

In the absence of fraud or mistake, the terms of the bill of lading, or its legal effect, cannot be explained, added to, or contradicted by parol. It expresses the whole contract.

Ibid.

Contracts limiting liability must be construed strictly against the carrier.

Hutchinson, Carr. §§ 275, 277.

The burden of proof that the case is one within the exception is upon the carrier.

The Mohler, 21 Wall. 230, *sub nom. The Mollic Mohler v. Home Ins. Co.* 22 L. ed. 485.

The ship is liable for every loss or injury which might have been prevented by human foresight, skill, and prudence.

The Niagara v. Cordes, 21 How. 7, 16 L. ed. 41.

No exception of a private nature, which is not contained in the contract itself, can be engrafted upon it by implication as an excuse for nonperformance.

Howland v. Greenway, 22 How. 502, 16 L. ed. 394.

There was no "restraint of princes or people," which permitted the vessel to discharge the sulphur preparatory to sailing, or to sail without it.

Olivera v. Union Ins. Co. 3 Wheat. 183, 4 L. ed. 365; *Smith v. Universal Ins. Co.* 6 Wheat. 176, 5 L. ed. 235; *Bradlie v. Maryland Ins. Co.* 12 Pet. 402, 9 L. ed. 1133; *The G. R. Booth*, 171 U. S. 459, 43 L. ed. 239, 19 Sup. Ct. Rep. 9; *Spinetti v. Atlas S. S. Co.* 80 N. Y. 80.

The mere existence of a state of war between the parties did not, as of course, abrogate the treaty, particularly the clause of the treaty which was especially negotiated with a view to the existence of war between the parties.

2 Wharton, International Law Digest, 2d ed. pp. 44, 45; 1 Halleck, International Law, Baker's ed. 212.

Sulphur has not been by any means generally recognized as contraband of war *per se*.

The Jonge Margaretha, 1 C. Rob. 192; Halleck, International Law, chap. 24; Lawrence, Principles of International Law, chap. 6; Hall, International Law, pt. 4, chap. 5; Owen, Declaration of War, p. 159. See also *The Peterhoff*, 5 Wall. 28, *sub nom. The Peterhoff v. United States*, 18 L. ed. 564.

Crude brimstone or sulphur is not primarily used for military purposes, even in time of war.

22 Enc. Britannica, p. 634, title *Sulphur*, p. 635; 11 Enc. Britannica, title *Gunpowder*, pp. 320, 324.

Information to Italians concerning international matters and matters affecting Italian commerce is conveyed to Italians and others in Italy involved in her commerce through the Italian government.

Wharton, International Law Digest, *Neutrals*, § 116.

1032

Notification to a foreign government would clearly include all the individuals of that nation, it being the duty of the government to communicate the information to its citizens.

The Olinda-Rodriguez, 89 Fed. 107.

The court will not hesitate to hold the master to a high plane of duty, realizing the effect of a ruling that would leave masters free to violate their contracts upon very light or upon no pretexts.

Medeiros v. Hill, 8 Bing. 231.

The suggestion that after having induced, as it were, neutrals to sail with sulphur as a free cargo, the Spanish government would turn around suddenly and indecently withdraw its word, is preposterous.

The Buena Ventura, 175 U. S. 388, *sub nom. The Buena Ventura v. United States*, 44 L. ed. 208, 20 Sup. Ct. Rep. 148.

There was nothing unusual or doubtful in the form of communicating the Spanish orders to her vessels by a circular letter to merchants and prefects.

2 Wharton, International Law Digest, 2d ed. p. 716.

In the bill of lading in this suit the ship agrees to "carry goods of all kinds, dangerous or otherwise;" not only did she not agree to carry only lawful goods, but she agreed to carry any goods, whether dangerous or otherwise.

Westcott v. Fargo, 61 N. Y. 553, 19 Am. Rep. 300.

A trade by neutrals in articles contraband of war is a lawful trade, though a trade subject, from necessity, to inconvenience and loss.

Seton v. Low, 1 Johns. Cas. 1.

An embargo or blockade of the port of departure merely suspends the contract until the embargo is removed.

Palmer v. Lorillard, 16 Johns. 348; *The Spartan*, 25 Fed. 51.

Vis major did not put an end to the contract in suit.

Crossman v. Burrill, 179 U. S. 112, 45 L. ed. 112, 21 Sup. Ct. Rep. 38.

Mr. Edward B. Hill argued the cause, and, with Mr. William J. Curtis, filed a brief for Malecomson:

Words of exception in any instrument are to be construed most strongly against the party for whose benefit they are introduced.

Palmer v. Warren Ins. Co. 1 Story, 364, Fed. Cas. No. 10,698.

This rule is applied to bills of lading.

Compania de Navegacion La Flecha v. Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12.

Mere apprehension of capture does not justify the master in abandoning the voyage without leaving port.

Atkinson v. Ritchie, 10 East, 530.

In order to justify a master in not proceeding, there must be such danger of capture as would affect a man of "ordinary courage, judgment, and experience."

The San Roman, L. R. 5 P. C. 301.

Undoubtedly a master is not bound to wait indefinitely, and wholly sacrifice the

186 U. S.

interests of the vessel to those of the cargo; but neither is he permitted to act hastily and without inquiry, and wholly to sacrifice the interests of the cargo to those of the vessel.

The Julia Blake, 107 U. S. 418, *sub nom. Bank of St. Thomas v. The Julia Blake*, 27 L. ed. 595, 2 Sup. Ct. Rep. 692.

Mr. Melville H. Regensburger submitted the cause for *Munroe et al. Messrs. Stern & Rushmore* were with him on the brief.

[9] **Mr. Justice Shiras* delivered the opinion of the court:

The master of a ship is the person who is intrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention. *Abbott, Shipping*, 7th Am. ed. 167.

It was well said by the district judge in the present case, that "though exceptions . . . noted in the bill of lading contemplate circumstances of war, and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master, as the agent of all concerned, is still bound to a prudent regard for the interests of the cargo, and 'must endeavor to hold the balance evenly' between ship and cargo when their interests conflict."

"All will agree that the master must act in good faith and exercise his best discretion for the benefit of all concerned." *New England Ins. Co. v. The Sarah Ann*, 13 Pet. 400, 10 L. ed. 219; *The Amelie*, 6 Wall. 27, *sub nom. Fitz v. The Amelie*, 18 L. ed. 808.

The good faith of the master and his reasonable exercise of discretion must be considered and determined in the light of the facts in each particular case. The term "discretion" implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action. "Discretion means the equitable decision of what is just and proper under the circumstances." *Bouvier, Law Dict.* "Discretion means the liberty or power of acting without other control than one's own judgment." *Webster, Dict.*

Courts, in passing upon such questions, should endeavor to put themselves in the position of the actors in the transaction, and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate; what those concerned have a right to demand of a master, when confronted with unexpected emergencies, is not an infallible, but a deliberate

[10] *and considerate, judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pur-

sued a prudent course or not. *Holladay v. Kennard*, 12 Wall. 254, 20 L. ed. 390.

Applying these principles to the facts of the present case, we have to inquire whether the conduct of the master of the *Styria* showed a reasonable exercise of judgment, having regard to the rights of the owners of the vessel and those of the several owners of cargo.

That the situation was a difficult one is obvious, and is shown by the fact that the learned judges of the courts below, though having the advantage of a full disclosure of the facts and of able discussion by counsel, disagreed on the critical question in the case, whether the master was right in deciding that it was his duty to reland and store the contraband goods.

As heretofore stated, the *Styria* was an Austrian steamship, owned by the Austro-Americana Steamship Company, and *Burrill & Sons* of Glasgow were her managing agents. She sailed April 16, 1898, with some cargo, from Trieste via Sicilian ports for New York, and on April 21 reached Port Empedocle, Sicily, her second loading port. Her master began at once to load on board different lots of sulphur owned by the libellants, and by April 24 it was all on board, bills of lading therefor had been signed, and the vessel cleared from the custom-house, and was ready to proceed on her voyage to Messina and Palermo for additional cargo of fruit, and thence to New York. On April 27, the master, having learned that war between Spain and the United States had broken out, and being aware that sulphur was a contraband article, began to reland the sulphur at Port Empedocle, and had it all unloaded and warehoused by May 7. He gave notice in writing to the shippers, and to the consignees named in the bills of lading, that, "on finding risky my passage to New York with the actual sulphur cargo for facts of war," he was discharging that portion of his cargo. On the same day he gave notice in writing to the Austrian consul at Girgenti "that, by order of the representative of my owners, for facts of war," he was discharging and warehousing the sulphur from the *Styria*, for whom it might concern; and *also gave [11] notice in writing, through the Austrian consul, to the director general of the customs at Girgenti, that, having loaded the sulphur on the *Styria*, "and sulphur being declared contraband of war, war actually existing between Spain and the United States of America, in behalf of the present laws, I deem it in the interest of all whom it might concern to discharge the whole sulphur here on receiving the necessary permit from the customs;" and asking that duties might be remitted on reshipment. On April 30 and May 2 the shippers of the sulphur protested against the unloading; and on May 3 and 5, respectively, the master replied that he, "in discharging the goods, acted as was his right, and in the best interest of the goods,—which is confirmed by the fact, published in the papers, and discussed in the Italian Parliament, that sulphur had been declared contraband of war by one of the belligerent

powers." And at the conclusion of the unloading, on May 7, the master gave notice to the shippers that, as soon as they paid the expense incurred on their account, the sulphur would be delivered to them; and to the consignees that the sulphur was lying in the warehouses at Port Empedocle, at the risk and expense of whom it might concern.

As both the district court and the circuit court of appeals held that, within the provisions of the bills of lading, the master had the right to decide on the course to pursue, whether to discharge the sulphur, or to refuse to sail until there was some reasonable assurance of safety, or to immediately proceed on his voyage, it is unnecessary for us to discuss the meaning of the bills of lading in that regard, but only to determine whether the decision of the master, to discharge and warehouse the goods, was a reasonable exercise of the discretion vested in him.

The learned judge of the district court held that, while the bills of lading contemplated circumstances of war, and were therefore applicable, yet that the master's right under them could not be exercised without waiting a reasonable time to see whether the danger of continuing the voyage with the sulphur might not be removed by negotiation between the Italian and Spanish governments. He thus expressed himself:

- [12] *—"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar, would presumably be pecuniarily dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure, though she were ultimately released. Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband, I have no doubt that it would have been both the right and the duty of the master, for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24, until there was some reasonable assurance of safety. See *The San Roman*, L. R. 3 Adm. & Eccl. 583, when there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo the master, in my judgment, was bound, in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard. . . . I must find, therefore, that the ship was not justified by clauses (a) and (b) of the bill of lading . . . in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there

was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time." 93 Fed. 474, 95 Fed. 698.

The circuit court of appeals took a different view of the duty of the master to suspend his voyage and await the uncertain results of the rumored negotiations, and held that he had a right to unload the cargo of sulphur when he did. The following quotations sufficiently show the reasoning of the court:

"It seems manifest that, upon the outbreak of war, a voyage with contraband on board to the port of one of the belligerents *might fairly be regarded as a risky piece of [13] business. The suggestion made upon the argument that the naval power of Spain was not such as would induce a 'man of ordinary courage, judgment, and experience' to hesitate to proceed, is of no weight. We may not attribute to the captain of the *Styria* knowledge gained after the event; and indeed this court is not advised of any historical facts which would warrant the conclusion that it was not entirely within the power of Spain, during the first few months of the war, to arrest and search every vessel westward bound through the Straits of Gibraltar, and picking her way along by the lighthouses on the Spanish coast. . . . We do not find it necessary to discuss this branch of the case, because we find in clause (a) abundant authority for a refusal to carry forward the sulphur, while such a condition of affairs existed as that already described as being generally known to exist, when the discharge began on April 27. There is no logical difference between a restraint of princes and rulers exercised by a cruiser, with power to visit, search, and seize, lying 2 leagues off Port Empedocle, and that exercised by a half dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances the owner of contraband cargo (loaded as this was before war broke out) could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. Moreover, it would certainly be unreasonable to require the ship to remain in port with the contraband cargo on board until the war should cease,—a period of months, possibly years. The owners of other cargo not contraband have rights as much, if not more, entitled to consideration than those of the owners who have been unfortunate enough to ship the cargo which has produced the risk. . . . Inasmuch as the master, where the contract was made in time of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband, we fail to see why he should not have the right to land such contraband cargo, with all proper precautions as to safekeeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk or delay by reason of an actual arrest, which would be caused only by the presence *of such contraband cargo. The [14]

ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered. We understand that the district court reached this same conclusion, but found the ship in fault because she did not wait a reasonable period to see if there might not be some reasonable assurance of safety, and held that 'the commencement of the discharge on the 27th was too hasty and precipitate.' This brings us to the next branch of the case.

"When two nations formally proclaim the existence of a state of war between themselves with all the solemnity observed in this instance, it would seem to be going too far to say that parties whose contracts are affected thereby should wait some indefinite time, which a court shall find reasonable, in a vague expectation that the belligerents may think better of it and make peace. A situation is quite conceivable, where delay might fairly be required. Thus the minister of one power or the other might demand his passports, or the day named in an ultimatum might pass without compliance with its requirements, or a squadron of the war vessels of one power might impress seamen from the deck of the war vessel of another power, as the *Carnegie* and her consorts did with the *Baltimore* in 1798, or the war vessel of one power encountering the war vessel of another upon the high seas might pour broadside after broadside into her, as the *Leopard* did with the *Chesapeake* in 1807,—any one of which acts would seem to import the imminence, if not the actual existence, of war, and yet might fall short of being such authoritative evidence of a state of belligerency as would justify a master in treating any part of his cargo as being thereby made contraband. But the situation shown here was a very different one. Both nations had united in proclaiming to the whole world that they were at war, and we know of no reason why the master of any vessel of a neutral nation was bound to wait twenty-four hours, or twenty-four days or twenty-four weeks, to see if the two belligerents would not settle their differences.

"As soon as he learned that war was declared the master knew that the cargo he had taken on board at Port Empedocle was contraband. 'I knew,' says he, 'that [15] sulphur is to make gunpowder. *Everybody knows that. . . . I thought it must be contraband.' We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war. It certainly should be a safe assumption for the master of a neutral vessel to make that he cannot carry such cargo to the ports of one belligerent without risking its seizure by the other; and, in the absence of special circumstances, there would seem to be no necessity to wait for further assurance in that regard. In the case at bar, however, there were special circumstances which will be next considered.

"The exportation of sulphur is one of the greatest industries of the island of Sicily, 186 U. S.

and the Italian government was naturally solicitous that the trade in sulphur with the United States should not be interfered with. It now appears in the record, by reports obtained from diplomatic sources, that shortly after the proclamation of the Queen Regent negotiations were opened by the Italian government to secure a modification of its provisions so that sulphur should not be considered contraband of war. The Spanish government declined to alter the decree, but on April 29, at Madrid, the Spanish Minister for Foreign Affairs 'verbally' [*sic*: orally?] stated to the Italian ambassador that orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war. The same statement was made by the Spanish Minister for Foreign Affairs to the British ambassador on May 6. On May 31 the same Minister stated in an official note to both the Italian and the British ambassadors that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice.

"Not being in telephonic communication with the chancellery of the embassy at Madrid, the master of the *Styria* was not advised of these transactions at the moment they occurred; and his conduct is to be judged, not in the light of exact knowledge acquired after the event, but by such information as may have been available for him at the time and place. As we have seen, he knew certainly on April 27, and probably on April 26, * that war had been declared, [16] and that his sulphur cargo was contraband; that he was, therefore, entitled to land and store it, thus leaving his ship free to carry out her obligations to the rest of the cargo. On April 25 the *Giornale di Sicilia*, a newspaper published at Palermo, and which the captain saw from day to day, stated that Messina merchants had asked their Parliamentary deputy to urge the government to co-operate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filled with reports and rumors as to the progress of this movement to secure exemption. But down to the 6th of May not one of these reports bore the stamp of authority; and no one vouched for their accuracy. The statements in the clippings from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents in Rome, or elsewhere, furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted. It is a variety of merchandise such as always has been contraband. Its exportation to the United States might well be considered an 'aid' to Spain's enemy. No one appears to have suggested that the United States concede the same exemption. On the one hand, it might be urged that it would please the government and people of Italy to grant the request, but, on the other hand, in the case of merchandise so highly contraband, neither

the Italian government nor people could justly take offense if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can see that the hopeful prognostications of the writers for the *Journal of Sicily* were well founded, but there was nothing to give any such assurance at the time they appeared. We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken." 41 C. C. A. 639, 101 Fed. 728.

[17] *We concur in these views of the circuit court of appeals and in the conclusion thereby reached, that the master of the *Styria* was justified in relanding and warehousing the contraband portion of his cargo, and that in so doing he had reasonable regard for the interests of both ship and cargo.

Several leading authorities are cited on this branch of the case in the brief for the *Styria*, and which we shall briefly notice.

Geipel v. Smith, L. R. 7 Q. B. 404, was a case where the defendants had agreed to load a cargo of coal in England and sail to Hamburg. After the charter party had been made war broke out between France and Germany, and the port of Hamburg was blockaded by the French fleet. The defendants refused to carry out the charter party, relying on an exception of restraints of princes and rulers. It was held that they were justified in their refusal. And as to the contention that the defendants were bound to be in readiness to carry the cargo as soon as the blockade should be raised, Cockburn, Ch. J., observed:

"But it would be monstrous to say that in such case the parties must wait—for the obligation must be mutual—till the restraint be taken off,—the shipper with cargo which might be perishable or its market value destroyed,—the shipowner with his ship lying idle, possibly rotting;" and Lush, J., said: "A state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this."

In *Nobel's Explosives Co. v. Jenkins* [1896] 2 Q. B. 326, the plaintiff's goods, which were dynamite and contraband of war, had been placed upon a general ship of the defendant for carriage from London to Yokohama, a bill of lading containing similar clauses with those in the case of the *Styria*. The ship also contained noncontraband goods belonging to other shippers. In the course of the voyage she arrived at Hong Kong, and while there war was declared between China and Japan. There were at the time Chinese war vessels in and around the port of Hong Kong, and it was found that if the master had attempted to sail thence with the plaintiff's goods on board there

would have been danger of their being seized and confiscated. The master *cabled to his owners for advice, and they instructed him to land the cargo at Hong Kong. This was done. The plaintiffs forwarded the dynamite by another steamer several months later, and then brought an action to recover from the defendants the amount of freight which they had to pay for so forwarding, and also for the other expenses for relanding and reshipping the cargo at Hong Kong. The opinion of the court, delivered by Mathew, J., is so pertinent to our case that we extract a considerable portion of it:

"The main ground of defense was the exception in the bill of lading of 'restraint of princes, rulers, or people.' A large body of evidence was laid before me to show that if the vessel sailed with the goods on board she would, in all probability, be stopped and searched. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board he would have been acting recklessly. It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith*, L. R. 7 Q. B. 404, and *Rodoconachi v. Elliott*, L. R. 9 C. P. 518. The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese government that contraband of war should be landed. The analogy of a restraint by a blockade or embargo seems to me sufficiently close. The warships of the Chinese government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary, as was contended by the plaintiff's counsel. There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time. I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception. . . .

*"But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated. In the words of Willes, J., in *Notara v. Henderson*, L. R. 7 Q. B. 225, at p. 237, 'a fair allowance ought to be made for the difficulties in which the master may be involved. . . . The place,

the season,—the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience must be taken into account.” I am of opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo.”

A suggestion of the district judge, and repeated in the argument for the libellants, to the effect that the master was guided in his action in discharging the contraband cargo by a telegram from Burrill & Sons, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time; that if he had been left to exercise his own judgment, he would not have discharged the cargo, especially not at the time he did,—does not appear to us to be supported by the testimony of the captain, which is the only evidence on the subject. It is true that he did state that he acted under instructions of the agents, but he also said, in reply to questions put on cross-examination, as follows:

[20] “Now, captain, you say that you put this brimstone ashore on instructions of the managing owners? A. Yes, and also because I knew that the war was there, and I acted on the *bill of lading clause. Q. You have testified, haven’t you, that all this you did by orders? A. No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deemed it not safe to proceed with the cargo that was declared contraband of war.”

Without transcribing all of the master’s testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with the contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have already said, had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so. So far as the ship-owners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf. In the case of *Nobel’s Explosives Co. v. Jenkins*, just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in ref-

erence to the duty imposed upon him to take reasonable care of the goods intrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners, if it were possible to get it before the emergency was over; and that all that can be said is, that there was a concurrence of judgment between the ship agents and the master as to what was the proper course to pursue.

But, while we concur with the conclusion of the circuit court of appeals, that the master acted discreetly in landing and storing the contraband portion of the cargo when and as he did, we cannot accept the other conclusion of that court that, in the subsequent circumstances, it was the master’s duty to reship the cargo and resume his voyage with the sulphur on board. Indeed, the facts and reasoning which brought the court to its first, seem to us to be quite inconsistent with its latter, conclusion. In its opinion heretofore quoted, the court said that it “was not the duty of the master “to delay[21] action on the expectation that a belligerent would voluntarily abandon one of its weapons on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken.” Yet the court thought that, on May 6, the situation had changed, and that the publication in a newspaper, purporting to be from the Italian Minister of Agriculture, Industry, and Commerce, that the Spanish government had given notice to the commanders of its vessels to let sulphur pass free, was an official declaration, upon the strength of which the master ought to have reshipped the sulphur. That publication, under the date of May 5 and 6, was as follows: “Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23 of the Spanish government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur. . . . I would also state that, in consequence of our request, the Spanish government has given notice to the commanders of its vessels to let sulphur go free.”

The publication of May 7 and 8 was as follows: “The Prefettura, also, with its communication confirms to us that the exportation of sulphur, notwithstanding the Spanish-American war, may continue. Indeed, the Spanish government has officially declared in the circular to the commandants of their ships, that sulphur is not to be considered as contraband of war. An official and public declaration is lacking, but there is no doubt that sulphur will pass freely.”

It must be observed that these assurances did not come from any Spanish, but from Italian, sources. It was for the interest of the Italians to continue to export sulphur, and to give the impression that it could be done with security to the carrying vessels, and all statements from Italian sources must be weighed with reference to that

fact. In the meantime, on May 7, the Styria had sailed, and the master testified that when he was clearing the ship to leave on the 7th of May that he saw a notice from the consul to say that there was a communication from the prefect that it was agreed [22] between Italy and Spain that *sulphur would not be taken, that Spanish vessels had instructions to let it go free, saying: "It was not given officially — only a matter of verbal arrangement. Of course, the verbal arrangement you cannot believe." "On the 7th, in the evening, about eight o'clock, and I already had my clearances." And he further testified, in reply to a question by libellant's counsel, as follows: "Q. But the day before you sailed, on the 7th, you did read in the papers that the governments had come to an agreement — to an understanding? A. Yes,—not to an understanding, not to a safe understanding, but a temporary understanding, you know. Q. To the effect that sulphur temporarily would not be treated as contraband of war? A. Yes. Q. In spite of the previous proclamation, was it not? A. Yes, but the papers said, not officially confirmed, you see. That meant, of course, they could withdraw it at any moment. Q. The newspapers in which you read about these things, were what papers? A. I could not tell you. I believe the Siilian Courier; I don't know; something like that; the paper published in Palermo,—the largest paper published in Palermo."

From this it appears that when the Styria sailed on the evening of May 7 the only information that the captain had was that the newspapers said that a temporary verbal arrangement had been made between Italy and Spain that sulphur might go free, but that the captain's opinion was that a mere verbal arrangement could not be relied on, and that the statements contained in the newspapers could be withdrawn at any moment.

Giving to the evidence every reasonable intendment, it falls far short, in our opinion, of making it the master's duty to change his arrangements to sail on the evening of the 7th of May. The Spanish proclamation of April 23, declaring sulphur to be contraband, had not been withdrawn, and it is evident that the master had no right, in justice to the other cargo owners, to make a longer delay. A perishable cargo of fruit was awaiting the vessel at Palermo, and no one could foretell what the result of the negotiations would be. The master and the ship cannot reasonably be charged with knowledge of subsequent events. And when [23] they are examined they do not show *that, within a reasonable period, any change in affairs was disclosed that would have made it safe beyond question to have sailed with the contraband cargo on board. It was not until May 10 that the British government, replying to Burrill & Sons' previous application for information, telegraphed that orders had been given not to treat sulphur for the present as contraband of war. And by tel-

egram of that date it was further stated that the Spanish government states that "decree already issued cannot be altered," but that, as "temporary measure," naval departments have been ordered not to treat sulphur as contraband of war, "but they lay stress on the fact that the measure is temporary only."

Moreover, it does not appear when such orders were actually given, nor that they had been transmitted to war vessels which had sailed, under the directions of the proclamation of April 23, before such alleged orders were given. It was not until May 31 that the Spanish minister stated, in a note to the English ambassador at Madrid, that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice. It does not appear that any formal agreement was ever made between Spain and Italy, or any other government, that the proclamation of April 23, declaring sulphur contraband of war, was withdrawn. And it is mere matter of conjecture whether, if the Styria had sailed, even as late as May 10, with sulphur on board, and had been arrested by a Spanish war vessel which had not received orders countermanding the proclamation, the sulphur would not have been confiscated by a Spanish prize court. In any event, there was the liability of such an arrest and of the incident delay to both vessel and cargo.

Without protracting the discussion, we are of the opinion that the master was justified in landing and storing the cargo that had become contraband by reason of the outbreak of the war between Spain and the United States, and by the Spanish proclamation of April 23; that, having acted reasonably with due regard to the interest of all concerned in so doing, it was not made his duty, by the facts brought to his notice, to reship the sulphur on the Styria and further delay his voyage.

*The sulphur was subsequently, in pursu-[24] ance of an agreement in writing, after the signing of the peace protocol between the United States and Spain, forwarded on the steamship Abbazia, belonging to the owners of the Styria, to the port of New York. Several questions arose in the courts below, under the terms of that agreement, and chiefly having reference to the measure of damages in case that the vessel was held liable. But as, for the reasons given, we hold that the vessel was not liable, those questions do not call for our consideration.

The decrees of the District Court and of the Circuit Court of Appeals, sustaining the libels of the respective libellants, are hereby reversed; the decrees of the Circuit Court of Appeals reversing the decrees of the District Court, dismissing the respective cross libels, are hereby affirmed, and the causes are remanded to the District Court with directions to take further proceedings in conformity with the opinion of this court.

MONTANA MINING COMPANY, Limited,
Plff. in Err.,
v.
 ST. LOUIS MINING & MILLING COMPAN-
 NY OF MONTANA.

(No. 213.)

MONTANA MINING COMPANY, Limited,
Plff. in Err.,
v.
 ST. LOUIS MINING & MILLING COMPAN-
 NY OF MONTANA.

(No. 214.)

(See S. C. Reporter's ed. 24-32.)

*Appeal—final judgment of circuit court of
 appeals—effect of reversal, on cross writ
 of error, of judgment previously affirmed.*

▲ writ of error from a judgment of the circuit court of appeals affirming a judgment of a circuit court must, together with a writ of error from a separate and subsequent judgment of the circuit court of appeals on a cross writ of error reversing the same judgment of the circuit court, and remanding the cause for a new trial on the question presented by such cross writ of error, be dismissed, as the judgment of the circuit court of appeals first rendered ceased to be final by the operation of the second judgment, which was itself not final.

[Nos. 213, 214.]

Argued April 9, 1902. Decided May 19, 1902.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Montana in favor of plaintiff in an action for trespass, and also to review a judgment reversing the same judgment of the Circuit Court on a cross writ of error, and remanding the cause for a new trial on the question presented by such cross writ of error. *Dismissed.*

See same case below (No. 213) 42 C. C. A. 415, 102 Fed. 430; (No. 214) 44 C. C. A. 120, 104 Fed. 664.

Statement by Mr. Chief Justice **Fuller**:
 This was an action brought by the St. Louis Mining & Milling Company of Montana against the Montana Mining Company in the circuit court of the United States for the district of Montana, to recover damages for trespass on a vein of rock, having its apex entirely within the described premises of plaintiff, and extracting therefrom and converting large quantities of valuable ore.

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Light Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482, and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

186 U. S.

The cause was tried on a second amended and supplemental complaint, which was filed June 26, 1899, and is set forth in the record, but the original complaint and the amended complaint are not. The record contains the original summons, dated September 18, 1893, which ran against the Montana company and sundry individuals, whose citizenship was not stated, though it appeared that they were served in Lewis and Clarke county, Montana, but who seem to have disappeared as parties in the progress of the cause, and who are not parties to the complaint contained in the record.

The 1st paragraph of the second amended and supplemental complaint alleged—

"That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then territory (now state) of Montana, under the corporate name of St. Louis Mining & Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said state, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then territory (now state) of Montana, was and is entitled and authorized to do and transact business in said state."

The 2d paragraph alleged plaintiff "to be the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis quartz lode mining claim, and all the quartz, rock, and ore, and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis lode mining claim, although such veins, lodes, or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis quartz lode mining claim," situated in the county of Lewis and Clarke, Montana, and more particularly described as follows: (Here followed a full description, concluding) "Save and except that portion thereof known as the 30-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour lode mining claim, which said fractional portion of said St. Louis lode mining claim is described as follows, to wit." Here followed description.

The 3d and 4th paragraphs were as follows:

"3. That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour quartz lode mining claim, situate and being east of the said St. Louis lode mining claim, and including the 30-foot strip or compromise ground aforesaid, and

that the discovery, location, and recordation of the said St. Louis lode mining claim and the United States patent therefor was made prior to the discovery, location, and recordation and patent to the said Nine Hour lode mining claim.

"4. That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis mining claim is to the east and dips under and beneath the said Nine Hour lode mining claim, including the said 30-foot strip or the compromise ground, which is a part and portion of the said Nine Hour quartz lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis quartz lode mining claim at a point on the east side line thereof, between corners, Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis quartz lode mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west [27] of the east side line of *said St. Louis quartz lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis quartz lode mining claim, between corners Nos. 1 and 2, with the west line of the said 30-foot strip hereinbefore described; thence south 59 degrees 50 minutes west 108 feet and along the west line of the said 30-foot strip, to a projected parallel end line of said St. Louis quartz lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said 30-foot strip.

"That it is also the owner of, in possession, and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of 25 feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis lode mining claim.

"A map or plat showing the point at which the said vein enters said St. Louis lode mining claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim, is hereto attached, marked Exhibit 'A,' and made a part of this complaint, and to which reference is made."

The Montana Mining Company answered June 30, 1899, in three paragraphs, the first admitting the allegations of paragraphs numbered 1, 2, and 3 of the second amended and supplemental complaint; the 2d paragraph denying each and every other allega-

tion thereof; and the 3d being as follows:

"And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said 30-foot strip or compromise ground, for that heretofore, to wit, on or about the 7th day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed, and delivered to William Robinson, James Huggins, and Frank P. *Sterling, who were and are the [28] predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said 30-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked Exhibit 'A,' and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis lode mining claim, including said 30-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said plaintiff and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said plaintiff and the said Mayger having refused and declining to make, execute, or deliver such a deed, this defendant thereafter, and on or about the 6th day of September, A. D. 1894, commenced an action in the district court of the first judicial district of the state of Montana, within and for the county of Lewis and Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth: that thereafter such proceedings were had in said action as that on the 1st day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute, and deliver to this defendant a good and sufficient conveyance in fee simple absolute, free from all encumbrances, for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order, and decree the said plaintiff, on or about the 1st day of July, A. D. 1895, made and executed a deed to this defendant of and for the said *premises and of all the [29] mineral therein contained, and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereto annexed, marked Exhibit 'B,' and

made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or 30-foot strip aforesaid, or any mineral contained therein."

Replication was filed, the cause tried by the court and a jury, a verdict returned in favor of plaintiff for \$23,209, and judgment rendered thereon. To review this judgment the Montana company prosecuted a writ of error from the circuit court of appeals for the ninth circuit, which writ was dated October 7, 1899, and the judgment was affirmed May 14, 1900. 42 C. C. A. 415, 102 Fed. 430. The writ of error in No. 213 was then allowed.

On the trial the St. Louis company was restricted by the circuit court to damages for ore taken north of what was designated as the 108-foot plane of the Nine Hour claim, but the company insisted on the right to recover for ore taken up to what was designated as the Nine Hour 133-foot plane. Accordingly the St. Louis company took out a cross writ of error from the circuit court of appeals, dated January 30, 1900, and that court reversed the judgment, October 8, 1900, and remanded the cause for a new trial as to the recovery sought for the conversion and value of certain ores between the planes designated as the 108-foot and 133-foot planes. 44 C. C. A. 120, 104 Fed. 664. The writ of error in No. 214 was then brought.

Messrs. W. E. Cullen and Charles J. Hughes, Jr., argued the cause, and, with *Messrs. Edward C. Day, Aldis B. Browne, and Alex. Britton*, filed a brief for plaintiff in error.

Messrs. Thomas C. Bach and Arthur Brown argued the cause, and, with *Messrs. E. W. Toole and H. P. Henderson*, filed a brief for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

[30] The St. Louis company recovered judgment in the circuit court for the sum of \$23,209. This judgment was affirmed by the court of appeals, May 14, 1900, on the writ of error brought by the Montana company.

On the 8th of October, 1900, the court of appeals gave judgment on the cross writ of error of the St. Louis company in these words: "On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is, hereby, reversed, with costs, and the cause is remanded to said circuit court for a new trial as to damages alleged and recovery sought for the conversion and value of certain ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes."

To review these judgments thus separately rendered, the Montana company sued out on the same day, October 24, 1900, two

writs of error from this court, the records returned on which were filed December 18, 1900, and the cases docketed, and now numbered 213 and 214.

The St. Louis company moved to dismiss the writ of error in No. 213 on the ground that the jurisdiction of the circuit court was, according to plaintiff's statement of his own claim, "dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states," and the judgment of the circuit court of appeals was, therefore, not reviewable on error under the 6th section of the judiciary act of March 3, 1891. And at the same time the St. Louis company moved to dismiss the writ of error in No. 214 on the additional ground that the judgment was not a final judgment. This objection is, of course, well taken, and the writ of error must be dismissed. But when, thereupon, the mandate of the court of appeals goes down to the circuit court, if in the meantime we have retained jurisdiction in No. 213, the result would be that part of the case would be pending in the court of original jurisdiction, and part in the court of last resort. And should we differ with the court of appeals and reverse its judgment brought up in No. 213, our mandate would go to the circuit court, which would have been already directed to proceed as to part of the case on other principles. *We do not mean to [31] intimate in the slightest degree any conclusion on the merits, but only wish to indicate embarrassments which might arise if one and the same case is treated as two separate and independent cases.

By rule 22 of this court, appeals and cross appeals are heard together, and the practice is the same as to writs and cross writs of error. Where there are cross appeals or cross writs of error in the circuit courts of appeals in cases in which the decrees or judgments are made final in that court by statute, and the case is brought here on certiorari, we consider only the errors assigned by petitioner, unless a cross writ of certiorari is applied for and allowed. *Hubbard v. Tod*, 171 U. S. 474, 43 L. ed. 246, 19 Sup. Ct. Rep. 14.

In this case two writs of error were sued out by the Montana company because there were two judgments rendered below, but the records on both constitute the record in one and the same case, as both writs of error in the court of appeals ran to the same judgment of the circuit court.

It is said that the complaint described two sections of the vein, one lying north of the 108-foot plane and one between the 108 and 133-foot planes, and that as they were described separately this was equivalent to two counts on distinct causes of action. But we do not understand that this is so, for the complaint is complete in itself, and a single trespass may be committed on several closes and alleged in a single count. Moreover, although set up in two counts, if there were no misjoinder, which is not

pretended here, the recovery would be entire and would require an entire judgment. And as the trial court sustained a recovery as to one part of the vein, and not as to the other, and both parties took bills of exceptions and resorted to the appellate tribunal, we do not think that the judgment as rendered could be retained as a judgment and a retrial had as to so much of the claim as was disallowed. Our attention is not called to any act of Congress or to any rule of practice which authorizes this to be done, nor to any statute or decision of the courts of Montana to that effect, if, indeed, the Federal courts would be obliged to follow such practice if it existed. And the difficulty of the situation is illustrated by the suggestion of counsel that this one action [32] should be regarded "as two actions, over one of which the ground of jurisdiction of the circuit court was dependent solely on diverse citizenship, and over the other, not.

But we are of opinion that the judgment of the court of appeals on the writ of error prosecuted by the St. Louis company operated to reverse the prior judgment of affirmance, inasmuch as the court in terms reversed the judgment of the circuit court, although imposing a limitation on the extent of the new trial awarded. Even if the court of appeals had power to impose that limitation, the issue so reserved deprived the first judgment of finality so far as our jurisdiction is concerned. *Covington v. First Nat. Bank*, 185 U. S. 270, ante, 906, 22 Sup. Ct. Rep. 645.

The answer to the complaint consisted of a general denial and an affirmative defense that the plaintiff had granted by contract, and afterwards by deed enforced by a decree of court, a 30-foot strip along a portion of its side line, and the trial court held that the plaintiff could not recover for the 25-foot section between the two planes, but that it could recover northerly from the 108-foot plane. Each party was defeated in some part of its contention, and each party took the case to the court of appeals, but the decision of that court left a part of the case undisposed of in the court below. The judgment of reversal being before us in No. 214, we are not compelled to ignore its effect on the judgment in No. 213, and to entertain one writ of error while dismissing the other. *Butler v. Eaton*, 141 U. S. 243, 35 L. ed. 714, 11 Sup. Ct. Rep. 985; *Kimball v. Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; *Mills v. Green*, 159 U. S. 654, 40 L. ed. 294, 16 Sup. Ct. Rep. 132; *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 84, 27 L. ed. 65, 1 Sup. Ct. Rep. 10.

When these writs of error were taken out the judgment first rendered had ceased to be final by the operation of the second judgment, which was itself not final, and the result is that both must be dismissed.

Writs of error dismissed.

Mr. Justice **Gray** did not hear the argument and took no part in the decision.

*ALPHONSE EMSHEIMER, *Appt.*, [33]

v. s.

CITY OF NEW ORLEANS.

(See S. C. Reporter's ed. 33-48.)

Appeal—certified question—diverse citizenship as ground of Federal jurisdiction.

1. Questions presented for determination by a certificate from the circuit court of appeals will not be answered by the Supreme Court of the United States, where the certificate contains no statement of the facts on which the question certified arises, as required by rule 37 of the latter court, but the entire record is certified, and the questions contemplate an examination of the whole case, and, in large part, its decision on the merits.
2. A circuit court of the United States has jurisdiction, on the ground of diverse citizenship, of a suit by the assignee of the payees of police warrants, if such payees might, at the time the suit was commenced, have themselves prosecuted suit therein on that ground if there had been no assignment or transfer.

[No. 347.]

Argued March 19, 20, 1902. Decided May 19, 1902.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit presenting a question as to the jurisdiction of a circuit court on the ground of diverse citizenship. *Jurisdiction sustained.*

Statement by Mr. Chief Justice **Fuller**:
The certificate in this case is as follows:

"This suit was commenced by filing in the circuit court the following bill and exhibit, filed November 13th, 1899:

"To the honorable the judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, New Orleans division:

"Alphonse Emsheimer, of New Orleans, an alien and a subject of the Empire of Germany, brings this his bill against the city of New Orleans, a municipal corporation created by the laws of Louisiana, and a citizen of said state. And thereupon your orator complains and says:

"1st. That by an act of the legislature of Louisiana (No. 74), approved September 14th, 1868, the parishes of Orleans, Jefferson, and St. Bernard were territorially united in one district for the purpose of police government therein called the 'metropolitan police district of New Orleans, state of Louisiana;' that the government of said dis-

NOTE.—As to definiteness of a question to be certified—see note to *Waco Water & Light Co. v. Waco (Tex.)* 31 L. R. A. 392.

As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & I. Co. (C. C. W. D. Va.)* 1 L. R. A. 108, and note; *Myers v. Murray, N. & Co. (C. C. S. D. Iowa)* 11 L. R. A. 216, and note. And see note *Roberts v. Lewis*, 36 L. ed. U. S. 579.

trict for police purposes was vested in a board of commissioners, styled 'the board of metropolitan police.'

[34] "2d. That said board was required to appoint all the officers *and employees of the police force required in said district, and their salaries (which were prescribed by the act) were required to be paid monthly; that by said act and acts of said legislature, supplementary to and amendatory thereof, said board was required to make annually an estimate of the expenses of maintaining a police force in said district, and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay, and to provide the means for promptly paying, the amounts thus apportioned to them.

"3d. That said city of New Orleans was a municipal corporation created by the laws of said state of Louisiana, and was within said metropolitan police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said metropolitan police and apportioned the same to said several cities and parishes as required by said acts.

"4th. That the apportionments made by said board aforesaid to the city of New Orleans for all the years from 1869 to 1876, inclusively, amounted to the sum of \$6,033,030.51, and when said apportionments were made and notified, as they were to said city, she became liable to said board of metropolitan police for the amount thereof.

"5th. That like apportionments of police expenses were made by said board to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments they each became liable to said board, but afterwards, by acts of said legislature, said cities were consolidated with said city of New Orleans, which by said acts of consolidation was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

"Your orator has not sufficient information to state the amount of the liabilities thus created and imposed upon said city of New Orleans, but avers, upon information and belief, that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

[35] "6th. That like apportionments were made by said board of police expenses to be paid by said parishes of Jefferson and *St. Bernard and the city of Kenner, all within said police district, and notice given to each of said corporations thereof, as required by law, and thereupon they became and were absolutely liable to said board for the amount of their respective apportionments; but what the amounts of said apportionments were complainant is unable to state, but avers that they were sufficient to meet the annual police expenses within their respective jurisdictions.

"7th. That while said cities and parishes within the police district were required to promptly pay and to provide the means for promptly paying their respective appor-

tionments, the councils of said cities and the police juries of said parishes were authorized to raise the amount required for that purpose by levying taxes upon the persons and things subject to taxation within their respective jurisdictions, and for that purpose did severally make such levies, and your orator avers that said city of New Orleans annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority levied and collected taxes for the purpose of paying the same, and paid upon account thereof large sums of money, but not enough to discharge her liability in the premises, there still being due upon account thereof, including Carrollton, the sum of two hundred and forty-one thousand, one hundred and six and $\frac{54}{100}$ dollars (\$241,106.54), and the defendant, the present city of New Orleans, successor of said city, as existing at the time said apportionments were made, is liable therefor.

"8th. And your orator avers that said city of New Orleans was and is a statutory trustee of the money derived from such taxation, and collected by her for the purpose of paying said apportionments of police expenses; that ever since said several levies of such taxes said city has been, and still is, making collections thereof, and has collected large sums of money on account thereof, for which she has failed to account and still holds subject to said trust, the amount thereof being to your orator unknown; that for a portion of such collections a receiver was appointed by the civil district court for the parish of Orleans with the consent of said city, to whom said city on July 25th, 1888, *paid the sum of thirty thousand nine hundred and forty-four $\frac{94}{100}$ dollars (\$30,944.94) part and parcel of the moneys derived from the collection of such taxes as well as other small sums thereafter, the amount and date of payment of which is to your orator unknown. [36]

"And your orator avers that afterwards, to wit, on the 27th of December, 1890, said receiver died, and that said board has been since then, and is now, without any successor or representative, and its affairs are under no administration whatsoever; that said city of New Orleans has since the death of said receiver continued to collect said police taxes, and is still collecting the same, the amount of such collections being to your orator unknown, but he avers that it is a large amount, no part of which she has applied to the payment of any of her indebtedness on account of said apportionments; and that she holds the same subject to said trust as above averred.

"And your orator avers that large amounts of said police taxes levied, as aforesaid, became delinquent, and thereafter interest accrued thereon at the rate of 10 per cent per annum: that said city of New Orleans collected large amounts of such interest, which, as accessory to said taxes, should have been paid to said police board, but which she neglected and refused, in viola-

tion of her duty as trustee, to apply to the payment of said apportionments, and she should be required to account for the same with interest thereon; that the amount of police taxes, as well as the interest thereon, so as aforesaid collected, is unknown to your orator, and he is entitled to an account thereof from said city before one of the masters of this honorable court, or otherwise, as your honors may direct.

"9th. That said board of metropolitan police, in obedience to the laws creating and governing the same, organized a metropolitan police force in said district and maintained the same until March 31st, 1877, when said act No. 74 of September 14th, 1868, establishing said metropolitan police district, as well as all other acts amendatory thereof and upon the same subject-matter, were repealed, and said board of metropolitan police was abolished without any provision being made for the liquidation of its affairs, or the payment of its debts.

[37] "10th. That said board of metropolitan police was a body corporate under the laws of its creation, and by the repeal of said law, ceased to be and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complaint herein, and he is remediless, except in this honorable court, where matters of this nature are cognizable and relievable, wherefore he brings this his bill in behalf of himself and all other creditors of said board, similarly situated, who may come in and contribute to the expense of this suit.

"11th. That one Lew Goldstein, as holder of a large amount of metropolitan police warrants, issued to officers and members of the metropolitan police, and assignee of sundry creditors of said board of metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court in and for the parish of Jefferson, Louisiana, against said city of New Orleans, said city of Kenner and said parishes of Jefferson and St. Bernard, in behalf of himself and all other creditors of said board, similarly situated, praying the appointment of a receiver and enforcement of the liabilities of said several defendants, for the purpose of paying and discharging the obligations of said board; that citation was served on the 26th of October, 1886, upon each of said defendants to appear and answer in said suit, and afterwards said suit was removed into this honorable court, where holders of warrants and claims against said board, amounting to a much larger sum, appeared before the master appointed by the order of the court, and proved their demand, the claims now held by your orator being among those so presented and proved, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the city of New Orleans was afterwards dismissed upon the ground that this court had not acquired jurisdiction thereof; but as to all other defendants the same still remains pending and undisposed of.

"That afterwards, to wit: February 9th, 1891, Henry W. Benjamin exhibited and filed his bill of complaint in this honorable court against said city of New Orleans and others for an account of the sums due by said defendants, applicable to the *payment [38] of the certificates and claims against said police board held by him, being the same claims upon which said Goldstein brought suit as aforesaid, and which said Benjamin had acquired; that various persons having like claims against said police board intervened in said suit and proved the same before the master therein; that among said claims sued upon by said Benjamin and said interveners were included the obligations and claims since acquired and now held and owned by your orator, hereinafter enumerated and described; that process of subpoena in said case was duly served upon said city of New Orleans February 9th, 1891, that she afterwards appeared and answered and a final decree was made against her in favor of said complainant, and the interveners therein establishing their claims and decreeing the said city to pay the same, which suit was afterwards dismissed for want of jurisdiction in this honorable court, but without prejudice to a new bill, which decree became final January 31st, 1898.

"12th. That your orator is the holder and owner of certificates issued by said board of metropolitan police in acknowledgment of its indebtedness for services rendered to it by the persons therein named and of transfers of debts due by said police board, amounting to three thousand, thirty and forty-eight-100 dollars (\$3,030.48), a list whereof is hereto annexed as Exhibit 'A,' and made a part of this bill; that said claims have been duly assigned and transferred to your orator for a valuable consideration, and he is now the holder and owner thereof.

"And your orator avers that each of said persons in whose favor said claims accrued, and to whom said certificates were issued, or their heirs or legal representatives, are citizens respectively of states other than Louisiana, and competent as such citizens to maintain suit in this honorable court against said defendant for the enforcement of said indebtedness, represented by said certificates and transfers, if no assignment or transfer thereof had been made, the citizenship of said persons being as follows, viz.:

"Said D. M. Moore is a citizen of the state of New York.

"Said Eli Jones is a citizen of the state of Texas.

"Said Peter Joseph is a citizen of the [39] state of Colorado.

"Said Robert Crofton is a citizen of the state of Mississippi.

"Said W. C. Bodechtel is a citizen of the state of California.

"Said J. H. Moore is a citizen of the state of Colorado.

"Said Edward Masterson is a citizen of the state of Ohio.

"Said John Dinan is a citizen of the state of Ohio.

"Said F. Coleman is a citizen of the state of Ohio.

"Said R. H. Taylor is a citizen of the state of Illinois.

"Said W. H. Murphy is a citizen of the state of Michigan.

"Said G. H. Hamersley resided in and was a citizen of the state of California, until he died recently, leaving two sons, G. H. Hamersley and — Hamersley, as his sole heirs, who are also citizens of the state of California.

"Said Dr. J. B. Cooper resided in and was also a citizen of the state of California, where he died leaving Mrs. Catherine E. Cooper, his widow in community, as sole heir under the laws of said state of which she is a citizen.

"15th. And your orator further shows and avers that there are now outstanding, due and unpaid, other warrants and certificates issued by said board of metropolitan police, and sums due and owing by it, for services rendered and supplies furnished thereto, amounting to a large sum, the exact amount thereof being unknown to your orator, but he avers upon information and belief that, including interest thereof, the amount exceeds two hundred thousand dollars (\$200,000); that the only assets of said board of metropolitan police, at the time it was abolished, were the amounts due to it by the said city of New Orleans, and by other municipal corporations within said police district; that the amount due by said city as aforesaid is applicable to the payment of the claims held and owned by your orator as aforesaid, the same being for services rendered within said city, and that he is entitled to an accounting by said city, in order that the amount due by her may be ascertained and fixed and decreed to be paid, and applied to the payment of your orator's claims, and of such others as shall join herein and contribute to the expense of this suit.

"In consideration whereof and inasmuch as your orator has not a complete and adequate remedy at law to the end therefore [40] that*the said defendant may, if she can, show why your orator should not have the relief hereby prayed, and that she may full, true, and perfect answer make to all and singular the premises (but not under oath, the oath thereto being expressly waived); that an account be taken before a master to be appointed by the court, of the amount of taxes collected by the defendant on account of the assessments and levies of taxes for police purposes, as set forth in the bill, and of the amounts due by the defendant on account of the apportionments aforesaid due by her, and that the defendant may be decreed to pay into the hands of a receiver the amount of said taxes collected, with interest thereon, since the same have come into the hands of the defendant, and a sufficient amount of the said apportionments as trust funds, to meet the demands of the complainant and other

creditors similarly situated who may come into this cause and take the benefit of these proceedings, and all expenses and costs; and that the same be applied to their payment."

Then followed prayer for process and for general relief and signatures of counsel; also Exhibit "A," "list of certificates of indebtedness of board of metropolitan police and claims against it held and owned by said complainant." These were in small amounts, some of them dated in October, November, and December, 1874, some in December, 1875, and some in November and December, 1876. The original payees were D. M. Moore, Eli Jones, Peter Joseph, Robert Crofton, W. C. Bodechtel, Edward Masterson, R. H. Taylor, John Dinan, G. H. Hamersley, W. H. Murphy, F. Coleman, and Dr. J. B. Cooper.

The city demurred to the bill on the ground that the circuit court had no jurisdiction as such for want of proper averments of diverse citizenship; that necessary parties were lacking; that plaintiff had not stated a case entitling him to the relief prayed; and that the remedy was at law, and not in equity. On hearing the circuit court entered the following decree:

"This cause came on to be heard at a former day upon the demurrer to the bill, filed by defendant, and after arguments from counsel, was submitted.

"*On consideration thereof for the rea-[41] sons on file:

"It is ordered that the defendant's first ground of demurrer be and the same is hereby overruled, the court finding and decreeing that the allegations of the citizenship of the complainant, of the original payees, and of the city of New Orleans are fully sufficient.

"It is further ordered that defendant's third and fourth grounds of demurrer are hereby sustained, the court finding and decreeing that there is no equity in the bill of complaint herein, and said bill is therefore dismissed for want of equity with full reservation of complainant's right to sue and proceed at law."

"The complainant below prosecuted an appeal to this court, and assigns herein errors as follows:

"1st. Said circuit court erred in sustaining the demurrer to the complainant's bill, and in dismissing the same.

"2d. Said court erred in holding that complainant's bill does not state a case within the jurisdiction of a court of equity.

"Wherefore, for the errors assigned, and others manifest in the record, said complainant prays that said decree be reversed and said cause reinstated to be proceeded with according to law."

"And now at this term this cause came on to be heard on the transcript and was argued,—

"Whereupon, for the proper decision of the case, this court, desiring the instruction of the honorable, the Supreme Court of the United States, certifies to that court the fol-

lowing questions and propositions of law arising on the record, to wit: 1. This being a suit brought by an assignee to recover the contents of choses in action, does the bill state sufficient facts to give the court jurisdiction on the ground of diverse citizenship? 2. Under the facts stated in the bill and under the proper construction of act No. 35 of the Laws of Louisiana, approved March 31, 1877, can the city of New Orleans, as a legal successor of the defunct metropolitan police board, be held liable to the complainant as the holder of valid outstanding certificates of indebtedness issued by the late board of [42] *metropolitan police for the amounts due on said certificates? 3. Under the facts stated in the bill, can the complainant maintain a suit in equity in the circuit court of the United States for the eastern district of Louisiana against the city of New Orleans for the establishment of a fund out of which he in common with other creditors of the late metropolitan police board may be paid *pro rata* upon their claims?"

Mr. J. D. Rouse argued the cause, and, with Mr. William Grant, filed a brief for appellant:

The right of an assignee of a chose in action to sue thereon in the United States circuit court, he himself having the requisite citizenship to sue therein, depends upon the capacity of the assignor to sue therein at the time the suit is brought.

Kirkman v. Hamilton, 6 Pet. 20, 8 L. ed. 305; *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; *White v. Leahy*, 3 Dill. 378, Fed. Cas. No. 17,551; *Portage City Water Co. v. Portage*, 102 Fed. 769; *Chamberlain v. Eckert*, 2 Biss. 126, Fed. Cas. No. 2,577; *Thaxter v. Hatch*, 6 McLean, 68, Fed. Cas. No. 13,866; *Mollan v. Torrance*, 9 Wheat. 537, 6 L. ed. 154; *Jones v. Shapera*, 6 C. C. A. 423, 13 U. S. App. 481, 57 Fed. 457; *Milledollar v. Bell*, 2 Wall. Jr. 334, Fed. Cas. No. 9,549; *Wilson v. Fisher*, Baldw. 133, Fed. Cas. No. 17,803.

Mr. Frank B. Thomas argued the cause, and, with Mr. Samuel L. Gilmore, filed a brief for appellee:

Where a chose in action has passed from the original holder through the hands of third parties, averment of the diverse citizenship of the intermediate holders is necessary to maintain a suit in the circuit court of the United States.

Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173.

Federal jurisdiction depends upon citizenship. A party whose citizenship is not set out in the pleading is presumed to be a citizen of the same state as the defendant.

United States Nat. Bank v. McNair, 56 Fed. 323.

It is the citizenship of the intervening assignees upon which depends the jurisdiction in this case: the requisite citizenship of these does not appear upon the face of the bill.

Mollan v. Torrance, 9 Wheat. 537, 6 L.

ed. 154; *Turner v. Bank of North America*, 4 Dall. 8, 1 L. ed. 718; *Morgan v. Gay*, 19 Wall. 81, 22 L. ed. 100.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is a certificate under § 6 of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), and it is settled as to such certification that each question propounded must be a definite point or proposition of law clearly stated, so that it can be definitely answered without regard to other issues of law in the case; that each question must be a question of law only, and not of fact, or of mixed law and fact; and that the certificate cannot embrace the whole case, even where its decision turns on matter of law only, and even though it be split up in the form of questions. *Graver v. Faurot*, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799; *Cincinnati, H. & D. R. Co. v. McKeen*, 149 U. S. 259, 37 L. ed. 725, 13 Sup. Ct. Rep. 840.

Rule 37 provides: "Where, under § 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises." In this case there is no such statement, but the entire record is certified, and the questions contemplate an examination of the whole case and in large part its decision on the merits.

We cannot regard this certificate as in compliance with the rule, and are constrained to decline to answer the second and *third questions, but we think we may prop[43] erly answer the first question in view of the narrow limits by which it was apparently intended to be circumscribed.

The judicial power extends to controversies between citizens of different states; and between citizens of a state and citizens or subjects of foreign states; but the judiciary act of 1789 provided that the district and circuit courts of the United States should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange" (1 Stat. at L. 78, chap. 20, § 11); and the same provision of the act of March 3, 1887, as corrected by that of August 13, 1888, is in these words: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 Stat. at L. 433, 434, chap. 866, § 1.

To prevent abuse of the constitutional right to resort to the Federal courts, juris-

diction in respect of assignees or transferees was thereby denied except as to suits upon foreign bills of exchange, suits upon choses in action payable to bearer and made by a corporation, and suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made. *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. Rep. 329.

The bill shows that at the time this suit was brought the circuit court had jurisdiction as between plaintiff and defendant, and also that the payees of these warrants might themselves then have instituted it, if there had been no assignment or transfer. We lay out of view as inapplicable the limitation on amount prescribed as to parties plaintiff by another clause with a different purpose.

But it is objected that the restriction re-
[44]lates to the time when *the paper was assigned, and not to the time of the commencement of the suit; and that if there were intermediate assignees jurisdiction in respect of them must appear, and does not appear on the face of this bill.

We are of opinion that the inquiry is to be determined as of the date when the suit is commenced. Jurisdiction vests then and cannot be divested by subsequent change of residence; but jurisdiction cannot be held to have vested prior to action brought. There have been many decisions to this effect, the same question being presented under all the acts from 1789.

In *Chamberlain v. Eckert*, 2 Biss. 126, Fed. Cas. No. 2,577, Judge Drummond held that the time of the commencement of the suit determined the question; and, among other things, said: "But if the rule contended for by the defendant is the true rule, then no change in the status of the payee, after the assignment, could ever enable a party to bring a suit, and it might happen, where the note was executed by the maker to the payee of another state, and at the time of the commencement of the suit in the Federal court, he was of the same state with the maker, the suit could be maintained by the assignee, a citizen of another state, because you have to look according to the view of the defense, to the status of the parties at the time that the assignor held the note. And if he ever could have prosecuted the suit, the assignee could prosecute it, although at the time when the suit is brought the payee and maker are citizens of the same state. That would be the necessary consequence, and the question recurs, What does the language of the statute mean, 'unless the suit might have been prosecuted in said court, if no assignment had been made?' I think it means at the time the suit was prosecuted, so that if it appears then that the assignor could have maintained the suit if no assignment had been made, the assignee, being a citizen of another state, can maintain the suit." And see *Thaxter v. Hatch*, 6 McLean, 68, Fed. Cas. No. 13,866.

In *White v. Leahy*, 3 Dill. 378, Fed. Cas. 186 U. S.

No. 17,551, the same conclusion was announced by Judge Dillon. The suit was a bill to foreclose, brought in the circuit court for the district of Kansas by plaintiff, a citizen of Missouri, as the assignee of a note and mortgage. The maker and payee of the note were citizens of Kansas, *and were such [45] at the time the note and mortgage were made and the payee indorsed the note and assigned the mortgage, and delivered the same to plaintiff in Missouri. But at the time the suit was brought the payee was a citizen of Texas. Judge Dillon said: "If no assignment of this note had been made, the assignor might, being at the time when suit was brought a citizen of Texas, have then commenced it; and under the statute his assignee has the same right. If the restriction on the assignee does not exist at the time suit is commenced, the court has jurisdiction if the case involves the requisite amount and is between a citizen of a state where the suit is brought and a citizen of another state."

The same ruling was made by the circuit court of appeals for the fifth circuit in *Jones v. Shapera*, 6 C. C. A. 423, 13 U. S. App. 481, 57 Fed. 457, and the foregoing and other cases were cited. See also *Portage City Water-Co. v. Portage*, 102 Fed. 769.

In *Milledollar v. Bell*, 2 Wall. Jr. 334, Fed. Cas. No. 9,549, which was a bill to foreclose, complainant, the mortgagee, was a citizen of New York, and defendant was a citizen of New Jersey, but there had been intermediate assignments. Mr. Justice Grier said: "The complainant's case is therefore within the strict letter of the law; nor can we discover anything in the spirit, equity, or policy of the act, or in adjudged cases, which would compel us to give it a construction such as the defendant asks. The statute does not take from the assignee of a chose in action his right to sue in the courts of the United States, unless his immediate assignor could have sustained such action; but only in case the court could have had no jurisdiction as between the original parties to the instrument, if no assignment had been made. The situation or rights of temporary intermediate assignees, holders, or indorsers enter not into the conditions of the case."

Wilson v. Fisher, Baldw. 133, Fed. Cas. No. 17,803, was approved. There a citizen of New York had obtained a judgment against a citizen of Pennsylvania in the supreme court of that state. The judgment was assigned to citizens of Pennsylvania, and subsequently to complainant, who was an alien, and jurisdiction was sustained; *Hopkinson, J.*, saying: "The suit cannot be maintained *here unless it might have been [46] prosecuted here if no assignment had been made; that is, as we understand it, if it had remained with the original parties to the transaction, contract, or cause of action. The law does not declare that no assignee shall prosecute his suit in this court unless his assignor might have done so; but, unless

a recovery of the right claimed might have been had in this court if no assignment of it had been made; and of course in every case in which a recovery might have been prosecuted in the courts of the United States if no assignment had been made, it may be so prosecuted after such assignment to a party competent to sue here."

In *Kirkman v. Hamilton*, 6 Pet. 20, 8 L. ed. 305, where the payees of a note and the makers thereof were citizens of Tennessee, and before the note became due the payees became citizens of Alabama and indorsed it to a citizen of Alabama, the jurisdiction of the circuit court for the western district of Tennessee of a suit brought by the holder of the note was upheld because the payees could have prosecuted a suit to recover the contents of the note in that court if no assignment had been made. But it is to be observed that the payees were not only citizens of Alabama when the suit was commenced, but when the note was assigned.

In *Mollan v. Torrance*, 9 Wheat. 537, 6 L. ed. 154, the declaration contained two counts. The first was against the defendant, Torrance, as indorser of a promissory note made by Spencer and Dunn, payable to Sylvester Dunn, and indorsed by him to Torrance, by whom it was indorsed to Lowrie, and by him to plaintiffs. The other count was for money had and received by Torrance to plaintiffs' use. The declaration stated plaintiffs to be citizens of New York, and defendant to be a citizen of Mississippi, but was silent "respecting the citizenship or residence of Lowrie, the immediate indorsee of Torrance, through whom the plaintiffs trace their title to the money for which the suit is instituted."

The ruling in *Young v. Bryan*, 6 Wheat. 146, 5 L. ed. 228, "that an indorsee who resides in a different state may sue his immediate indorser, residing in the state in which the suit is brought, although that indorser be a resident of the same state with [47] the *maker of the note," was affirmed, but it was pointed out that, "in this case the suit is brought against a remote indorser, and the plaintiffs, in their declaration, trace their title through an intermediate indorser, without showing that this intermediate indorser could have sustained his action against the defendant in the courts of the United States. The case of *Turner v. Bank of North America*, 4 Dall. 8, 1 L. ed. 718, has decided that this count does not give the court jurisdiction. But the count for money had and received to the use of the plaintiffs being free from objection, it becomes necessary to look farther into the case." The record showed that defendant Torrance had filed a plea to the jurisdiction, in which he stated that the promises laid in the declaration were made to Lowrie, and not to plaintiffs, and that Lowrie and defendant were both citizens of the state of Mississippi. Plaintiffs demurred to this plea, the demurrer was sustained, and judgment rendered for defend-

ant. The court overruled the plea because it averred that Lowrie and defendant were citizens of Mississippi at the time of the plea pleaded, not that they were citizens of the said state at the time the action was brought; and Chief Justice Marshall said: "It is quite clear that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events. Since, then, one of the counts shows jurisdiction, and the plea does not contain sufficient matter to deny that jurisdiction, we think that judgment ought not to have been rendered on the demurrer in favor of the defendant." The judgment was reversed and the cause remanded.

That was a suit on the distinct contract between indorsee and indorser, but as plaintiff was not the immediate indorsee, and made title through Lowrie, who was, the court held that the first count should have shown the competency of the latter to invoke the jurisdiction at the time the suit was brought.

The general rule is that when a note or bill is indorsed in blank the bona fide holder of it may write an indorsement to himself or to another over the indorser's name, and where there are several indorsements in blank he may fill up the first one to himself, or may deduce his title through all of them. **Evans v. Gee*, 11 Pet. 80, 9 L. ed. 639; 1[48] Dan. Neg. Inst. 4th ed. §§ 693, 694, 694a.

However, this bill does not trace title through any intermediate assignee, and, on the contrary, does so directly from the original payees. It is true that there are averments that in a proceeding by one Goldstein, still pending and undisposed of in the circuit court, against other parties than the city of New Orleans, these claims, "now held" by complainant, were presented and proved, the master's report thereon being referred to but not set out; and also that in a suit by one Benjamin and certain interveners, brought against the city of New Orleans in the circuit court, and subsequently dismissed without prejudice, these claims, "since acquired and now held and owned by" complainant, were included; and while this shows that these warrants must have passed through the hands of others than complainant, it does not appear that there was any indorsement of them other than in blank, and on the bill as framed complainant distinctly appears to be assignee of the payees. What complications may emerge hereafter in respect of the prior cases, or either of them, need not be considered.

We answer the first question by saying that on the face of the bill the circuit court had jurisdiction on the ground of diverse citizenship.

It will be so certified.

Mr. Justice Gray did not hear the argument, and took no part in the decision.

[49]*R. W. McCLAUGHRY, as Warden of the United States Penitentiary at Fort Leavenworth, Kansas, *Appt.*,
v.

PETER C. DEMING.

(See S. C. Reporter's ed. 49-70.)

Courts-martial—trial of volunteers by officers in Regular Army of the United States—consent as waiver of objection to jurisdiction—review by habeas corpus.

1. The Volunteer Army of the United States raised under the act of Congress of March 2, 1899 (30 Stat. at L. 977, chap. 352), is "other forces" within the meaning of the 77th article of war, declaring that "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces," although the volunteer troops organized under that act were mustered directly into the service of the United States without regard to state or territorial lines.
2. A court-martial entirely composed of officers in the Regular Army of the United States, who, by the 77th article of war, are "not competent to sit on courts-martial to try the officers or soldiers of other forces," is without jurisdiction to try an officer or soldier of such other forces when convened for that sole purpose.
3. Consent can confer no jurisdiction on a court-martial composed entirely of officers of the Regular Army of the United States in direct violation of the 77th article of war, which declares that such officers shall not be competent to sit on courts-martial to try the officers or soldiers of other forces.
4. The invalidity of a court-martial constituted entirely of officers in the Regular Army of the United States in direct violation of the 77th article of war, declaring that such officers "shall not be competent to sit on courts-martial to try the officers or soldiers of other forces" can be raised on habeas corpus.

[No. 610.]

Argued April 28, 29, 1902. Decided May 19, 1902.

A PPEAL from the Circuit Court of the United States for the District of Kansas to review an order discharging a prisoner on habeas corpus in accordance with the judgment of the Circuit Court of Appeals for the Eighth Circuit. *Affirmed.*

See same case below, in Circuit Court of Appeals, 113 Fed. 639.

Statement by Mr. Justice **Peckham**:

A petition for a writ of habeas corpus was presented to the circuit court of the United States for the district of Kansas, first division, asking that Peter C. Deming, once

a captain in the subsistence department of the Volunteer Army of the United States, might be produced by Robert W. McClaughry, the appellant herein, in whose custody Deming was placed, McClaughry being the warden of the United States prison at Fort Leavenworth, Kansas.

On the part of Deming it was shown in the petition that he was imprisoned and restrained by virtue of a sentence imposed upon him by a general court-martial of the United States, convened at the Presidio of San Francisco, California, by William R. Shafter, Major General, United States Volunteers, and Brigadier General of the United States Army, retired, being of the age of sixty-four years. The sentence imposed upon Deming by the court-martial was that he should be dismissed from the service of the United States, and be confined in such penitentiary as the reviewing authority might direct for the period of three years, and that the crime, punishment, name, and place of abode of the accused should be published in the newspapers in and about the city of San Francisco, and in the state where the accused usually resided. The sentence was approved by the Secretary of War and affirmed by the President of the United States on June 8, 1900.

The petition further showed that the court-martial which imposed the sentence was convened by virtue of the following order:

*Special Orders. } [50]
No. 65. }

Headquarters Department of California.

San Francisco, Cal., March 29, 1900.

7. A general court-martial is appointed to meet at the Presidio of San Francisco, California, at 11 o'clock A. M., on Tuesday, the 3d proximo, or as soon thereafter as practicable, for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers.

Detail for the court:

Colonel Jacob B. Rawles, 3rd Artillery.

Lieutenant Colonel Richard I. Eskridge, 23rd Infantry.

Major Louis H. Rucker, 6th Cavalry.

Major Benjamin C. Lockwood, 21st Infantry.

Captain Frank West, 6th Cavalry.

Captain Carber Howland, 4th Infantry.

Captain Sedgwick Pratt, 3rd Artillery.

Captain Henry C. Danes, 3rd Artillery.

Captain Charles A. Bennett, 3rd Artillery.

Major Stephen W. Groesbeck, judge advocate, U. S. Army, judge advocate.

[Seal.]

The court is empowered to proceed with the business before it with any number of

NOTE.—On the jurisdiction of the United States courts on habeas corpus—see *Re Reinitz* (C. C. S. D. N. Y.) 4 L. R. A. 236, and note. See also notes to *State ex rel. Cochran v. Winters* (Kan.) 10 L. R. A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus
186 U. S.

—see notes to *State v. Jackson* (C. C. E. D. Tenn.) 1 L. R. A. 373; *Bion's Appeal* (Conn.) 11 L. R. A. 694; *United States v. Hamilton*, 1 L. ed. U. S. 490; *Ex parte Carlil*, 27 L. ed. U. S. 288; *Cortes v. Jacobus*, 34 L. ed. U. S. 464; and *Pearce v. Texas*, 39 L. ed. U. S. 164.

185 U. S.

members present not less than the minimum prescribed by law, the above being the greatest number that can be convened without manifest injury to the service.

Such journeys as Colonel Rawles, Major Groesbeck, and Captain Pratt may be required to make between their respective stations and the Presidio of San Francisco, in attending the meetings of the court, are necessary for the public service.

By command of Major General Shafter:

J. B. Babcock,
Assisiant Adjutant General.

It was further shown in the petition that Deming was an officer in the Volunteer Army and forces of the United States, and that the members of the court-martial above named, and who tried him, were all officers in the Regular Army, and it was averred that he could not legally or lawfully be tried [51] by a court-martial* composed of such officers, because it would be in direct violation of the 77th article of war, § 1342, Revised Statutes of the United States, which reads as follows:

"Article 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article 78."

"Article 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present, and duly authorized, shall be obeyed."

It was further averred in the petition that Deming was tried and convicted without due process of law and in violation of the 5th Amendment of the Constitution of the United States; that the court-martial was an illegal one and without warrant of law, and the sentence imposed upon Deming was without warrant or authority of law, illegal and void. A writ of habeas corpus was prayed for, to be directed to the warden, commanding him to have the body of Deming before the court. This petition was sworn to in behalf of Deming by the petitioner J. H. Atwood.

Upon that petition the writ issued, and the warden, in compliance therewith, produced Deming and made return to the writ in substance, as follows: That William R. Shafter was a major general of volunteers, exercising command of the Department of California, by virtue of an assignment of the President of the United States, as Commander-in-Chief of the Army; that on March 29, 1900, pursuant to authority and in conformity with the provisions of article 72 of the articles of war, General Shafter appointed a general court-martial, by special orders, to meet at the Presidio of San Francisco on April 3, 1900, or as soon thereafter as practicable, for the trial of Peter C. Deming, assistant commissary of subsistence, United States Volunteers, the detail

of which court-martial was then stated, and which was the same as that already mentioned in the order convening the court. It was admitted that all the members of the court-martial* so detailed were members of [52] the Regular Army; that on April 5, 1900, the court proceeded to the trial of Deming, who, being present in court, the order convening the court was read to him, and he was asked if he objected to being tried by any member present named in the order convening the court, to which he replied in the negative. The members of the court and the judge advocate were then duly sworn, the court adjourning to meet again on April 23, 1900, at which time all the members of the court were present, and the judge advocate and Deming, the accused, with counsel. The accused was then arraigned upon charges of embezzling public money of the United States in violation of the 60th article of war, and conduct unbecoming an officer and a gentleman in violation of the 61st article of war; that thereupon Deming pleaded guilty, and the court-martial then passed sentence upon him, which was set forth in the return, and has been already stated.

The return further stated that on May 2, 1900, the proceedings, findings, and sentence of the court-martial were approved by Major-General Shafter, and submitted for the action of the President pursuant to the provisions of article 106 of the articles of war, and that thereafter on June 8, 1900, the sentence was confirmed by the President of the United States, and on that day, by direction of the Secretary of War, Deming ceased to be an officer of the Army of the United States, and the penitentiary at Fort Leavenworth, Kansas, was designated as the place for his confinement.

A certified copy of the record and proceedings of the court-martial duly authenticated under the laws of the United States, together with a copy of the order for the court-martial, the proceedings, findings, and sentence in the case, were attached to the return of the warden, and made a part of it.

The facts above detailed also appear in the record of the court-martial.

The petitioner demurred to the return as not stating facts sufficient to warrant the detention of the petitioner in custody, nor to warrant the refusal of the writ of habeas corpus, prayed for in the petition, and because such facts did not give the warden any legal right to deprive Deming of his liberty.

*Although it does not appear distinctly in [53] the record, yet it is conceded that upon the argument before the district judge the writ was discharged and the prisoner remanded to the custody of the warden, and that upon appeal to the circuit court of appeals that court reversed the order of the circuit court, and directed that the writ issue and that Deming be discharged from custody. Thereafter, in accordance with the judgment of the circuit court of appeals, Deming was discharged by the circuit court, and from the order of the court so discharging him the government has appealed to this court.

Mr. E. H. Crowder argued the cause, and, with **Solicitor General Richards**, filed a brief for appellant:

The analogy of the court-martial is to the jury.

6 Ops. Atty. Gen. 206; 1 Winthrop, Military Law & Precedents, pp. 53-55, 62, 63; Davis, Military Laws & Courts Martial, p. 15.

The verdict of a jury composed of incompetent persons, or a sentence of a court-martial likewise constituted, is voidable only, and, if incompetency is not made the subject of timely objection, absolutely valid.

Clark v. Van Vrancken, 20 Barb. 281; 1 Winthrop, Military Law & Precedents, p. 344; *Hollingsworth v. Duane*, Wall. C. C. 147, Fed. Cas. No. 6,618, 4 Dall. 353, 1 L. ed. 864; *Kohl v. Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Mima Queen v. Hepburn*, 7 Cranch, 290, 3 L. ed. 348; *Fisher v. Yoder*, 53 Fed. 565.

Even where the ground of disqualification exists on the part of the judge, instead of one of the jurors, it has been held to be waived if not raised until after trial.

Pettigrew v. Washington County, 43 Ark. 33; *Fowler v. Brooks*, 64 N. H. 423, 13 Atl. 417; *Crozier v. Goodwin*, 1 Lea, 125; *Holmes v. Eason*, 8 Lea, 754; *Wilson v. Smith*, 18 Ky. L. Rep. 927, 38 S. W. 870.

The court-martial having jurisdiction and acting within its powers, its proceedings cannot be assailed by habeas corpus.

15 Am. & Eng. Enc. Law, title *Habeas Corpus*, p. 176; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773; *Rose ex rel. Carter v. Roberts*, 40 C. C. A. 199, 99 Fed. 948.

No acts of military officers or tribunals within the scope of their jurisdiction can be reversed, set aside, or punished, civilly or criminally, by a court of common law.

Tyler v. Pomeroy, 8 Allen, 484.

Mr. James H. Hayden argued the cause, and, with **Mr. Joseph K. McCammon**, filed a brief for appellee:

A departmental construction of statutes will not be followed by the courts when it is clearly erroneous.

United States v. Tanner, 147 U. S. 661, 37 L. ed. 321, 13 Sup. Ct. Rep. 436.

Repeals and annulments by implication are not favored in law. The courts have never adopted such an implication unless compelled to do so by the utter inconsistency or repugnance of the provisions of an earlier and a later statute.

Wood v. United States, 16 Pet. 342, 10 L. ed. 987; *South Carolina v. Stoll*, 17 Wall. 425, 21 L. ed. 650; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222.

The obvious purpose of the 77th article of war will be sustained by the courts, notwithstanding that it may have received a contrary construction by the War Department.

Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963.
186 U. S.

Nothing could be plainer than that Congress wished to place volunteers and all other persons in the temporary service upon the same basis, for purposes of trial, as the militia.

Benet, Military Law & Practice of Courts Martial, p. 25; 1 Winthrop, Military Law & Precedents, p. 92; Winthrop, Abridgment of Military Law, pp. 29, 37; Davis, Military Laws of the United States, 1897 ed. p. 490, note 1; Dig. Opin. J. A. G. p. 745.

The military authorities have not been consistent in treating volunteers as part and parcel of the same force as the regulars.

See Official Register of Officers of Volunteers in the Service of the United States, Organized under act of March 2, 1899; General Orders No. 55, Headquarters of the Army, May 26, 1898; General Orders No. 73, Id. June 21, 1898; General Orders No. 41, Id. May 10, 1898.

If a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by law, though its sentence be approved by the officers having revisory power of it, civil courts may, in an action by a party aggrieved, inquire into the want of the court's jurisdiction, and give him redress.

Dynes v. Hoover, 20 How. 65, 15 L. ed. 838.

Where a court-martial without jurisdiction of the person or of the offense charged proceeds with a trial, and imposes a sentence resulting in the imprisonment of the accused, or where such sentence has been executed without first being approved and confirmed in the manner prescribed by law, it is a nullity, and the accused has a remedy in the civil courts, and may secure his release through habeas corpus proceedings.

Runkle v. United States, 122 U. S. 543, 30 L. ed. 1167, 7 Sup. Ct. Rep. 1141; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Clarke*, 100 U. S. 399, 25 L. ed. 715; *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213; *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Re Grimley*, 137 U. S. 147, sub nom. *United States v. Grimley*, 34 L. ed. 636, 11 Sup. Ct. Rep. 54; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773.

Consent cannot confer jurisdiction where none exists.

Dig. Opin. J. A. G. 591.

Mr. Justice Peckham, after stating the foregoing facts, delivered the opinion of the court:

The grave question in this case relates to the power of an officer convening a court-martial for the trial of an officer of volunteers, to compose that court entirely of officers of the Regular Army. It is claimed on the part of the respondent herein that a volunteer officer could not be legally tried by such a court, and that to convene and constitute a court-martial so composed, for the

trial of a volunteer officer, was a violation of the 77th article of war, above set forth.

The circuit court of appeals for the eighth circuit held, in a very clear and satisfactory opinion (113 Fed. 639), that the trial of Deming by a court-martial, all the members of which were officers of the Regular Army, was illegal, and that the objection could be taken on habeas corpus. The reasoning of the opinion leaves little to add further than to state our concurrence therein. As the case is one of considerable importance in its results, it is, however, proper that we should ourselves state the reasons which lead us to the conclusion that the order appealed from was right, and should be affirmed.

[54] The government seeks a review of the decision of the court below, upon the strength of three propositions, argued by its counsel, upon one or all of which a reversal of the decision of that court is sought. These propositions are as follows:

(1) That the Volunteer Army of 1899, of which Deming was an officer at the time of his trial, conviction, and sentence, was not "other forces" within the meaning of article 77 of the articles of war.

(2) That even if Deming were to be treated as an officer of "other forces" within the meaning of that article, the fact would not deprive the court-martial of regular officers who tried him of jurisdiction; this article relating entirely to the competency of members of a court-martial, not at all to its jurisdiction.

(3) The court-martial having jurisdiction and acting within its powers, its proceedings cannot be assailed by habeas corpus.

Taking these propositions in the order named, we are brought to the consideration of the meaning and application of the 77th article of § 1342 of the Revised Statutes of the United States (p. 237), commonly called the articles of war. Article 78 has no application to this case, which rests upon the proper construction of article 77. The reading of the latter article shows that the existence of other forces than those of the Regular Army is contemplated. When a volunteer force is spoken of as well as a regular army force, in the statutes of the United States, such force would seem to come within the description of some other force than that of the Regular Army.

But the claim is made on the part of the government that by virtue of the act of Congress of April 22, 1898 (30 Stat. at L. 361, chap. 187), and particularly that of March 2, 1899 (30 Stat. at L. 977, chap. 352), the officers of the Volunteer Army of the United States are not properly described by the words "other forces," within the meaning of the 77th article of war.

It is said that while the course of legislation prior to the passage of the acts above mentioned showed a clear distinction between the militia or volunteer forces and the Regular Army of the United States, the acts referred to, and especially that of 1899, changed the status of the volunteer forces enlisted under them, and, so far as the 77th

article of war is concerned, rendered such force, in reality, the same in substance *as [55] the forces of the Regular Army, and not "other forces" of the country. We think this claim is unfounded, and that the distinction still exists within the meaning of the article.

The 77th article of war as enacted in 1874 was but a substantial continuation of provisions found in various act of Congress from the foundation of the government. In September of the year 1776 the Continental Congress enacted what is termed the Military Code of that year. In that Code is to be found § 17, art. 1, which reads as follows:

"Sec. 17, art. 1. The officers and soldiers of any troops, whether minute-men, militia, or others, being mustered and in continental pay, shall at all times, and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules or articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.

"That such militia and minute-men as are now in service, and have, by particular contract with the respective states, engaged to be governed by particular regulations while in continental service, shall not be subject to the above articles of war." 2 Winthrop, Military Law & Precedents, p. 1501.

From the text of this section it is argued on the part of the government that the purpose of its passage was not to guard against the feeling of jealousy and distrust with which the professional soldier was regarded, as was stated by the court below, because, as the government claims, the regular forces of the Revolutionary War period were not made up of professional soldiers, and also because the article provided, not only that the trials of militiamen should be before courts-martial composed entirely of militia officers, but that such officers should be of the same provincial corps with the offender. All this language, it is claimed, was but an expression in military legislation of the political doctrine, generally urged at that time in extreme form, that each state should be to the greatest extent practicable self-governing.

*We think, however, there was, in addition [56] to the idea of state control over the troops from a state, a recognition of the fact that there was a substantial difference between the regular forces and the militia. There was a recognition of the undoubted fact that at all times there has been a tendency on the part of the regular, whether officer or private, to regard with a good deal of reserve, to say the least, the men composing the militia as a branch not quite up to the standard of the Regular Army, either in knowledge of martial matters or in effectiveness of discipline, and it can be readily seen that there might naturally be apt to exist a feeling among the militia that they would not be as likely to receive what they would

think to be as fair treatment from regulars, as from members of their own force. The reasons for the feeling are set forth fully in the opinion below, and we think quite correctly. It is most probable that Congress recognized all these reasons in its earliest legislation upon the subject as considerations upon which that legislation was founded.

This Military Code with the above-mentioned section remained in force during the War of the Revolution and until 1806. Various acts were passed in the meantime providing for calling the militia into active service, and the acceptance of volunteers was also authorized by the act of March 3, 1791, § 8 (1 Stat. at L. 222, 223, chap. 28), and by that of May 28, 1798 (1 Stat. at L. 558, chap. 47), but, as stated by counsel for the government, none of the organizations of volunteers authorized by the legislation was actually received into the service of the general government and organized as United States troops.

By the act of April 10, 1806 (2 Stat. at L. 359, chap. 20), Congress established rules and articles for the government of the Army of the United States. Among them is the following:

"Art. 97. The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in [57] like manner with the officers* and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers."

This section, it will be observed, leaves out the words "of the same provincial corps with the offender," which are contained in § 17 of the Military Code of 1776, above set forth, thus leaving the militia to be tried by courts-martial the members of which shall be composed entirely of militia officers. While the provision that the courts-martial should be composed of militia officers of the same provincial corps with the offender was left out, the other provision that the courts should be composed entirely of militia officers was retained. This legislation still recognized the difference between the militia and the regular forces, and provided for the trial of militia offenders by militia officers, while at the same time the restriction that such officer should be of the same provincial corps with the offender was stricken out, thus showing that of the two ideas, the one which recognized the general ground of distinction between the regular and the militia forces was stronger than that which restricted the trial of a member of the militia to courts-martial composed of the same provincial corps.

While it may be that there was then no particular distrust or jealousy of the Regular Army, the provision in question recognized, as we have said, the difference there was between the two bodies, the regulars

and the militia or volunteers, and Congress still thought it proper to provide that those composing the latter force should not be tried by officers of the former. It was not jealousy or distrust of the Regular Army which led to the enactment; it was the radical difference existing between the two forces which made it proper to provide that regular officers should not sit in courts-martial to try offenders in the volunteer forces.

History shows that no militia, when first called into active service, has ever been equal to a like number of regular troops. It is not that the men composing the militia force are less brave or less intelligent, but they lack actual experience which the regulars have, and it is that fact which gives the regulars the feeling of superiority, and it is that feeling which is recognized by Congress and which has resulted in legislation of this character.

*Further distinctions between the two [58] forces are very well stated in the opinion of the circuit court of appeals in this case.

This § 97 of the act of 1806 continued in force until the revision of the law of 1874. During this time the war of 1812, the Seminole war, the Mexican war, and the Civil war were all carried on. During the Civil war the volunteer troops, called for under the first proclamation of the President, came primarily as state troops, and the general orders of the War Department provided for the appointment of all field and company officers by the governors of the states who were to commission them. The same provisions in substance were contained in the subsequent acts of 1861. See acts of July 22, 1861, 12 Stat. at L. 268, chap. 9; and August 6, 1861, chapter 57, § 3, 12 Stat. at L. 317.

The statute of July 22, 1861, which provided that when vacancies occurred in any of the volunteer organizations received into the service under that act, they should be filled by election, and that the officers so elected should be commissioned by the respective governors of the states, or by the President of the United States, was amended by the act of August 6, 1861, which provided for the appointment and commissioning of officers of volunteers exclusively by the governors of the states furnishing the same.

The question of the meaning of the 97th article of war, with reference to the volunteer forces of the Civil war, was presented to Judge Advocate General Holt, who, on November 19, 1863, in an opinion, expressed himself as follows: "The words 'militia officers,' as employed in the 97th article of war, have been interpreted since the commencement of the rebellion as synonymous, as far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished," the object of the rule being that members of the volunteer forces of the Army at that time should be tried only by courts-martial composed of volunteer officers.

The intent of the legislation of 1874 was simply to preserve the rule which had existed from the formation of the government, [59] *and to keep up the distinction between the Regular Army and the volunteer forces, so far as to maintain the practice of trying volunteers by volunteer officers. The question was not so much how the volunteer or "other forces" came into the service of the government, whether under officers appointed and commissioned by governors of their states, or by direct enlistment as volunteers, to aid the government, but whether they were in fact volunteers, and not members of the Regular Army. If they were volunteers, the same reasons for not being tried by regular army officers were present, whether they first volunteered through the state, and were then mustered into the service of the government, or entered directly into that service, for in both cases they were volunteers, and were not members of the Regular Army.

The acts of Congress of 1898 (30 Stat. at L. 361, chap. 187), and of 1899 (30 Stat. at L. 977, chap. 352), show conclusively, as we think, that the distinction was kept up and in the mind of Congress between the Regular Army and the Volunteer Army of the United States, and the declaration of § 2 of the act of 1898, which provides that in time of war the Army shall consist of two branches, which shall be designated respectively as the Regular Army and the Volunteer Army of the United States, is a plain recognition by Congress of the difference between the two forces. We cannot read the various provisions of these two acts of Congress without being brought to the conclusion that they contemplated and particularly provided for the existence of other forces than that of the Regular Army. The Volunteer Army was one of such other forces, and also the militia when in active service of the United States, and the Marine Corps when detached and placed upon duty with the Army by order of the President. The volunteer force is certainly not the regular force or army, and if not, it must be some other force, and if so, its members cannot be tried by officers of the regular force or army. The act of 1899 does not assume to repeal that of 1898, excepting some specific provisions thereof, such as are mentioned in § 11 of the act of 1899. The balance of the earlier act remains in force, except as to any provision which may be in conflict [60] with the act of 1899. Upon this *particular matter of a distinction between the Regular Army and the Volunteer Army, there is no inconsistency between the two acts, and therefore the act of 1898 on that subject remains in connection with that of 1899.

It would unduly lengthen this opinion to cite the various sections of the two acts which provide for and prove this difference. It was done with much detail by the judge who wrote the opinion in the circuit court of appeals when this case was before that court, and we refer to that opinion for those details which in our judgment are controlling proof that the volunteer officers and men

constitute other forces than the Regular Army within the meaning of the 77th article of war.

Section 14 of the act of 1898 seems to us particularly significant of the desire of Congress to recognize and keep up the distinction between these various forces of the Army of the United States. It proves its purpose to keep the interests of the volunteer troops particularly in mind, and that they should be looked after by members of their own body. It is therein provided that a general commanding a separate department or a detached army shall have authority to appoint military boards of not less than three nor more than five of the volunteer officers of the Volunteer Army to examine into the capacity, conduct, and efficiency of any commissioned officer of that army within his command. They were to be, not only officers of the Volunteer Army, but were themselves to be volunteer officers. This section of the act of 1898 has never been repealed, and is not in conflict with any part of the act of 1899. Although the volunteer troops organized under the last act of Congress were mustered directly into the service of the United States without regard to state or territory lines, yet the very provisions of both these acts with regard to volunteers show that they were organized as volunteers for a temporary purpose only, and did not form any part of the force of the Regular Army. The same reasons which have existed since the formation of the government for prohibiting trials of such men by courts-martial composed of regular army officers exist under these acts. The 77th article of war by its terms covers such a case. It has not been repealed or amended. The reasons *for its enactment still remain [61] as strong as when it was first adopted, and we think it covers the case of this officer who belongs to the Volunteer Army, raised under the act of 1899 and who was tried by a court-martial composed of regular army officers in violation of the act of Congress in that behalf. Congress could, of course, legislate for and temporarily enlarge the Regular Army, and the troops so enlisted for such Regular Army would be regular troops, notwithstanding they might be enlisted only for the term of the duration of a war then imminent or actually existing. Such was the act of February 11, 1847 (9 Stat. at L. 123, chap. 8), in regard to the war with Mexico. But that has no material bearing upon the proposition that troops not so enlisted, but, on the contrary, enlisted simply and in terms as volunteers, would not be troops of the Regular Army, but would be what they purport to be, volunteers, a separate branch from the regulars, and constituting by the terms of the statute other forces than such regulars.

The mere fact of a direct enlistment of the volunteers into the service of the United States under the act of 1899 cannot, as we have said, change the essential character of the Volunteer Army as a different and separate force from that of the Regular Army.

By the act of February 24, 1864 (13 Stat. at L. 6, chap. 13, § 24), it was provided:

"That all able-bodied male colored persons, between the ages of twenty and forty-five years, resident in the United States, shall be enrolled according to the provisions of this act, and of the act to which this is an amendment, and form part of the national forces.

"But men of color, drafted or enlisted, or who may volunteer into the military service, while they shall be credited on the quotas of the several states, or subdivisions of states, wherein they are respectively drafted, enlisted, or shall volunteer, shall not be assigned as state troops, but shall be mustered into regiments or companies as United States colored troops."

Here was a case where the colored troops were mustered directly into regiments or companies as United States (colored) [62] troops, *although credited on the quotas of the several states. They became United States troops, yet were not part of the Regular Army of the United States.

The Judge Advocate of the Army on December 16, 1864, rendered an opinion as to the composition of courts-martial for the trial of officers and soldiers in the Veteran Reserve Corps and United States colored troops, in which he used this language:

"In the absence of any statute law which either designates officers of the Veteran Reserve Corps or of the United States colored troops as regulars in express terms, or by a necessary implication from its provisions, fixes upon them this status, the Secretary of War has not proceeded to so characterize them, and until he shall do so these officers should, so far as the composition of courts-martial is concerned, be regarded as a part of the volunteer force."

Without some statute, otherwise providing therefor, the Judge Advocate General was of opinion that those forces should be regarded as a part of the volunteer forces unless the Secretary of War otherwise characterized them. Whether that official had power to do so need not now be inquired into, but unless he did so the Judge Advocate General thought that the United States colored troops were to be regarded as a part of the volunteer forces.

We conclude that the acts of 1898 and 1899 still left the Volunteer Army as a separate or other force from the Regular Army of the United States.

The second proposition argued by counsel for the government we cannot agree to. If the defendant were a member of one of the "other forces," named in the 77th article of war, a court-martial, solely convened for the purpose of trying him, composed entirely of regular officers, would not have jurisdiction. Such a body would have jurisdiction over neither the subject-matter nor the person. A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction. It was said by Mr.

186 U. S.

Chief Justice Waite in *Runkle v. United States*, 122 U. S. 543, 555, 30 L. ed. 1167, 1170, 7 Sup. Ct. Rep. 1141, 1146:

*"A court-martial organized under the [63] laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev. § 470; *Brooks v. Adams*, 11 Pick. 441, 442; *Mills v. Martin*, 19 Johns. 7, 30; *Duffield v. Smith*, 3 Serg. & R. 590, 599. Such, also, is the effect of the decision of this court in *Wise v. Withers*, 3 Cranch, 331, 2 L. ed. 457, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 209, 7 L. ed. 650, 655, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes v. Hoover*, 20 How. 65, 80, 15 L. ed. 838, 844; *Mills v. Martin*, 19 Johns. 33. There are no presumptions in its favor, so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 115, 8 L. ed. 885, 886, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive,—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

What jurisdiction can a court-martial have which is composed of officers incompetent to sit on such court, of officers who are placed there in direct and plain violation of the act of Congress? This particular court was convened for the sole purpose of trying an officer of the Volunteer Army, and it was composed under the orders of the officer convening it of members each *and all of whom [64] were prohibited by law from sitting on such court. As to the officer to be tried there was no court, for it seems to us that it cannot be contended that men, not one of whom is authorized by law to sit, but, on the contrary, all of whom are forbidden to sit, can constitute a legal court-martial because detailed to act as such court by an officer who in making such detail acted contrary to and in complete violation of law. Where does such a court obtain jurisdiction to perform a single official function? How does it get jurisdiction over any subject-matter or over

the person of any individual? The particular tribunal is a mere creature of the statute, as we have said, and must be created under its provisions. It is a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved. The officers composing the alleged court were not *de facto* officers thereof, for there was no court, and therefore it could not have *de facto* officers. *Norton v. Shelby County*, 118 U. S. 425, 441, 30 L. ed. 178, 185, 6 Sup. Ct. Rep. 1121. The attempt at the creation of a court failed because such attempt was a plain violation of the statute. A court-martial is wholly unlike the ease of a permanent court created by constitution or by statute and presided over by one who had some color of authority although not in truth an officer *de jure*, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected. But in this case the very power which appointed the members of and convened the court violated the statute in composing that court. It is one act, appointing the members of and convening the court, and in performing that act the officer plainly violated the law. Is such a court a valid court and the members thus detailed *de facto* officers of such valid court? Clearly not.

[65] It is urged, however, that the 77th article of war contains no reference to the jurisdiction of courts-martial; that it merely provides that certain officers shall not be competent to sit on such courts to try certain offenders, and that the jurisdiction of the court to hear and decide is regulated by other articles. But the court-martial that has jurisdiction over any *offense must, in the first place, be legally created and convened. Such a court is not a continuous one, created by the statute itself and filled from time to time by appointments of certain members under the power given by statute. The court has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members; and when in appointing such members he violates the statute, as in this case, by appointing men to compose the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial, and has no jurisdiction over either the subject-matter of the charges against a volunteer officer or over the person of such officer. The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate from the officers detailed to compose it. By the violation of the law the body lacked any statutory authority for its existence, and it lacked, therefore, all jurisdiction over the defendant or the subject-matter of the charges against him. It is said, in *Keyes v. United States*, 109 U. S. 336, 27 L. ed. 954, 3 Sup. Ct. Rep. 202, that where the statutory condi-

tions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.

Within the *Runkle Case*, 122 U. S. 543, 30 L. ed. 1167, 7 Sup. Ct. Rep. 1141, this particular court was not legally constituted to perform the function for which alone it was convened. It was therefore in law no court. The men were disqualified to act as members thereof, and no challenge was necessary for there was no court to hear and dispose of the challenge. It is unlike an officer who might be the subject of challenge as under some bias. A failure to challenge in such a case might very well be held to waive the defect, and the officer could sit and the finding of the court be legal. But this is not the case of a personal challenge of some member of the court where an objection to his sitting might be thus particularly raised. It is an objection that the whole court as a court was illegally constituted because in violation of the express provision of the statute, and the challenge to the whole court is not provided for by the statute.

*But it is said defendant did not object to [66] being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. His consent had no effect whatever in the face of the statute which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet: and the decision of neither tribunal would be validated by the consent of the person submitting to such trial.

Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304, was a criminal case, and it was held that in New Jersey the alienage of a juror participating in a trial was a subject of challenge when he was called; that it was for the state court to decide whether the verdict of conviction should be set aside on his motion when the accused did not interpose such challenge when the juror was drawn. The principle of that case does not apply here. It was an objection to a single juror, and was ground for a personal challenge. The presence of an alien on the jury did not render the court an illegal one, had no effect upon its jurisdiction over the person of the defendant or the subject-matter of the indictment, and therefore

did not render the trial a nullity. The case at bar differs in all these facts, and the court, having been illegally constituted, had no jurisdiction to try the offender for any offense whatever, even with his consent.

[67] It may also be said that the disqualification of a particular juror is brought before the court by a challenge in regard to the decision of which the juror takes no part. In this case no *provision having been made for a challenge to the whole court, the challenge must have been to each member thereof, separately, and the officers to try the challenge would have to decide a question existing in the case of each of such officers precisely to the same extent that was presented in the case of the officer challenged, so that in effect each would be passing upon a challenge in his own case. We do not say that this fact alone creates the difference between the two cases. The material and all pervading fact constituting that difference is that the whole court is in the one case constituted in utter violation of the command of the statute, while in the case cited the court was legal, had jurisdiction over the subject-matter and over the person, and the sitting of one disqualified juror being a cause of personal challenge is waived by the failure to interpose it.

There are some cases cited by counsel for the government where disqualified judges sat in violation of the statute, such as *Pettigrew v. Washington County*, 43 Ark. 33; *Fowler v. Brooks*, 64 N. H. 423, 13 Atl. 417; *Crozier v. Goodwin*, 1 Lea, 125; *Holmes v. Eason*, 8 Lea, 754; *Wilson v. Smith*, 18 Ky. L. Rep. 927, 38 S. W. 870.

On the other hand, there is the case of *Oakley v. Aspinwall*, 3 N. Y. 547, where it was held that a judge who was disqualified to sit in a cause by reason of consanguinity to one of the parties could not sit even by consent of both parties, and if he did the judgment in regard to which he took part would be vacated. In that case it was said (p. 552):

"It was, however, urged at the bar, that although the judge were wanting in authority to sit and take part in the decision of this cause, yet, that having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and is an answer to this motion. But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibitions of a law—which was not designed merely for the protection of the party to a suit, but for the general interests of justice. *Low v. Rice*, 8 Johns. 409; *Clayton v. Per Dun*, 13 Johns. 218; *Edwards v. Russell*, 21 Wend. 63; 21 Pick. 101, 32 Am. Dec. 248. It is the design of the law to maintain the purity and impartiality of the courts, [68] and to insure for their decisions the *respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important in that respect that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that

186 U. S.

the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

A judge, who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction. This is the doctrine of above case. It has been followed without doubt or hesitation in the state of New York ever since its rendition in 1850. *People v. Connor*, 142 N. Y. 130, 36 N. E. 807, is among the latest of the cases on that subject. See also *Sigourney v. Sibley*, 21 Pick. 101, 106, 32 Am. Dec. 248; *Gay v. Minot*, 3 Cush. 352; *Hall v. Thayer*, 105 Mass. 219, 224, 7 Am. Rep. 513; *Chicago & A. R. Co. v. Summers*, 113 Ind. 10, 17, 14 N. E. 733.

It is difficult for us to understand how an ephemeral court, composed of men detailed as members, each one of whom is so detailed in direct violation of the statute on that subject which prohibits their sitting, can obtain any jurisdiction over the subject-matter or person even by the consent of the defendant. In those cases where the judgment rendered by a disqualified judge was held free from attack because of a waiver, it can at least be said there was a valid court for other purposes than the trial or hearing of the particular case, and that the objection was simply a personal one, and should be made before the trial or it must be deemed waived. We are not inclined to that view, but the principle is not applicable to this case where the court is created and all the members of it are convened in total disregard and violation of the statutes upon the subject of its membership.

(3) We are also of opinion that the invalidity of the court-martial can be raised upon a hearing on habeas corpus. The judgment, even after the approval of the officers, provided for by statute, is that of a court of limited jurisdiction only, whose *judgments [69] may be attacked collaterally. In explaining the decision of *Wise v. Withers*, 3 Cranch, 331, 2 L. ed. 457, where he had himself written the opinion, Chief Justice Marshall said in *Ex parte Watkins*, 3 Pet. 193, 209, 7 L. ed. 650, 655, that it had been considered in the former case that a court-martial was one of those inferior courts of limited jurisdiction, whose jurisdiction might be questioned collaterally. In order to give effect to the judgment of a court of that nature it must appear affirmatively that the court was legally constituted; that it had jurisdiction, and that all of the statutory requirements governing its proceedings had been complied with. *Runkle Case*, 122 U. S. 543, 30 L. ed. 1167, 7 Sup. Ct. Rep. 1141. Jurisdiction of inferior courts not of record must be affirmatively shown, and no presumption thereof exists. Freeman, Judgm. 3d ed. § 517. They can, therefore, be attacked collaterally.

While the writ of habeas corpus cannot be

1057

converted into a writ of error, yet, unless the court which tried the prisoner has jurisdiction to try and punish him for the offense, the prisoner may be discharged on such writ. *Re Coy*, 127 U. S. 731, 757, 32 L. ed. 274, 280, 8 Sup. Ct. Rep. 1263.

The question we are now discussing resolves itself into one of jurisdiction simply. If the court-martial had jurisdiction over the subject-matter of the charge against the defendant and of the person, or if the consent of the defendant gave such jurisdiction, the writ of habeas corpus will afford no relief, for, generally, in such case any error committed by a court-martial regularly organized and with full jurisdiction is not available before the civil courts. *Swaim v. United States*, 165 U. S. 553, 41 L. ed. 823, 17 Sup. Ct. Rep. 448; *Carter v. McClaughry*, 183 U. S. 365, ante, 236, 22 Sup. Ct. Rep. 181.

For the reasons already given, we think the court was illegally constituted, in violation of law, and that it had no jurisdiction over the person of the defendant or the subject-matter of the charges against him, and that consent could confer none in opposition to the statutory requirements for members of a court-martial convened to try him.

The question of who shall act on courts-martial for the trial of offenders belonging to the various branches of the Army of the United States is one entirely for Congress to determine. If it should think the time has [70] come to do away with the distinction between the volunteer or militia force and the Regular Army, it rests in its discretion to so provide.

We are of opinion, after a careful examination of this record, that the decision of the court below was right, and the order discharging the defendant from custody should be affirmed.

The CHIEF JUSTICE and Mr. Justice McKenna dissented.

Mr. Justice Gray and Mr. Justice Brewer did not hear the argument, and took no part in the decision.

E. BEMENT & SONS, Plffs. in Err.,
v.

NATIONAL HARROW COMPANY.

(See S. C. Reporter's ed. 70-95.)

Error to state court—conclusiveness of findings of fact in a suit in equity—Federal anti-trust act—violation of, as defense to suit on contract—validity of conditions in license from patentee.

1. The findings of fact made in a state court

NOTE.—*Restraint of trade in patented articles.*

This note is not intended to include matters as to the patent laws, or rights acquired under letters patent, but only cases involving licenses or contracts of sale in which the question of monopoly or restraint of trade arises out of

in a suit in equity are conclusive upon the Supreme Court of the United States on writ of error to that court.

2. The defense that a contract is in violation of the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies, which makes illegal every contract violative of its provisions, may be set up by a private individual when sued thereon, and, if proved, constitutes a good defense to the action.
3. Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, which keep up the monopoly or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), to protect trade and commerce against unlawful restraints or monopolies.
4. Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, restricting the terms upon which the article manufactured under such license may be used, and the price to be demanded therefor, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies.
5. The agreement of the licensee of a patent for improvements relating to float spring tooth harrows, not to manufacture or sell any other such harrows than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows.
6. An agreement by the licensor of a patent for improvements relating to harrows, not to license any other person than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee, does not violate the act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies.

[No. 215.]

Argued April 9, 10, 1902. Decided May 19, 1902.

IN ERROR to the Supreme Court of the State of New York to review a judgment affirmed by the Court of Appeals in favor of plaintiff in an action to recover damages for the violation of a patent license. Affirmed.

the contract or license itself, as in *E. BEMENT & SONS v. NATIONAL HARROW CO.*

A sale of the business of manufacturing patented machinery, whereby the vendor contracts not "to manufacture, sell, or cause to be sold any sandpapering machines of any description," unless with the consent of the vendor, is void, as

Statement by Mr. Justice **Peckham**:

This is a writ of error to the supreme court of the state of New York, to which court the record had been remitted after a decision of the case by the court of appeals. The action was brought by the plaintiff below, the defendant in error here, *a corporation, to recover the amount of liquidated damages arising out of an alleged violation by the defendant below, the plaintiff in error here, also a corporation, of certain contracts executed between the parties in relation to the manufacture and sale of what are termed in the contracts "float spring tooth harrows," their frames, and attachments applicable thereto, under letters patent owned by the plaintiff. The action was also brought to restrain the future violation of such contracts, and to compel their specific performance by the defendant. The case was tried

before a referee pursuant to the statute of New York providing therefor, and he ordered judgment in favor of the plaintiff for over \$20,000, besides enjoining the defendant from violating its contract with the plaintiff, and directing their specific performance as continuing contracts. This judgment was reversed by the appellate division of the supreme court, and an order made granting a new trial, but on appeal from such order the court of appeals reversed it and affirmed the original judgment. The defendant brings the case here by writ of error.

The particular character of the action appears from the pleadings. The complaint, after alleging the incorporation of both parties to the action, the plaintiff in New Jersey and the defendant in Michigan, averred that about April 1, 1891, the plaintiff's assignor, a New York corporation, entered with the

it is unlimited as to time, place, or circumstances, and does not relate to business secrets, trademarks, or patents. *Berlin Mach. Works v. Perry*, 71 Wis. 495, 38 N. W. 82.

And an agreement not to engage in manufacturing or selling fire-alarm or police telegraph machines and apparatus, and not to enter into competition with the purchaser of the business, for the period of ten years, with no restriction as to place stipulated, which agreement is entered into by a manufacturer on the sale of his business and a transfer of his patents used therein, is void as a contract in restraint of trade, and cannot be upheld on the theory that it concerns property and business protected by patents. *Gamevell Fire Alarm Teleg. Co. v. Crane*, 160 Mass. 50, 22 L. R. A. 673, 35 N. E. 98.

So, an agreement to sell no harrow for less than a schedule price is invalid when made by the owner of the patent with a corporation organized by rival manufacturers of harrows to take title to the patents and to license the former owners to operate under them and sell only at schedule prices to be fixed by the corporation. *National Harrow Co. v. Hench*, 39 L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36.

And one of the assignors who violates such agreement cannot be sued by the corporation for the infringement of the patent, on the theory that the corporation holding the legal title to the patent can sue the owners of the equitable title, not as licensees, but as infringers, since both the license and the assignment are invalid. *National Harrow Co. v. Hench*, 84 Fed. 226.

But a contract not to make any other machines during the life of a patent, except such as are covered by the same, which is assigned to the vendee, will be sustained. *Jones v. Lees*, 1 Hurst. & N. 189, 26 L. J. Exch. N. S. 9, 2 Jur. N. S. 645.

And a sale of business and patents, where the vendors agreed not to engage in business in opposition, is valid; and an advertising gift of similar articles will be a fraud on the rights of the vendee. *Mackinnon Pen Co. v. Fountain Ink Co.* 16 Jones & S. 442.

So, a contract by the vendor of a business protected by a patent, not to do any act which may injure the vendee in his business, will be upheld where the vendee is to have the right to purchase all future improvements relating to the business, made by the vendor. *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513.

So, where the vendor of a business and patents for making guns and ammunition cove-

nanted not to engage for twenty-five years in the trade or business of a manufacturer of guns, gunmountings, gunpowder, ammunition, or in any competing business, provided that the restriction should not apply to other explosives than gunpowder or to other business, the vendee to have the benefit of the vendor's inventions, it was held to be a reasonable and valid contract. *Maxim Nordenfelt Guus & Ammunition Co. v. Nordenfelt* [1893] 1 Ch. 630, 62 L. J. Ch. N. S. 273, 68 L. T. N. S. 833, 41 Week. Rep. 604. Affirmed in [1894] A. C. 535, 71 L. T. N. S. 489, 63 L. J. Ch. N. S. 908.

A contract by which a patentee grants an exclusive license to build, weave, and construct wire fences in a specified territory, and requires the licensee to purchase the necessary wire, pickets, and fence machines from the licensor at fixed prices, does not violate the Texas statute against trusts. *Clark v. Cyclone Woven Wire Fence Co.* 22 Tex. Civ. App. 41, 54 S. W. 392.

And a patentee may impose the condition upon the sale of a patented machine, that an unpatented and unpatentable article necessary to the operation of such machine shall be bought exclusively from the patentee, although the effect is to give him a monopoly in such unpatented article. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288.

No rule of public policy is violated by an agreement on the part of a purchaser of patented machines which have passed out of the monopoly, to waive the immunity and bring them again within the operation of the patent by a contract of license from the patentee by which the licensee agrees to pay a royalty and limits his right as to the disposition and use of such machines. *International Pav. Co. v. Richardson*, 75 Fed. 590.

And a compromise of a suit for infringement of a patent, whereby a party to a license for a certain time agreed not to manufacture "cemented hams of any kind without your consent during the existence of your patent," is valid, and is construed to mean "similar cemented hams." *Billings v. Ames*, 32 Mo. 265.

The joint owner of a patent may stipulate that one alone shall conduct the business. *Kinsman v. Parkhurst*, 18 How. 289, 15 L. ed. 385.

On the general subject of the validity of contracts of sale in restraint of trade without limitation of place, see note to *Gamevell Fire Alarm Teleg. Co. v. Crane* (Mass.) 22 L. R. A. 673.

defendant into certain license contracts, called therein Exhibits A and B. The substance of contract A is as follows: It stated that the plaintiff was the owner of certain letters patent of the United States, which had been issued to other parties and were then owned by the plaintiff, for improvements relating to float spring tooth harrows, harrow frames, and attachments applicable thereto, eighty-five of which patents were enumerated; and that the defendant desired to acquire the right to use in its business of manufacturing at Lansing, in the state of Michigan, and to sell throughout the United States, under such patents or some one or more of them, and under all other patented rights owned or thereafter acquired by the plaintiff, which applied to and embraced the peculiar construction employed by the defendant, during the term of such patents, or [72] either or any *thereof, applicable to and embracing such construction. The plaintiff then, in and by such contract, gave and granted to the defendant the license and privilege of using the rights under those patents in its business of manufacturing, marketing, and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames without teeth, and attachments applicable thereto; a sample of the harrow frames and attachments the defendant was licensed to manufacture and sell, being (as stated) in the possession of the treasurer of the plaintiff, and marked and numbered as set forth in schedule A, which was made a part of the license. The license was granted upon the terms therein set forth, which were as follows:

(1) The defendant was to pay a royalty of \$1 for each float spring tooth harrow or frame sold by it pursuant to the license, to be paid to the plaintiff at its office in the city of Utica, in the state of New York.

(2) The defendant was to make verified reports of its business each month and mail them to the plaintiff, and the defendant agreed that it would not ship these harrows to any person, firm, or corporation to be sold on commission, or allow any rebate or reduction from the price or prices fixed in the license, except to settle with an insolvent debtor for harrows previously sold and delivered.

(3) The defendant agreed that it would not during the continuance of the license sell its products manufactured under the license at a less price or on more favorable terms of payment and delivery to the purchasers than was set forth in schedule B, which was made a part of the license, except as hereinafter provided.

(4) The plaintiff reserved the right to decrease the selling price and to make the terms of payment and delivery more favorable to the purchasers, and it might reduce the royalty on the harrows manufactured under the license.

(5) The plaintiff agreed to furnish license labels to the defendant, which were to be affixed to each article sold, and the amount of 10 cents paid for each of such labels was to be credited and allowed on the royalty paid

by the defendant at the time of such payment.

* (6) The defendant agreed that it would [73] not, during the continuance of the license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee should be licensed by the plaintiff to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff.

(7) The defendant agreed to pay to the plaintiff for each and every of the articles sold contrary to the strict terms and provisions of the license, the sum of \$5, which sum was thereby agreed upon and fixed as liquidated damages.

(8) The defendant agreed not to, directly or indirectly, in any way, contest the validity of any patent applicable to and embracing the construction which the defendant was licensed to manufacture, or which it might manufacture for another licensee, which such other licensee was itself licensed to manufacture or sell, or the reissues thereof, and no act of either party should invalidate this admission. The defendant also agreed not to alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames without teeth, or attachments applicable thereto, which it was authorized to manufacture and sell under the license, in any part or portions thereof which embody any of the inventions covered by the letters patent, or any of them, or any reissues thereof.

(9) The plaintiff agreed that after the license was delivered it would not grant licenses, or let to any other person, the right to manufacture the articles named, of the peculiar style and construction or embodying the peculiar features thereof used by the defendant, as illustrated and embodied in the sample harrow then placed in the possession of the treasurer of the plaintiff, and referred to in schedule A of the license.

(10) Nothing contained in the license was to authorize the defendant to manufacture or vend, directly or indirectly, any other or different style of harrow than duplicates of such samples *as had been deposited by it [74] with the plaintiff, and such as were embraced in the license.

(11) Any departure from the terms of the license might at the option of the plaintiff be treated as a breach of the license, and the licensee might be treated as an infringer, or the plaintiff might restrain the breach thereof in a suit brought for that purpose and obtain an injunction, the licensee waiving any right of trial by jury; such remedy was to be in addition to the liquidated damages already provided for.

(12) The termination of the license by the plaintiff was not to release the defendant from its obligation to pay for articles sold up to the termination of the license.

(13) The plaintiff agreed to defend the defendant in any suit brought for an alleged infringement.

(14) No royalties were to be paid for articles exported for use in a foreign country.

(15) The license was personal to the licensee, and not assignable, except to the successors of the defendant in the same place and business, without the written consent of the plaintiff, nor were the royalties or other sums specified to cease to be paid under any circumstances, except under the conditions named in the license, during the continuance thereof.

(16) The parties agreed that the license should continue during the term of the patent or patents applicable to the license, and during the term of any reissues thereof.

(17) The place of the performance of the agreement was the city of Utica, New York, and the agreement was to be construed and the rights of the parties thereunder determined according to the laws of New York.

(18) The consideration of the contract or license was \$1, paid by each of the parties to the other, and the covenants contained therein to be performed by the other, and it applied to and bound the parties thereto, their successors, heirs, and assigns.

Schedule A, which followed, contained a description of the particular kinds of harrow which the defendant was authorized to make and sell under the license. Schedule B contained a statement of the prices and terms of sale under the license, and it was [75] therein *stated that "a maximum discount of 42 per cent may be allowed on sales of harrows, frames, and teeth in the following territory: All of the New England states, also states of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and West Virginia. A maximum discount of 45 per cent may be allowed on all sales in the territory throughout the United States not mentioned above."

This contract or license was signed by the president of the National Harrow Company for the plaintiff, and A. O. Bement, president of the defendant corporation, for the defendant.

The other license, called Exhibit B, was in substance the same as Exhibit A, excepting that the privilege of sale for the articles manufactured was that portion of the territory embraced within the United States lying south and west of Virginia, West Virginia, and Pennsylvania, and there was some difference in the machines which the defendant was authorized to manufacture and sell under this license, and in regard to the prices to be charged for those machines not covered by the former contract or license.

These two agreements were, as stated, made parts of the plaintiff's complaint, and the plaintiff then set forth various alleged violations of the two agreements on the part of the defendant, and claimed a recovery of a large amount of damages under the provisions of the contracts, and prayed for an injunction restraining future violations, and for a specific performance of the contracts.

The plaintiff also alleged that the plain-

tiff's assignor, the New York corporation, duly assigned to the plaintiff all its rights and interests in regard to the subject-matter of the two contracts, and that the plaintiff, at the time of the commencement of the action, was the lawful owner of all such interests and rights, and was entitled to bring the action in its own name.

To this complaint the defendant made answer, denying many of its allegations, and setting up certain other agreements which it alleged had been made by the plaintiff and other parties, including defendant, and which, as averred, amounted to a combination of all the manufacturers and dealers in patent harrows, to regulate their manufacture and to provide for their sale and *the [76] prices thereof throughout the United States. It was also in the answer averred that such contracts had been pronounced to be void by the supreme court of New York, and the contracts now before the court were, as contended by defendant, but a continuation and a part of the other contracts already declared void, and that these contracts between the parties to this action were also void. It is also alleged that all of the various contracts were in violation of the act of Congress approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress (26 Stat. at L. 209), entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

The case was referred to a referee to hear and decide, who, after hearing the testimony, reported in favor of the plaintiff. The material portions of his report are as follows:

"That for some time prior to the month of September, 1890, the spring tooth harrow business was conducted by the following named parties: D. C. & H. C. Reed & Company, of Kalamazoo, Mich.; G. B. Olin & Company, Perry and Canandaigua, N. Y.; Chase, Taylor, & Company, W. S. Lawrence, doing business under the name of Lawrence & Chapin, both of Kalamazoo, Mich.; J. M. Childs & Company, of Utica, N. Y.; and A. W. Stevens & Son, of Auburn, N. Y.—who began the harrow business in substantially the order named above.

"The first two above-named firms conducted their business in separate portions or territory of the United States, under the same United States letters patent, and the other firms began their business in hostility to the same letters patent. The first two firms began a number of patent lawsuits against the other firms and their customers for infringement of patents. These suits were vigorously prosecuted, and the court finally decided the patents valid, and ordered an accounting of profits against the firm of Chase, Taylor, & Company, and W. S. Lawrence.

"Prior to September, 1890, the last four of the above-named firms settled their disputes over patents with the first two firms, and took licenses under their letters patent. Considerable sums of money were paid in settlement of these disputes and rights; and prior to said date, September, 1890, there was no other relation between the first two

[77] firms named and the other parties *than that of licensor and licensee under United States letters patent.

"In the year 1890, and just prior thereto, other persons, firms, and corporations began the spring tooth harrow business, and other patent lawsuits followed. Suits were begun against the defendants herein, and against their customers purchasing their spring tooth harrows; and one case had gone to final decree, in which the defendant was ordered to account for profits and damages; and an injunction had been granted in another suit. Proceedings were pending upon an application for rehearing in these cases.

"In September, 1890, the six firms first above named decided to organize a corporation known as the National Harrow Company of New York, with a view to transferring various United States letters patent owned by the six firms respectively to said corporation, and for the purpose of conducting the manufacture of some part or portion of the material which entered into their spring tooth harrow business.

"In the conduct of the spring tooth harrow business, the harrows came to be known in the market as 'float spring tooth harrows;' that name having been adopted to differentiate the harrows from those known in the market as 'wheel harrows,' which had frame bars and curved spring teeth supported from an axle above, which axle had wheels at either end of the diameter above 30 inches. The two classes of harrows were differentiated, one being called a 'float' and the other a 'wheel' spring tooth harrow. The litigations had been wholly over the 'float' spring tooth harrows.

"The members composing the first six firms above named in the harrow business in September, 1890, organized under the laws of the state of New York the 'National Harrow Company.' That corporation was duly legally incorporated, and after its incorporation it received from the said six firms the transfer of their separate United States letters patent, license contracts, and privileges under patents. The defendant's president, Arthur O. Bement, became and continued a director of this corporation until its dissolution, which followed in a little over a year.

[78] *"[This corporation entered into some contracts with spring tooth harrow manufacturers, which were decided by the supreme court of the state of New York to be illegal as against public policy, on account of restraints contained in the contracts, which extended beyond the lifetime of the patents. That case is reported in the New York Supplement, vol. 18, page 224. *Strait v. National Harrow Co.*

"Immediately following this decision, all of the contracts then in existence which were affected thereby were immediately canceled by the parties to such contracts.

"The defendant, E. Bement & Sons, in the fall of 1890, entered into a contract with the National Harrow Company, looking to the selling of its patents and rights under patents relating to the spring tooth harrow business, but this contract was abandoned; the

conditions upon which it was executed not having been complied with, the contract became and was wholly void.

"The defendant had no contract with the National Harrow Company until about June 16 or 17, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and privileges thereby transferred, and the defendant agreed to accept in payment thereof the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by arbitration, under which arbitration the defendant was awarded and the value was fixed at upwards of \$29,000. The defendant was dissatisfied with the amount of the award, and such dissatisfaction and difference was afterwards adjusted by an agreement to issue to the defendant and the defendant to accept an additional amount of \$16,000 of said capital stock. That by agreement, in the place of the said capital stock of the New York company, the defendant accepted *and agreed to take the stock of [79] the plaintiff in this action, and there has been issued to the defendant and the defendant has received the capital stock of this plaintiff in an amount upwards of \$45,000 in payment for the property and rights sold and transferred by the defendant to the National Harrow Company of New York. That said upwards of \$45,000 of stock was issued to the president of the defendant for defendant's benefit, and on said stock defendant has received several cash dividends.

"The transaction between the National Harrow Company of New York and this defendant, had in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the United States letters patent and licenses under United States letters patent relating to the float spring tooth harrow business conducted by the defendant, and it was founded on a good, valuable, and adequate consideration moving between the parties.

"That, as a part of such transaction, the National Harrow Company of New York granted, issued, and delivered to the defendant the license contracts A and B, which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above and the defendant and its customers was settled. The papers which were executed in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. At the date of the execution and delivery of the license contracts A and B the

National Harrow Company of New York was the owner by assignment and purchase of a large number of United States letters patent, which it is claimed fully monopolized and covered the defendant's float spring tooth harrow business.

"The sale by the defendant of its letters patent and license rights and privileges to the National Harrow Company of New York, and the signing and delivering of license contracts A and B, were intended to and did settle existing controversies with reference to the rights of the National Harrow Company of New York and the defendant.

[80] * "I decide that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant, were and are good and valid contracts, founded on adequate considerations, and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept.

"In July, 1891, a corporation was organized under the laws of the state of New Jersey, known and designated as the National Harrow Company, which corporation is the plaintiff in this action. None of the parties organizing this corporation were in the spring tooth harrow business. The New Jersey corporation was duly and legally organized in conformity with the laws of that state, and was by those laws and its charter authorized to purchase United States letters patent, and to grant licenses under United States letters patent, and to conduct the manufacturing business, and had a variety of other rights and privileges under its charter and said statutes. That this corporation, the plaintiff, still is a legal and valid corporation, entitled to hold and enjoy such of its property as it now or may hereafter own or acquire, and that it was not organized in hostility to any rule of public policy.

"That the National Harrow Company of New Jersey, this plaintiff, through its duly constituted officers purchased from the National Harrow Company of New York all of its various United States letters patent, and all contracts, licenses, and privileges which the National Harrow Company of New York then owned and possessed, and also purchased a part of its other property, rights, and privileges.

"That on the 9th of September, 1891, a formal transfer in writing was made from the National Harrow Company of New York to the National Harrow Company of New Jersey of the property and rights sold as aforesaid by the former company to the latter, which transfer was founded on a good, valuable, and adequate consideration moving between the parties, and which transfer was sanctioned by the directors and stockholders of the New York corporation, and by the officers and *directors of the National Harrow Company of New Jersey, this plaintiff, and separate assignments in writing were made of the various United States letters patent

186 U. S.

from the New York corporation to the New Jersey corporation.

"I decide that this transfer was in all respects legal and valid, being founded on a good and valuable consideration, and that it vested in the plaintiff in this action all the rights, privileges, and benefits accruing to the New York corporation under its contracts with the defendant, including contracts A and B, which contracts have been slightly modified by the parties as to price and terms of sale.

"The defendant's president, Arthur O. Bement, became a director and an active manager of the plaintiff, and continued as such down to September, 1893.

"The defendant made monthly verified reports to this plaintiff down to and including the 8th of September, 1893, of the harrows embraced in contracts A and B, by such reports stating the total harrows sold to be 13,900, on which defendant paid to the plaintiff a royalty of \$13,900.

"The National Harrow Company of New York and this plaintiff have performed all of the stipulations and provisions in the contracts entered into between the National Harrow Company of New York and this defendant, including all the provisions of contracts A and B; and the plaintiff is now ready, willing, and able to perform all of the stipulations and agreements to be performed on its part as assignee of the National Harrow Company of New York.

"That the defendant, after having received and retained large pecuniary benefits under the contracts, has failed, neglected, and refused, and still fails, neglects, and refuses, to keep and perform its contracts entered into, including the stipulations and provisions contained in contracts A and B, and since September, 1893, it has wholly repudiated contracts A and B, and refused to perform any of the stipulations contained therein which it agreed to do and perform, and it has broken and violated all of the stipulations and agreements contained in contracts A and B which it agreed to do and perform."

The referee then states with some detail the various violations *of the license agree- [82] ments by the defendant, and finds the defendant indebted to the plaintiff in the sum of over \$20,000. He then continues as follows:

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction; and that all of the contracts in evidence were and are legal, valid, and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade or tending to create a monopoly, trust, or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted."

The referee then held the plaintiff entitled to a judgment against the defendant, declaring the validity of the plaintiff corporation and its title to the contracts and their validity, and decreeing specific performance thereof, and restraining future violations of the contracts by the defendant. Judgment in accordance with the report was entered, from which the defendant appealed to the appellate division of the supreme court.

Some difficulties regarding the form in which the case was presented to that court arose upon the argument, and it was therefore suspended and the case sent back to the referee for a resettlement, which was subsequently agreed upon by counsel for the respective parties, who entered into a stipulation in regard to what was to be reviewed by the courts above, and, among other things, it was agreed between counsel "that the foregoing record, as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee material to the questions to be raised on this appeal by the appellant, which questions to be raised by the appellant on this appeal are to be only as follows." Those questions are eight in number, the fourth of which is: "Whether or not the contracts A and B are valid under the act of Congress approved

[83] July 2, 1890, chapter 647 of the *first session of the Fifty-first Congress." This is the only Federal question raised and appearing in the record.

The case was thereupon argued before the appellate division, which reversed the judgment and ordered a new trial, but it did not state in its order of reversal that the judgment was reversed on questions of fact as well as of law. The plaintiff then appealed to the court of appeals from the order granting a new trial, and after argument it was held by that court that it had no jurisdiction to review the facts, and that upon the findings of the referee there had been no error of law committed, and consequently the supreme court was wrong in reversing the judgment. The court therefore reversed the judgment of the supreme court, and affirmed the judgment entered upon the report of the referee.

Messrs. Clark C. Wood and Edward Cahill argued the cause and filed a brief for plaintiffs in error:

All the contracts bearing date April 1, 1891, and the assignment of September 9, 1891, must be construed together as one contract.

Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; *Livingston v. Story*, 11 Pet. 386, 9 L. ed. 760; *Rogers v. New York & T. Land Co.* 134 N. Y. 210, 32 N. E. 27; *Hannig v. Mueller*, 82 Wis. 241, 52 N. W. 98; *Beckman v. Beckman*, 86 Wis. 659, 57 N. W. 1117.

The contracts, combinations, etc., in restraint of interstate trade or commerce, which are declared to be illegal by the act of July 2, 1890, include all contracts, etc., operating to restrain trade or commerce, whether legal or illegal at common law, or

whether the restraint is reasonable or unreasonable.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Every court before which these contracts have come has held that they are a grossly oppressive restraint of trade, and in every case except the case at bar has held them void for that reason.

National Harrow Co. v. Quick, 67 Fed. 130, 20 C. C. A. 410, 46 U. S. App. 70, 74 Fed. 236; *National Harrow Co. v. Hench*, 76 Fed. 667, 39 L. R. A. 299, 55 U. S. App. 53, 83 Fed. 36, 27 C. C. A. 349, 84 Fed. 226.

These contracts are also, not only in restraint of trade, but of interstate commerce.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

The United States patent laws afford no protection to this monopoly.

National Harrow Co. v. Hench, 39 L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36.

Mr. Henry J. Cookinham also argued the cause and filed a brief for plaintiffs in error:

Any contract in restraint of trade is void, provided it has reference to interstate commerce.

United States v. Joint Traffic Asso. 117 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

This combination is a power in its confederated form, which no individual action can confer.

National Harrow Co. v. Hench, 76 Fed. 667, 39 L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36. See also *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288.

The contracts sued upon have been repeatedly held to be in restraint of trade according to the common law. If such is the case, how is it possible that they should not be in restraint of trade and tend to form a monopoly in regard to interstate commerce, provided they are applicable to that subject?

National Harrow Co. v. Hench, 76 Fed. 667; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *National Harrow Co. v. Quick*, 67 Fed. 130; *National Harrow Co. v. Bement*, 21 App. Div. 290, 47 N. Y. Supp. 462.

The mischief of this monopoly is not necessarily in the fact that it will prevent invention, but in that it has the power to control and prevent.

Strait v. National Harrow Co. 18 N. Y. 186 U. S.

Supp. 224; *National Harrow Co. v. Quick*, 67 Fed. 130.

A failure to pay a royalty, or any other breach of a royalty contract, does not authorize the licensor to treat the licensee as an infringer. Yet in this instance the combination does not allow licensees to make a harrow unless they agree to this extraordinary provision.

2 Robinson, Patents, § 821.

The Federal courts have repeatedly passed upon this statute, and the decisions show clearly that the contracts before the court in this case are in violation thereof.

McLullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Coal Dealers' Asso.* 85 Fed. 252; *United States v. Hopkins*, 82 Fed. 529; *United States v. Joint Stock Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

May not this court look into the whole record to see if a party's rights under the Federal laws have been denied; and, if so, may not the court consider any fact in the record necessary to enable it to grant relief?

Gregory v. McVeigh, 23 Wall. 294, 23 L. ed. 156; *Watson v. Tarpley*, 18 How. 517, 15 L. ed. 509; *Amis v. Smith*, 16 Pet. 313, 10 L. ed. 976.

Mr. **Edwin H. Risley** argued the cause and filed a brief for defendant in error:

Both the licensor and the licensee had existing conflicting rights which the contracts settled. The settlement was good.

Harston v. Swett, 66 N. Y. 206, 23 Am. Rep. 43.

The contracts are reasonable and legal in all of their provisions.

Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 154 Mass. 92, 12 L. R. A. 563, 27 N. E. 1005; *Dolph v. Troy Laundry Mach. Co.* 28 Fed. 553; *Re Greene*, 52 Fed. 104.

The anti-trust law gave no color or authority to a state court, or even a Federal court, to determine the validity or effect of contracts which might or might not affect interstate commerce, unless those questions were raised in a suit in equity wherein the United States was plaintiff, or in the circuit court of the United States where the aggrieved party was plaintiff.

Bowling v. Taylor, 40 Fed. 404; *Billings v. Ames*, 32 Mo. 265; *Jones v. Lees*, 1 Hurlst. & N. 189; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Pidcock v. Harrington*, 64 Fed. 821; *Southern Indiana Exp. Co. v. United States Exp. Co.* 88 Fed. 659, Aff. 186 U. S.

affirmed in 35 C. C. A. 172, 92 Fed. 1022; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Metcalf v. American School-Furniture Co.* 108 Fed. 909; Endlich, Interpretation of Statutes (1888) § 154, p. 216.

The Sherman anti-trust law applies to contracts and agreements relating exclusively to interstate commerce, and not to contracts which might or might not incidentally, remotely, or collaterally affect interstate commerce.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

It was never the intention of Congress, in the passage of the Sherman anti-trust law, that it should apply to or control private business transactions where the direct effect of the contracts did not necessarily interfere with articles of interstate commerce.

Minnesota v. Northern Securities Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308.

It is idle for the plaintiff in error to assail the validity of the contracts, for the purpose of keeping the large consideration received and repudiating the performance of the stipulations which it agreed to perform.

Good v. Daland, 121 N. Y. 1, 24 N. E. 15; *Hobbie v. Jennison*, 149 U. S. 353, 37 L. ed. 766, 13 Sup. Ct. Rep. 879; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 76, 4 Am. Rep. 513; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Hulse v. Bonsack Mach. Co.* 18 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864; *Bonsack Mach. Co. v. Smith*, 70 Fed. 383.

If it were to be assumed that the New York corporation was engaged in an unlawful effort to monopolize the spring-tooth harrow trade of the United States by virtue of its letters patent and its agreement with other persons, firms, and corporations than the plaintiff in error, it cannot avail itself of that fact when it was never a party thereto.

Strait v. National Harrow Co. 51 Fed. 819; *Kiff v. Youmans*, 86 N. Y. 329, 40 Am. Rep. 543; *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352, 56 N. W. 864; *Dennchy v. McNulta*, 41 L. R. A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825; *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 448, 41 N. E. 188; *The Charles E. Wisewall*, 74 Fed. 802; *Connolly v. Union Saver Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The Sherman anti-trust law applies only to a direct attack wherein the United States is complainant, or by a party who is injured, by a suit at law in the same court. It was never intended to be a defense on a collateral contract.

Connolly v. Union Saver Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

In this court we are concluded by the find-
1065

ings of fact made in a state court in a suit in equity, as well as in an action at law. *Dower v. Richards*, 151 U. S. 658, 666, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452; *Israel v. Arthur*, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922.

The only Federal question raised in the record is as to the validity of contracts A and B, with regard to the act of Congress on the subject of trusts. 26 Stat. at L. 209, chap. 647. That is a question of law plainly raised in the record, and we are not precluded from its consideration by any action of the state courts. If, however, facts not found by the referee are necessary for the purpose of connecting those contracts with others not found in such report, we cannot supply the omission to find those facts. The [84] contention of the defendant is that *the two contracts A and B are in truth a part and continuation of the agreements set forth in the defendant's answer, and that, taken together, they prove a purpose and combination on the part of all the dealers in patented harrows to control their manufacture, sale, and price in all portions of the United States; and defendant avers that such a contract or combination was and is void, not only as against public policy, but also because it is a violation of the Federal statute upon the subject of trusts and illegal combinations. Those former alleged contracts are not mentioned in the report of the referee excepting as, he stated, they had been declared void as against public policy and as being in restraint of trade because they extended beyond the life of the patents therein mentioned; and the referee found that following this decision all of the contracts then in existence, which were affected thereby, were immediately canceled by the parties thereto.

The referee made no finding of any fact connecting the contracts A and B with prior contracts of a like nature including other parties, as alleged in the answer of the defendant. The referee did find, however, that the defendant had no contract with the National Harrow Company until June 16 or 17, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York, and among other contracts the defendant executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which relate to the defendant's float spring tooth harrow business. He also found that such contracts constituted an absolute sale of the property and privileges thereby transferred, and that the defendant agreed to and did accept in payment thereof paid-up capital stock of the plaintiff. He further found that the transaction between the assignor of the plaintiff and the defendant in June, 1891, was intended by the parties to be an absolute sale by the defendant to such assignor of the United States letters patent and licenses un-

der such patents relating to the float spring tooth harrow business conducted by the defendant, and that it was founded upon a good, valuable, and adequate consideration between the parties; that as a part of such consideration *the assignor of the plaintiff [85] granted and delivered to the defendant the license contracts A and B, heretofore spoken of, and that upon the consummation of the transaction the controversy over patents and infringements existing between the first six firms named in the referee's report and the defendant and its customers was settled. The report also decided "that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant, were and are good and valid contracts, founded on adequate considerations, and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their own contents alone, and construed accordingly.

The referee also decided that the plaintiff was a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction; and that all the contracts in evidence were and are legal, valid, and binding contracts, and such as might reasonably be made under the circumstances, and were founded upon a good, valuable, and adequate consideration, and were reasonable in their provisions, and that they embodied no illegal restraints, and were not repugnant to any rule of public policy as in restraint of trade, and were not intended to create a monopoly, trust, or illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted.

When he speaks of all the contracts in evidence, the referee *plainly means all the con- [86] tracts in evidence between the parties to this action, for it was of such contracts only that he had been speaking. There were, in fact, other contracts than those designated A and B between these parties, and such other contracts had been put in evidence and previously referred to by the referee. He therefore must have included what is termed the escrow agreement in his finding that all the agreements made by defendant with the

plaintiff were valid. That agreement is set forth in the margin.†

[87] *There is no finding by the referee that this agreement was ever signed by anyone other than the parties to this action, or that any other person received the licenses from and made contracts with the plaintiff similar to the ones entered into between these parties. All that the referee finds is that all the contracts in evidence were legal, by which was meant, as already stated, all the contracts in evidence between the parties to the action, which were in existence and uncanceled. In the absence of any finding as to the escrow agreement having been signed by others, it must be regarded as unimportant, and we are brought back to the question whether these contracts or licenses, A and B, irrespective of any contracts not found by the referee as in any way connected with or forming a part thereof, are void as a violation of the act of Congress.

The plaintiff contends in the first place that only the Attorney General of the United States can bring an action under the statute, excepting that by § 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any circuit court of the United States in the district in which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract may set up as

a defense that it is a violation of the act of Congress, and, if found to be so, that fact will constitute a good defense to the action.

The 1st section of the act provides that "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue; but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal.

This brings us to a consideration of the terms of the license contracts, for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this ques-

†*Escrow Agreement.*

This memoranda of agreement, made and entered into this 1st day of April, A. D. 1891, by and between the National Harrow Company, a corporation of Utica, in the state of New York, and Edward Norris, of the same place, and E. Bement & Sons, of Lansing, in the state of Michigan.

Whereas, the said National Harrow Company is the owner of a large number of letters patent relating to float spring tooth harrows, and is desirous of granting licenses thereunder to the following-named persons, firms, and corporations, to wit: Chas. H. Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, the Herndeem Manufacturing Company, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W. S. Lawrence, McSherry Manufacturing Company, D. O. Everest & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

And whereas, the said National Harrow Company has placed in the hands of said E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms, and corporations hereinbefore named, to be by the said E. Norris immediately presented to each of the above and foregoing named respective persons, firms, and corporations, to be signed and executed by said respective persons, firms, and corporations—

Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms, and corporations they shall be held by said Norris in escrow for both parties until such time as all of said above-named persons, firms,

and corporations shall have signed, executed, and delivered the same to said Norris, whereupon they shall become operative, and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company, and the other duplicate thereof to the respective licensees who have signed the same, in person or by mail.

But in case any of the above-named persons, firms, and corporations shall neglect or refuse to sign, execute, and deliver said respective contracts and licenses on or before the 1st day of June next, then and in such case said E. Norris shall, provided he shall be so directed by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative, and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void.

Witness the signatures of the parties.

The National Harrow Co.,
By Chas. H. Childs, Pres't.
Edward Norris,
E. Bement & Sons,
By A. O. Bement, Pres't.

Received of E. Bement & Sons a license and contract executed between the National Harrow Company and said E. Bement & Sons, which I agree to hold and deliver in accordance with an agreement between the said National Harrow Company and said E. Bement & Sons and myself, and hereto attached.

Dated this 1st day of April, 1891.

Edward Norris.

tion is that the agreements concern articles protected by letters patent of the government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was therefore the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such [89] article himself or to authorize *others to sell it. As stated by Mr. Justice Nelson, in *Wilson v. Rousseau*, 4 How. 646, 674, 11 L. ed. 1141, 1153, in speaking of a patent:

"The law has thus impressed upon it all the qualities and characteristics of property for the specified period, and has enabled him to hold and deal with it the same as in case of any other description of property belonging to him, and on his death it passes, with the rest of his personal estate, to his legal representatives, and becomes part of the assets."

Again, as stated by Mr. Chief Justice Marshall, in *Grant v. Raymond*, 6 Pet. 218, 241, 8 L. ed. 376, 384:

"To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. This subject was among the first which followed the organization of our government. It was taken up by the first Congress at its second session, and an act was passed authorizing a patent to be issued to the inventor of any useful art, etc., on his petition, 'granting to such petitioner, his heirs, administrators, or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery.' The law further declares that the patent 'shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been ac- [90] tually received, *if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or

may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged."

In *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 732, 25 C. C. A. 267, 274, 47 U. S. App. 146, 160, 77 Fed. 288, 294, it is stated regarding a patentee:

"If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in *Hoe v. Knap*, 27 Fed. 204, is not supported by reason or authority.

It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several states, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation. Thus an improvement for burning oil, protected by letters patent of the United States, was condemned by the state inspector of Kentucky as unsafe for illuminating purposes, under the statute requiring an inspection and imposing a penalty for *the violation of the statute: and it was held [91] that the enforcement of the statute was within the proper police powers of the state, and that it interfered with no right conferred by the letters patent. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

There are decisions also in regard to telephone companies operating under licenses from patentees giving them the right to use their patents for the purpose of operating public telephone lines, but prohibiting companies from serving within such district any telephone company, and it has been held in the lower Federal courts that such a prohibition was of no force; that it was inconsistent with the grant, because a telephone company, being in the nature of a common carrier, was bound to render an equal service to all who applied and tendered the compensation fixed by law for the service; that while the patentees were under no obligation to license the use of their inventions by any

public telephone company, yet, having done so, they were not at liberty to place restraints upon such a public corporation which would disable it to discharge all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. It could not be a public telephone company, and could not exercise the franchise of a common carrier of messages, with such exception to the grant. See *State ex rel. Baltimore & O. Telcg. Co. v. Bell Teleph. Co.* 23 Fed. 539; *State ex rel. Postal Teleg. Cable Co. v. Delaware & A. Teleg. & Teleph. Co.* 47 Fed. 633, and *Delaware & A. Teleg. & Teleph. Co. v. State ex rel. Postal Teleg.-Cable Co.* 2 C. C. A. 1, 3 U. S. App. 30, 50 Fed. 677.

These cases are cited in the opinion of the court in the case of *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288. Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

[92] *The contention that they do not affect interstate commerce is not correct. We think the licenses do by their terms and by their plain meaning refer to, include, and provide for interstate as well as other commerce. The contract called Exhibit B provides for the manufacture at Lansing, Michigan, and for the sale of the articles there made in territory lying south and west of Virginia and West Virginia and Pennsylvania, and the referee finds that a number of harrows have been sold under that contract. The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the state of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article

may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, does not bear upon the facts herein. That case related to a purchase of stock in manufacturing companies, by reason of which the purchaser secured control of a large majority of the manufactories of refined sugar in the United States. It was held by this court that the Federal act relating to trusts and combinations affecting interstate commerce could not reach and suppress the creation of a monopoly in regard to the refining of sugar, and that the manufacturing of a commodity bore no direct relation to commerce between the states or with foreign nations. It was said by Mr. Chief Justice Fuller, for the court, while *speaking of such manufacture: "Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture, was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked." [93]

In these contracts, provision is expressly made, not alone for manufacture, but for the sale of the manufactured product throughout the United States, and at prices which are particularly stated, and which the seller is not at liberty to decrease without the assent of the licensor. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 238, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96. These contracts directly affected, not as a mere incident of manufacture, the sale of the implements all over the country, and the question arising is whether the contracts which thus affect such sales are void under the act of Congress.

On looking through these licenses we have been unable to find any conditions contained therein rendering the agreement void because of a violation of that act. There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. The execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents, as found by the referee. This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it, or sell the right to manufacture and sell the article patented, upon the condition that the as-

signee shall charge a certain amount for such article.

[94] It is also objected that the agreement of the defendant not *to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make, under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress.

The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning.

There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article. In brief, after a careful examination of these contracts, we are unable to find any provision in them, either taken separately or in connection with all the others therein contained, which would render the contracts between these parties void as in violation of the act of Congress.

It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit, designated A and B, and containing like conditions relating to the patents respectively owned by such parties. But there is no finding by the referee that such contracts were in fact entered into by those other parties, nor that they constituted *a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express

an opinion upon a state of facts not found. Upon the facts found there is no error in the judgment of the Court of Appeals, and it must therefore be affirmed.

Mr. Justice **Harlan**, Mr. Justice **Gray**, and Mr. Justice **White** did not hear the argument and took no part in the decision of this case.

NATHAN O. MURPHY *et al.*, *Appts.*,
v.

JAMES L. UTTER *et al.*

(See S. C. Reporter's ed. 95-113.)

Action—abatement—change of personnel in continuing municipal body—statutes—repeal by substantial re-enactment—power of territorial legislature to repeal act of Congress—territorial bonds—validity as affected by subsequent conduct of holders.

1. A change in the *personnel* of the loan commission of Arizona, created by Arizona Laws 1887, title 31, substantially re-enacted in the act of Congress of June 25, 1890 (26 Stat. at L. 175, chap. 612), for the express purpose of liquidating and providing for the payment of the outstanding indebtedness of the territory, does not abate a proceeding against the members of such commission, in their official capacity, to compel by mandamus the issue of refunding bonds, as such board was, by the acts creating it, made a continuing body with corporate succession, though not made a corporation by name.
2. The repeal of the Arizona act of March 18, 1887 (Ariz. Laws 1887, title 31), creating a board of loan commissioners for the territory, was effected by the act of Congress of June 25, 1890 (26 Stat. at L. 175, chap. 612) which substantially re-enacted the territorial act in all its provisions, although the preamble of such act speaks of the territorial act as being amended and, as amended, approved and confirmed.
3. The legislature of Arizona was not authorized to repeal the act of Congress of June 25, 1890 (26 Stat. at L. 175, chap. 612), by a provision therein that the territorial refunding act of March 18, 1887, which it substantially re-enacted, "is hereby amended," and "as amended the same is hereby approved and confirmed, subject to future territorial legislation."
4. A petition for a writ of mandamus to compel the Arizona loan commission to issue refunding bonds in exchange for county bonds is a "proceeding theretofore taken," within the meaning of the saving clause of Ariz. Rev. Stat. 1887, 2934 (§ 7), declaring that the repeal or abrogation of any statute shall not affect any action or proceeding theretofore taken, except as therein provided, and

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey* (N. C.) 4 L. R. A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136; and *United States v. 356 Caddies of Tobacco*, 20 L. ed. U. S. 235.

As to bonds in aid of railroad construction—see notes to *Cantillon v. Dnabue & N. W. R.* (Iowa) 5 L. R. A. 726; and *Sutliff v. Lake County*, 37 L. ed. U. S. 145.

As to the effect of repeal on pending action—see note to *United States v. Tynen*, 20 L. ed. U. S. 153.

was therefore not affected by a subsequent repeal of the act creating the loan commission.

5. Bonds of Pima county, Arizona, issued, in literal compliance with the Arizona act of February 21, 1883, in exchange for bonds of the Arizona Narrow Gauge Railroad Company, are not excluded from the provision of the act of Congress of June 6, 1896 (29 Stat. at L. 262, chap. 339), authorizing the refunding of all bonds which "had been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized," because subsequent to their issue the original holders of such bonds failed to complete the railroad and the county received no benefit therefrom, as the territorial act did not make the completion of the road a condition precedent to the issuance of the bonds, or make their validity dependent upon the subsequent conduct of the railroad company.

[No. 388.]

Argued March 7, 10, 1902. Decided May 19, 1902.

ON APPEAL from the Supreme Court of the Territory of Arizona to review a judgment ordering a peremptory mandamus to issue to the loan commissioners of Arizona, directing the refunding of certain bonds of that territory. *Affirmed.*

See same case below, 64 Pac. 427.

Statement by Mr. Justice **Brown**:

This was an appeal by the loan commissioners of Arizona from a judgment of the supreme court of that territory rendered March 22, 1901, granting a peremptory writ of mandamus and commanding such loan commissioners, upon the tender by plaintiffs of \$150,000 bonds of the county of Pima with coupons attached, described in the petition, to issue and deliver to the petitioners refunding bonds of the territory pursuant to certain acts of Congress.

The facts of the case are substantially as follows: By an act of the legislature of Arizona of February 21, 1883, the county of Pima in that territory was authorized to issue \$200,000 of bonds in aid of the construction of the Arizona Narrow Gauge Railroad Company, to which company the bonds were made payable. The entire issue was declared to be void by this court *in *Lewis v. Pima County*, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 22. This decision was pronounced in October, 1894.

Prior to this decision, however, owing to doubts that were entertained as to the validity of bonds issued in aid of railroads, the legislature of Arizona in 1887 and Congress in 1890 passed certain acts authorizing the refunding of territorial bonds, which had been authorized by law, and, in compliance with a memorial submitted by the legislature of Arizona, Congress passed a further act in 1896 authorizing the refunding of all outstanding bonds of the territory, and its municipalities, which had been authorized by legislative enactments, and also confirming and validating the original bonds, which by the 1st section were authorized to be refunded.

186 U. S.

Thereupon, and on December 31, 1896, James L. Utter and Elizabeth B. Voorhies filed the petition involved in this case for a writ of mandamus to compel the loan commissioners to issue refunding bonds in exchange for those originally issued by the county of Pima in aid of the Narrow Gauge Railroad Company. Defendants demurred to the petition, and for answer thereto averred that the bonds of Pima county, held by the petitioners, had been declared, both by the supreme court of the territory, and by this court, to be void, and therefore that the petition should be dismissed. They also interposed a plea of *res judicata*. The petition being denied by the supreme court of Arizona, the relators appealed to this court, which reversed the order of the supreme court of the territory, and remanded the case to that court for further proceedings. *Utter v. Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183. This decision was made in January, 1899.

Thereupon, and on June 1, 1899, after the case was remanded to the supreme court of Arizona, respondents, by leave of the court, filed an amended return to the effect that the bonds and coupons sought to be refunded were not delivered by anyone authorized by Pima county to do so; that the county never acknowledged the validity of the bonds or paid interest thereon; that the railroad, the construction of which the legislature intended to promote by the issue of the bonds, was never constructed, equipped, or operated; that Pima county never received *any[98] consideration whatever for the bonds; that they had been declared void by this court; that petitioners were not innocent holders of them; that the bonds and coupons were not sold or exchanged in good faith, and in compliance with the act of the legislature by which they were authorized, and that they were not intended to be included, and were not included, in the act of Congress of 1896, or any act or memorial of the legislative assembly of the territory. The return also set up the statute of limitations; that the *personnel* of the loan commission had been wholly changed; that the act authorizing the employment of loan commissioners had been repealed and no longer existed, and numerous defenses which had not been made or set up in the original answer or return.

Petitioners thereupon moved to strike the amended return from the files on the ground that the same had been filed without leave of the court, and that under the decision of this court in *Utter v. Franklin* no new defenses could be considered. The supreme court of the territory, however, overruled the motion and permitted the amended return to be filed, to which ruling petitioners excepted. But, instead of applying to this court for a writ of mandamus to carry its mandate into effect, they proceeded with the case in the supreme court of the territory, and filed a reply to the amended return. A referee was appointed, testimony taken, and the supreme court of the territory made a finding of facts set out in the record, and awarded a peremptory writ of mandamus di-

1071

recting the refunding of the bonds. From this judgment defendants appealed to this court.

Meantime, however, Elizabeth B. Voorhies, one of the petitioners, had died, and her executors were ordered by this court to be substituted.

Mr. Rochester Ford argued the cause and filed a brief for appellants:

The writ of mandamus will not issue where it would prove nugatory or unavailing, and parties who have no duties in the premises, or whose terms of office have expired, or whose offices have been abolished, cannot be made respondents in proceedings by mandamus.

Ex parte Mackey, 15 S. C. 322; *State ex rel. Bloxham v. Gibbs*, 13 Fla. 55, 7 Am. Rep. 233; *State, Worthley, Prosecutor, v. Steen*, 43 N. J. L. 542; *State ex rel. Lum v. Archibald*, 43 Minn. 328, 45 N. W. 606; *State ex rel. McGuire v. Waterman*, 5 Nev. 323; *Lamar v. Wilkins*, 28 Ark. 34; *Mason v. School Dist. No. 14*, 20 Vt. 487; *Barkley v. Levee Comrs.* 93 U. S. 258, 23 L. ed. 893; *Com. ex rel. Springfield v. Hampden County*, 6 Pick. 501; *People ex rel. Transportation Comrs. v. Central P. R. Co.* 62 Cal. 506.

It is immaterial that the act sought to be coerced by mandamus was a legal duty at the commencement of the proceedings. If it had been subsequently forbidden by law the writ will not be awarded.

2 Spelling, Extraordinary Relief, § 1378; *Hall v. Steele*, 82 Ala. 562, 2 So. 650; *People ex rel. Barron v. Monroe Oyer & Terminer*, 20 Wend. 103.

The loan commission of Arizona was established by the territory under the authority of the legislative act of March 10, 1887.

Ariz. Rev. Stat. 1887, title 31; *Utter v. Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183.

This was within the legislative power of the territory, which under the organic law "extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

U. S. Rev. Stat. § 1851; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. ed. 659; *Coulter v. Stafford*, 6 C. C. A. 18, 15 U. S. App. 118, 56 Fed. 564.

By the act of July 30, 1886, Congress intended to confer on the various territorial legislatures plenary power to legislate as they deem expedient with reference to funding.

Lawrence County v. Jewell, 41 C. C. A. 109, 100 Fed. 905.

Although Congress has the undoubted power to annul or modify at its pleasure the statutes of a territory of the United States, yet an intention to supersede the local law is not to be presumed unless clearly expressed.

France v. Connor, 161 U. S. 65, 40 L. ed. 619, 16 Sup. Ct. Rep. 497.

The act of Congress of July 25, 1890, entitled "An Act Approving, with Amendments, the Funding Act of Arizona," did

not change the territorial act into a congressional one.

Miners' Bank v. Iowa ex rel. District Prosecuting Atty. 12 How. 1, 13 L. ed. 867; *Lyons v. Woods*, 153 U. S. 661, 38 L. ed. 858, 14 Sup. Ct. Rep. 959; *Irwin v. Irwin*, 2 Okla. 180, 37 Pac. 548; *Martin v. Territory*, 8 Okla. 41, 56 Pac. 712; *Schuerman v. Territory* (Ariz.) 60 Pac. 895.

A new statute should be construed as a continuation of the old one with the modifications contained in the new one, although it formally repeals the old statute, when it re-enacts its substantial provisions and the two statutes are almost identical.

Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7; *Moore v. Mausert*, 49 N. Y. 332; *United Hebrew Benev. Asso. v. Benshimol*, 130 Mass. 327; *State ex rel. Churchill v. Bemis*, 45 Neb. 724, 64 N. W. 348; *Callahan v. Jennings*, 16 Colo. 471, 27 Pac. 1055; *State ex rel. Birdsey v. Baldwin*, 45 Conn. 134; *Stenberg v. State ex rel. Keller*, 50 Neb. 127, 69 N. W. 849; *Sutherland, Stat. Constr. § 133*; *Blaek, Stat. Constr. & Interpretation of Laws, § 359*.

Where an amendment is made by declaring that the original statute "shall be amended to read as follows," retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal and then re-enact the part retained, but such part remains in force as from the time of the original enactment, while the new provisions become operative at the time the amendatory act goes into effect, and all such portions of the original statute as are omitted from the amendatory act are abrogated thereby, and are thereafter no part of the statute.

Ely v. Holton, 15 N. Y. 595.

Nothing is better settled than that repeals,—and the same may be said of annulments,—by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction.

Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222.

To repeal an act by necessary implication it is not sufficient to establish that subsequent laws cover some, or even all, the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary; but there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only to the extent of the repugnancy.

Daviess v. Fairbairn, 3 How. 636, 11 L. ed. 760; *Wood v. United States*, 16 Pet. 362, 10 L. ed. 995.

Repeal by implication is not favored in law. It is held to occur only where different statutes cover the same ground, and there is a clear and irreconcilable conflict between the earlier and the later.

Wood County v. Luckawana Iron & Coal Co. 93 U. S. 619, 23 L. ed. 989.

Statutes relating to the same thing are

in pari materia, no matter when they were passed, and are to be construed together as though enacted at the same time.

State v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Potter's Dwarrr Stat.* p. 145; *Vane v. Newcombe*, 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. Rep. 60; *Black, Stat. Constr. & Interpretation of Laws*, p. 204; *Seward County v. Etna L. Ins. Co.* 32 C. C. A. 585, 61 U. S. App. 41, 90 Fed. 222.

A statute amending a former act operates, as to matters thereafter occurring, precisely as if the amendatory statute had been added to the prior act at the time of the latter's adoption, and the two acts must be considered together and as one statute. The amendment becomes a part of the original act.

Holbrook v. Nichol, 36 Ill. 161; *Peters v. Vawter*, 10 Mont. 201, 25 Pac. 438; *Ludington v. United States*, 15 Ct. Cl. 453.

The various funding laws of Arizona merely conferred a privilege on holders of bonds to have them funded, and created no contract that this should be done, and the offer could lawfully be withdrawn.

Durkee v. Louisiana Bd. of Liquidation, 103 U. S. 646, 26 L. ed. 598.

These laws were only a means by which the territory could execute its own policy or transact its own business, and might lawfully be altered or repealed at pleasure. Such funding arrangements are not a contract, but a mere legislative regulation.

Seward County v. Etna L. Ins. Co. 32 C. C. A. 585, 61 U. S. App. 41, 90 Fed. 222; *Durkee v. Louisiana Bd. of Liquidation*, 103 U. S. 646, 26 L. ed. 598; *San Francisco v. Beideman*, 17 Cal. 443; *South Carolina v. Gaillard*, 101 U. S. 433, 25 L. ed. 937; *Piqua Branch of State Bank v. Knoop*, 16 How. 408, 14 L. ed. 993; *Cooley. Const. Lim.* 145; *Dill. Mun. Corp.* § 69.

A person has no vested right in a remedy conferred by statute, to prevent the law-making power from modifying such remedy, or adding new conditions to its exercise, or withdrawing it entirely.

Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; *The Collector v. Hubbard*, 12 Wall. 1, *sub nom. Brainard v. Hubbard*, 20 L. ed. 272; *Covington & L. R. Co. v. Kenton County Ct.* 12 B. Mon. 144.

If there were any doubt as to the meaning of *Ariz. act* 1889, No. 32, it would be removed by the title, which shows that the purpose of the act was "to abolish the loan commission."

Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689.

General words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the act, and as not altering the general principles of the law.

River Wear Comrs. v. Adamson, L. R. 2 App. Cas. 743.

"Shall" ought, undoubtedly, to be construed as meaning "must," for the purpose of sustaining or enforcing an existing right, but it need not be for creating a new one.

186 U. S.

West Wisconsin R. Co. v. Foley, 94 U. S. 100, 24 L. ed. 71.

As against the government the word "shall," when used in statutes, is to be construed as "may," unless a contrary intention is manifest.

Cairo & P. R. Co. v. Hecht, 95 U. S. 168, 24 L. ed. 423.

It is a well-settled rule that the word "shall" may receive a permissive, rather than an imperative, interpretation, when necessary to carry out the true intent of the provision in which such word is found.

Endlich, Interpretation of Statutes, § 316; *Potter's Dwarrr. Stat.* p. 220; *Sedgw. Stat. & Const. Law*, p. 438.

Statutes are mandatory where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power be exercised.

Blake v. Portsmouth & C. R. Co. 39 N. H. 435; *Newburgh & C. Turnp. Road v. Miller*, 5 Johns. Ch. 112, 9 Am. Dec. 274.

Mr. John G. Carlisle also argued the cause for appellants:

Mr. C. F. Ainsworth also filed a brief for appellants:

A petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office.

Warner Valley Stock Co. v. Smith, 165 U. S. 31, 41 L. ed. 622, 17 Sup. Ct. Rep. 225.

The case of a public officer of the United States differs in this respect from that of a municipal board, which is a continuing corporation (although its individual members may be changed), and to which in its corporate capacity a writ of mandamus may be directed.

Leavenworth County v. Sellow, 99 U. S. 627, 25 L. ed. 335.

Mr. John F. Dillon argued the cause, and, with *Messrs. Harry Hubbard, John M. Dillon, and William H. Barnes*, filed a brief for appellees:

The decision of this case by this court on the former appeal was on the merits. The defendants had no right to make new defenses.

Re Potts, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; *Wayne County v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518; *Chaffin v. Taylor*, 114 U. S. 309, 29 L. ed. 198, 5 Sup. Ct. Rep. 924; *New Orleans v. Warner*, 180 U. S. 199, 45 L. ed. 493, 21 Sup. Ct. Rep. 353; *Stewart v. Salamon*, 97 U. S. 361, 24 L. ed. 1045; *Ex parte Story*, 12 Pet. 339, 9 L. ed. 1108; *Gaines v. Rugg*, 148 U. S. 228, *sub nom. Gaines v. Caldwell*, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, *sub nom. Dubuque & P. R. Co. v. Litchfield*, 17 L. ed. 514.

The fact that the officers who were loan commissioners at the time the suit was begun have ceased to be such officers does not affect the proceeding.

Thompson v. United States, 103 U. S. 480, 26 L. ed. 521; *Dill. Mun. Corp.* 4th ed. § 861b; *Leavenworth County v. Sellow*, 99 U. S. 624, 25 L. ed. 333.

The proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment.

Thompson v. United States, 103 U. S. 480, 26 L. ed. 521; *People ex rel. Case v. Collins*, 19 Wend. 56; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225; *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 42 L. ed. 873, 18 Sup. Ct. Rep. 441.

Although a statute is repealed generally, yet it may be in force for certain purposes.

Scibert v. Lewis, 122 U. S. 284, *sub nom. Scibert v. United States ex rel. Lewis*, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; *Memphis v. United States*, 97 U. S. 295, 24 L. ed. 922; *Champlain v. McCrea*, 165 N. Y. 264, 59 N. E. 83.

The relators' rights were vested before the repealing act was passed, and could not be destroyed or affected by that act, irrespective of the saving provisions of § 2934 of the Arizona statutes.

Memphis v. United States, 97 U. S. 293, 24 L. ed. 920.

The relators' rights were saved by the said § 2934, saving "any right then already existing or accrued," even if they would not be vested independently of that section.

Ibid.

They were also saved by the clause in § 2934, saving rights acquired in any pending "action or proceeding theretofore taken," i. e., taken before the repealing statute was enacted.

Ibid.

Mr. Justice **Brown** delivered the opinion of the court:

While upon the former hearing of this case, under the name of *Utter v. Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. [99] 183, the order of the supreme court of Arizona denying a writ of mandamus was reversed, and the case remanded for further proceedings, we expressed the opinion "that it was made the duty of the loan commissioners by these acts to fund the bonds in question." The logical inference from this was that a writ of mandamus should issue at once. True, the case was argued upon demurrer, but as the demurrer was accompanied by a plea of *res judicata*, which was expressly held to be untenable (p. 424, L. ed. p. 501, Sup. Ct. Rep. p. 186), it is a serious question whether the defendant should have been permitted to set up new defenses without the leave of this court. *Re Potts*, 166 U. S. 263, 267, 41 L. ed. 994, 996, 17 Sup. Ct. Rep. 520; *Ex parte Union S. B. Co.* 178 U. S. 317, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904; *Wayne County v. Kenicott*, 94 U. S. 498, 24 L. ed. 260; *New Orleans v. Warner*, 180 U. S. 199, 203, 45 L. ed. 493, 495, 21 Sup. Ct. Rep. 353; *Stewart v. Salamon*, 94 U. S. 434, 24 L. ed. 275; *Gaines v. Rugg*, 148 U. S. 228, *sub nom. Gaines v. Caldwell*, 37 L. ed. 432, 13 Sup. Ct. Rep. 611. The reason for such a course applies with special cogency to this case in view of the statute of Arizona (Rev. Stat. 1887, § 734), declaring

that the "defendant in his answer may plead as many several matters," whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas shall be stated in the following order, and filed at the same time: 1. Matters denying the jurisdiction of the court. 2. Matters in the abatement of a suit. 3. Matters denying the sufficiency of the complaint, or of any cause of action therein, by demurrer, general or special. 4. Matters in bar of the action. 5. Matters of counterclaim and set-off."

Of the numerous defenses upon the merits set up in the amended return, but two are pressed upon our attention, namely, whether the petition abated by a change of the personnel of the loan commission, or by a repeal of the act abolishing the commission altogether.

1. The court was correct in holding that the change in the personnel of the commission did not abate the proceeding, which was not taken against the individuals as such, but in their official capacity as loan commissioners. The original petition was entitled and brought by Utter and Voorhies, plaintiffs, against "Benjamin J. Franklin, C. P. Leitch, and C. M. Bruce, loan commissioners of the territory of Arizona," and the prayer was for a writ of mandamus requiring the defendants, "acting as the loan commission- [100] ers of the territory," to issue the refunding bonds.

The question when a suit against an individual in his official capacity abates by his retirement from office has been discussed in a number of cases in this court, and a distinction taken between applications for a mandamus against the head of a department or bureau for a personal delinquency, and those against a continuing municipal board with a continuing duty, and the delinquency is that of the board in its corporate capacity. The earliest case is that of *The Secretary v. McGarrah*, 9 Wall. 298, *sub nom. Cox v. United States ex rel. McGarrah*, 19 L. ed. 579, which was a writ of mandamus against Mr. Browning, then Secretary of the Interior, in which it appeared that Mr. Browning had resigned some months before the decision of the court was announced. It was held that the suit abated by his resignation, because he no longer possessed the power to execute the commands of the writ, and that his successor could not be adjudged in default, as the judgment was rendered against him without notice or opportunity to be heard. The same question was more fully considered in *United States v. Boutwell*, 17 Wall. 604, 21 L. ed. 721, in which it was held that a mandamus against the Secretary of the Treasury abated on his death or retirement from office, and that his successor could not be brought in by way of amendment or order of substitution. Said Mr. Justice Strong: "But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus is the personal obligation of the individual to whom it addresses the writ. If he be an or-

ficer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which, by him, the relator has a clear right. . . . It necessarily follows from this that, on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the [101] personal duty exists only so long *as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own." This language has evidently but an imperfect application to a case where the delinquency is not personal, but official, and the action is not that of an individual, but of a body of men in their collective capacity.

These were followed by *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225, wherein a bill in equity against the Secretary of the Interior and the Commissioner of the General Land Office, by their personal names, to restrain them from exercising jurisdiction with respect to the disposition of certain public lands, and to compel the Secretary to issue patents therefor to the plaintiff, was held to abate, as to the Secretary, upon his resignation from office, and could not afterwards be maintained against the Commissioner alone.

In *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 42 L. ed. 873, 18 Sup. Ct. Rep. 441, it was held that a suit to compel the Commissioner of Patents to issue a patent abates by the death of the Commissioner, and cannot be revived so as to bring in his successor, although the latter gives his consent. See also *United States ex rel. Warden v. Chandler*, 122 U. S. 643, 30 L. ed. 1244; *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97; *United States ex rel. Long v. Lochren*, 164 U. S. 701, 41 L. ed. 1181, 17 Sup. Ct. Rep. 1001.

It was doubtless to meet the difficulties occasioned by these decisions that Congress, on February 8, 1899, passed an act (30 Stat. at L. 822, chap. 121) to prevent the abatement of such actions.

We have held, however, in a number of cases, that if the action be brought against a continuing municipal board it does not abate by a change of *personnel*. Thus, in *Leavenworth County v. Sellow*, 99 U. S. 624, 25 L. ed. 333, which was an application for a mandamus against a board of county commissioners and its individual members to compel them to levy a tax to pay a judgment, it was held that the action would lie, though the terms of the members had ex-

pired, and the case of *Boutwell* was distinguished upon the ground that the county commissioners were "a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks *to have enforced. The alter-[102] native writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone." Said the Chief Justice: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifests itself in *Boutwell's Case* may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents who perform its duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation."

This was followed by *Thompson v. United States*, 103 U. S. 480, 26 L. ed. 521, which was a petition for a mandamus to compel the clerk of a township to certify a judgment obtained by the relator against the township, to the supervisor, in order that the amount thereof might be placed upon the tax roll. It was held that the proceeding did not abate by the resignation of the clerk upon the appointment of his successor; citing *People ex rel. Shaut v. Champion*, 16 Johns. 61, and *People ex rel. Case v. Collins*, 19 Wend. 56. See also *Re Parker*, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708.

We think these cases control the one under consideration, and that they are clearly distinguishable from the others. The loan commission of Arizona was originally created by an act of the territorial legislature of 1887 (Laws of 1887, title 31), the 1st section of which reads as follows:

"2039 (Sec. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the territory of Arizona, the governor of the said territory, together with the territorial auditor and territorial secretary, and their successors in office, shall constitute a board of commissioners, to be styled the loan commissioners of the territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided."

*Congress, by an act approved June 25, [103] 1890, re-enacted this statute substantially verbatim. 26 Stat. at L. 175, chap. 612. As the members of this commission and their successors in office were constituted a loan commission for the express purpose of liquidating and providing for the payment of the outstanding indebtedness of the territory, and subsequently by the act of Congress of 1896 (29 Stat. at L. 262, chap. 339), of its counties, municipalities, and school districts, we think it must be treated as a continuing body, without regard to its individual mem-

bership, and that the individuals constituting the board at the time the peremptory writ was issued may be compelled to obey it. As we said in *Thompson's Case*, 103 U. S. 480, 26 L. ed. 521, "the proceedings may be commenced with one set of officers, and terminate with another the latter being bound by the judgment."

It is true the loan commissioners were not made a corporation by the act constituting the board, but they were vested with power, and were required to perform a public duty; and, in case of refusal, the performance of such duty may be enforced by mandamus, under § 2335 of the Revised Statutes of Arizona of 1887, which provides that "the writ of mandamus may be issued by the supreme or district court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins." As, under the act of Congress, as well as the territorial act, the board was made a continuing body with corporate succession, the fact that it is not made a corporation by name is immaterial.

2. Respondents, however, relied largely upon the fact that as the loan commission of Arizona was abolished prior to the judgment of the supreme court in this case, there are now no persons upon whom the duty rests to fund the bonds in question, or against whom the writ of mandamus can go. There is no doubt that the legislature of Arizona did, on March 13, 1899, pass an act "to Abolish the Loan Commission," hereinafter set forth in full. But, in order to determine the effect of such act, it will be necessary to give a synopsis of the prior acts, both territorial and congressional, upon the same subject.

[104] To meet certain objections that had been raised to the validity *of bonds issued in aid of railroads (which objections were subsequently sustained by this court in *Lewis v. Pima County*, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 22) the legislature of Arizona on March 18, 1887, passed an act consisting of fourteen sections, the 1st section of which (above cited) constituted the governor, auditor, and secretary of the territory loan commissioners of the territory, for the purpose of providing for the payment of the existing territorial indebtedness of the territory due, and to become due, and for the purpose of paying and refunding the existing or subsisting territorial legal indebtedness, with power to issue negotiable bonds therefor. This power was limited to the legal indebtedness of the territory, and apparently had no bearing upon the indebtedness of its municipalities,—certainly not upon indebtedness which had been illegally contracted.

On June 25, 1890, Congress passed an act (26 Stat. at L. 175, chap. 614) providing that the above-mentioned funding act of the territory of Arizona "be, and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, *subject to future territorial legislation.*" The 1st section of this act is an exact copy of the 1st section of the territorial

act of 1887, with an immaterial addition here printed in italics, and reads as follows: "Par. 2039 (Sec. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the territory of Arizona *and such future indebtedness as may be or is now authorized by law*, the governor of the said territory, together with the territorial auditor and territorial secretary, and their successors in office, shall constitute a board of commissioners, to be styled the loan commissioners of the territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided." Then follow thirteen other sections, which are also copies of the corresponding sections of the territorial act, with a few immaterial changes as to the rate of interest, the form of the refunding orders, and the maturity of the bonds, etc., and followed by an additional section (15), providing against any further increase of indebtedness, with certain exceptions, beyond that limited by a former act.

The first question to be considered is as to the relation of these two acts. Is the act of Congress to be considered as an amendment or a repeal of the territorial act? It is true the preamble speaks of the territorial act as being amended, and, as amended, approved, and confirmed. But the language is not that of an amending act, but that of a repeated and substituted act. No attention is called to the amendments, which are not even introduced in brackets, and a careful reading and comparison of the two acts are required to discover where and how the territorial act is amended. It stands as an original piece of legislation, although its different sections contain the numbers taken from the Revised Statutes of Arizona, as well as from the original act of 1887. Both acts are complete in themselves, and each is, upon its face, independent of the other. It is impossible to say that, if the territorial act were repealed, the act of Congress passed three years later would also fail in consequence thereof, because the latter is not only the later, but the paramount, act. They must either stand together as two independent pieces of legislation, or the general, and perhaps the sounder, rule stated in *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153, be applied, that where there are two acts on the same subject, and the latter act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first. In that case, the defendant was indicted under an act passed in 1813 for uttering and counterfeiting a certificate of citizenship, purporting to have been issued by a California court. Upon a demurrer being filed to the indictment, the judges differed in opinion, and the case was sent to this court upon a certificate of division. While pending here, in 1870, Congress passed another act, embracing the whole subject of fraud against the naturalization laws, including all the acts mentioned in the law of 1813, and many others. It was held that the act

of 1870 operated as a repeal of the act of 1813, and that all criminal proceedings taken under the former act failed; and that even where two acts are not, in express terms, repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended to be a substitute for the first act, it will operate as a repeal of that act—citing a number of prior cases.

[106] *We think that case is controlling of the one under consideration, notwithstanding the cases of *Miners' Bank v. Iowa ex rel. District Prosecuting Attorney*, 12 How. 1, 7, 13 L. ed. 867, 870, and *Lyons v. Woods*, 153 U. S. 661, 38 L. ed. 858, 14 Sup. Ct. Rep. 959, relied upon by the respondents, which are readily distinguishable. In the first case, the territorial legislature of Wisconsin chartered the Miners' Bank. Afterwards, an act of Congress annulled the charter in certain particulars, but left other provisions in force. Thereafter, the territory was divided by an act of Congress, and the territory of Iowa erected over that former part of the territory of Wisconsin in which the bank was located. Later, the territorial legislature of Iowa repealed the charter, and directed the settlement of the affairs of the corporation by trustees under the supervision of the court. It was held that the annulment of several of the provisions of the bank's charter did not make the charter of the bank a congressional charter, but that it still remained a creation of the legislature of Wisconsin, and that no Federal question arose from the repeal of that charter by the legislature of Iowa. The case is totally different from the one under consideration, and that of *Lyons v. Woods* is equally so. There is a plain distinction between an act of Congress amending a territorial act by adding or striking out particular provisions, and one re-enacting it substantially in all its provisions.

We therefore are constrained to hold, as did the supreme court of the territory, that the territorial act of 1887 was repealed by the act of Congress of 1890, and that the latter act is still in force.

Returning now to the subsequent legislation, it appears that on March 19, 1891, the territory passed an act "supplemental to the act of Congress" approved June 25, 1890, and in compliance with the permit given by Congress for future territorial legislation, the 1st section of which declared that the act of Congress "be, and the same is hereby, now re-enacted as of the date of its approval," and enacted that the loan commissioners "shall provide" for the funding of the outstanding indebtedness "of the territory, the counties, municipalities, and school districts within said territory, by the issuance of bonds of said territory as authorized [107] by said act;" and also provided * (§7) that "any person holding bonds, warrants, or any other evidence of indebtedness of the territory, or any county, municipality, or school district within the territory, . . . may exchange the same for the bonds issued under the provisions of this act."

186 U. S.

In the following year, and on July 13, 1892, Congress passed another act amending the act of June 25, 1890, in several immaterial particulars, not necessary to be further noticed, and on August 3, 1894, it passed another act amending the act of 1890, also in immaterial particulars.

It seems, however, as stated in *Utter v. Franklin*, 172 U. S. 416, 420, 43 L. ed. 498, 500, 19 Sup. Ct. Rep. 183, that the existing legislation upon the subject was not deemed adequate by the territorial legislature, since in 1895 it adopted a memorial, urging Congress to pass such curative legislation as would protect the holders of all bonds issued under authority of its acts, the validity of which had been acknowledged, and relieve the people from the disastrous effects of repudiation.

In compliance with this memorial, Congress on June 6, 1896 (29 Stat. at L. 262, chap. 339), passed an act extending the provisions of the act of June 25, 1890, and the amendatory act of 1894 the 1st section of which provided that the above acts "are hereby amended and extended so as to authorize the funding of all outstanding obligations of said territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25, 1890," etc.; provided that such evidences of indebtedness "have been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized," and also providing that they "shall be funded with the interest thereon," etc. The 2d section provided that all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the act of 1890, "are hereby declared to be valid and legal for the purposes for which they were issued and funded, and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, approved, and validated, and may be funded as in this act provided, until January 1, 1897."

*This act was held in *Utter v. Franklin* to [108] require the refunding of the bonds involved in the case under consideration. There is no suggestion of any attempt having been made to repeal it. This opinion was pronounced January 3, 1899, and on March 13 of the same year the legislature passed a territorial act abolishing the loan commission. This act is in the following language: "An Act to Abolish the Loan Commission and to Repeal Sundry Laws Relating Thereto.

"Be it enacted by the legislative assembly of the territory of Arizona. Sect. 1. That par. 2039, sect. 1, chapter one, title 31, of the Revised Statutes of the territory of Arizona; also that sect. 1 of act No. 79, Session Laws of the 16th legislative assembly of the territory of Arizona, also act No. 33, and act No. 74, Session Laws of the 18th legislative assembly of the territory, are hereby repealed."

It will be observed that ¶ 2039, thus re-

pealed, is the 1st section of the territorial act of 1887, whereby the territorial governor, auditor, and secretary were constituted loan commissioners; that § 1 of act No. 79 was the territorial act of March 18, 1891, re-enacting the act of Congress of June 25, 1890, which, as before stated, was a substituted copy of the territorial act of 1887. Act No. 33 and act No. 74 have no bearing upon this case. The former referred only to territorial indebtedness, and the latter merely remedied defects in the records of the loan commissioners.

Upon this repealing act being presented to Governor Murphy, one of the defendants, for his approval, he submitted it to the attorney general for his opinion, and was advised by him that the act was void so far as attempting to abolish the loan commission was concerned. He advised the governor that, so far as the bill attempted to repeal § 1 of the territorial act of 1887, it was nugatory, as there was no such section to repeal, Congress having re-enacted it and having repealed all acts or parts of acts in conflict with it, and that if it were the intention of the repealing act to repeal the act of 1887 as approved and confirmed by Congress, it was beyond the [109] province of the territorial legislature to do so. Upon this opinion the governor returned the act without his approval, but the legislature proceeded to pass it over his veto by a two-thirds vote.

Had the territorial statute of 1887 been the sole authority for the appointment of loan commissioners, there would be much force in the argument that the repeal of this statute, as well as that of 1891, in 1899, terminated their official existence and operated even on pending cases (*Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 18 L. ed. 540; *Ex parte McCordle*, 7 Wall. 506, 19 L. ed. 264; *Re Hall*, 167 U. S. 38, 42 L. ed. 69, 17 Sup. Ct. Rep. 723); but, as we have already indicated, we think the congressional act of 1890 had already operated as a repeal of that act. Unless we are to take the position that the repeal of a territorial act operates as a repeal of an act of Congress covering the same subject, it is impossible to deny that the congressional act of 1890 is still in force. Had the latter been a mere amendment of the territorial act, the result would have been different, and a repeal of the original operated as a repeal of the congressional amendment.

It is true that the preamble of the act of 1890 declares that the funding territorial act of 1887 "is hereby amended," and "as amended the same is hereby approved and confirmed, *subject to future territorial legislation*," and it is insisted that, under this power to amend, it was competent for the territorial legislature to repeal the act altogether, and that such repeal would operate also to repeal the congressional act of 1890. That, as the legislature, before the approval by Congress of the act of 1887, had the undoubted power to abolish the commission which it had created, and as the act of 1887 was declared by Congress to be "subject to future territorial legislation," it had the

1078

power to do after the act of 1890 whatever it might have done before. But we think this is giving to the words "subject to future territorial legislation" too broad a scope. It was doubtless intended by these words to give to the territorial legislature power to make such new regulations concerning the funding act as future exigencies might seem to require. This power was properly exercised in the territorial act of March 19, 1891. Congress itself exercised the same power of amendment by its acts of July 13, 1892, August 3, 1894, and *June 6, 1896. While [110] we held in the recent case of *Shurman v. Arizona*, 184 U. S. 342, *ante*, 406, 22 Sup. Ct. Rep. 406, that the territorial statute of 1887 was the foundation for the appointment of the loan commissioners, and that their authority must be exercised in the manner prescribed by the territorial laws, it by no means follows that it was within the contemplation of Congress to authorize the legislature to repeal the act of 1890 under which their existence was continued. It was entirely reasonable to assume that the territorial legislature might wish to extend the power of refunding the bonds to those issued by its own municipalities, as well as by itself, as it did by the act of March 19, 1891, but it is inconceivable that, after having passed a complete and independent act of its own for the refunding of territorial bonds, Congress should authorize a territorial legislature to repeal it. While the territorial and congressional legislation subsequent to the act of Congress of June 25, 1890, has but little bearing upon the question now in controversy in this case, it indicates plainly that, under the power given for future territorial legislation, it was contemplated that such legislation should be in furtherance and extension of the main object of the act of 1890, whereby the power of refunding territorial indebtedness should be extended to the indebtedness of counties, municipalities, and school districts of the territory, and that it could not have been contemplated that power should be given to the territorial legislature to abolish the whole system without the consent of Congress.

The result is that, even if we are mistaken in saying that the congressional act of 1890 operated as a repeal of the territorial act of 1887, it is still a separate and independent act which it was beyond the territorial legislature to repeal, and that the office of loan commissioners, continued by the act, was not terminated by the repeal of 1890.

But, in addition to this, there is a saving clause in the Revised Statutes of Arizona of 1887, which provides as follows:

"2934 (Sec. 7). The repeal or abrogation of any statute, law, or rule does not revive any former statute, law, or rule theretofore repealed or abrogated, nor does it affect any right then already existing or accrued at the time of such repeal, or any *action or pro-[111] ceeding theretofore taken, except such as may be provided in such subsequent repealing statute, nor shall it affect any private statute not expressly repealed thereby."

It may admit of some doubt whether the

186 U. S.

petitioners had obtained any such "right" at the time of the repealing act of 1889, as could be said to be then "existing or accrued," and thereby saved by this section, inasmuch as they had obtained no judgment upon the refunding bonds before applying for a writ of mandamus, as was the case in *Memphis v. United States*, 97 U. S. 293, 24 L. ed. 920, although, it is true, they had obtained the opinion of this court that such bonds should issue.

But without expressing an opinion upon this point, we think that the petition for this mandamus was a "proceeding theretofore taken" within the meaning of the saving clause of § 2934, and that the right of the petitioners was saved thereby, even if it be conceded that the loan commission had been abolished. In the case of *Memphis v. United States*, already alluded to, it was said that "when the alternative writ of mandamus was issued March 22, 1875, a proceeding was commenced under or by virtue of the statute." The defendants insist that the action or proceeding must have resulted in a judgment prior to the repealing statute, in order that the rights should be saved by § 2934. This, however, confounds the distinction between a "right" already "existing or accrued" and an "action or proceeding theretofore taken," since, if the proceeding had culminated in a judgment, the latter clause would be superfluous, and the judgment would be saved by the former clause with respect to a right already existing or accrued. Every word or clause used in a statute is presumed to have a meaning of its own, independent of other clauses, and if a statute preserve, not only rights, but proceedings, it will be presumed that the legislature intended to save both classes, and to give to "proceeding taken" a broader meaning than would be indicated by the words "right existing or accrued."

[112] 3. The only remaining questions urged against the issue of a mandamus in this case is that these bonds do not come within the provisions of the act of June 6, 1896, for the reason that the Arizona legislature, finding that an attempt was being made *to include the bonds in question in that act, adopted certain memorials in 1897 and 1899 urging the President to veto the act of Congress legalizing the bonds, and urging upon Congress to pass such legislation as would exclude from the provisions of the act of June 6, 1896, the bonds issued by Pima county to the Arizona Narrow Gauge Railroad Company, so that the act should not be so construed as to validate these bonds. These memorials, however, seem to have been unsuccessful. No interest, however, was paid upon the bonds, and it was shown by the findings of fact that the present owners, Coler & Company, bought them as they matured with notice that the first coupons had been protested, and that the bonds had been repudiated by Pima county from the start. The court below, however, made a finding of fact from which it appeared that the original bonds of Pima county were issued in literal compliance with an act of the territory 186 U. S.

of Arizona, approved February 21, 1883, in exchange for bonds of the Narrow Gauge Railroad Company. It is true that the county of Pima derived little or no benefit from the building of the few miles of railroad, but, as was said by the supreme court, "there was nothing in evidence showing bad faith on the part of the railroad company, in so far as the first exchange of bonds was concerned, nor is there any evidence which shows bad faith on the part of the company or its contractor, Walker, and his principals, Coler & Company, except their failure to continue the building and equipment of the road after the completion of the 30 miles of grading and laying of 10 miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Company had difficulty in raising the money for the payment of the work done, and did not have the resources to go on and complete the work. Can the court say that, notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue the original holders of those bonds failed to complete the railroad, and the county of Pima thereby received no benefit from the same? The question of a failure of consideration is to be distinguished *from that of [113] an exchange of bonds in good faith under the act of June 6, 1896, unless the failure of consideration was due to a failure on the part of the holders of the bonds to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the one which required a certificate of the county surveyor, showing that each 5 miles of the road was graded and laid with ties and iron, as a condition precedent to the exchange of each \$50,000 of county bonds for a like amount of railroad bonds. As the supreme court has held in this case, Congress, by the act of June 6, 1896, validated the territorial act of February 21, 1883. And as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial compliance, but a literal as well, with the requirements of the act under which they were issued." [64 Pac. 432.]

But a further answer to these objections to the validity of the bonds is that all the facts upon which these objections are founded existed and were known to the loan commissioners at the time the original answer was filed and before the case of *Utter v. Franklin* was heard or decided by this court, and should have been then set up as a defense upon the merits.

Upon the whole case we are of opinion that

the judgment of the Supreme Court of Arizona, ordering a peremptory mandamus to issue to the present loan commissioners, was right, and it is therefore affirmed.

Mr. Justice **Gray** did not sit in this case, and took no part in its decision.

[114]

*LOUIS BEYER, *Appt.*,

v.

CAROLINE LE FEVRE.

(See S. C. Reporter's ed. 114-126.)

Courts—jurisdiction—waiver of objection—wills—undue influence—sufficiency of evidence.

1. The objection of the want of jurisdiction of the supreme court of the District of Columbia sitting as a court of equity, over a suit to set aside a will of real and personal property, will be regarded as waived where the parties agreed to submit certain issues to a jury (before whom such issues were in fact tried) and stipulated for returning the testimony there taken to the equity court for consideration by the judge thereof.
2. A will of a person of sound mind and memory cannot be set aside in the Federal courts on evidence tending to show only a possibility or suspicion of undue influence.

[No. 237.]

Argued April 25, 28, 1902. Decided May 19, 1902.

APPPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District setting aside a will for undue influence. *Reversed.*

See same case below, 17 App. D. C. 238.

Statement by Mr. Justice **Brewer**:

This was a bill filed in the supreme court of this District on April 7, 1899, to set aside the following will:

In the name of God, Amen.

I Mary Beyer of the city and county of Washington and District of Columbia being now of sound and disposing mind, do make, ordain, publish and declare this to be my last will and testament: That is to say, first after all my lawful debts are paid and discharged the residue of my estate, real and personal, I give, devise, bequeath, and dispose of as follows: to wit all the furniture and personal effects now in the home, number 2258 Brightwood avenue I desire to remain there during the life of my husband Louis Beyer or so long as it remains the family home, and in the event of the house not being retained as a family home then the furniture and all other personal effects be-

longing to me are to go to and belong to my nephew and adopted son born Charles Lewis Smith but adopted by me at birth and thereafter always called Louis Beyer, Junior.

To my sister Elizabeth Kersinski Maus of Philadelphia, Pa. I leave five dollars.

To my sister Caroline Kersinski Lefevre of Brookland, D. C. I leave five dollars.

*To my niece Helen J. Fenton of Wash-[115] ington, D. C., I leave five dollars.

All the rest and residue of my estate, real, personal and mixed, of which I may die seized and possessed, whatsoever and where-soever, of what kind, nature and quality so-ever the same may be, and not hereinabove given or disposed of, I hereby give, devise, and bequeath, unto my nephew and adopted son, Louis Beyer, Junior, and Helen B. Johnson my niece in equal shares, as tenants in common, and not as joint tenants, their heirs and assigns, absolutely and forever.

Having full faith and confidence in the honesty, integrity, and affection of my said adopted son and of my said niece, I leave them all the property stated herein knowing that they will provide a home and home comforts for Louis Beyer, Senior, during his natural life, but this is not to be construed to mean that said Louis Beyer, Junior and Helen B. Johnson are to be restricted from disposing of any or all of the property if their judgment so dictates but in the event of disposing of all the property before the death of Louis Beyer, Senior, they are to always maintain a home and home comforts for my beloved husband, Louis Beyer, Senior.

Likewise I make, constitute, and appoint, my adopted son born Charles Lewis Smith but always known as Louis Beyer, Junior, to be executor of this my last will and testament, hereby revoking all former wills made by me, and I request that he be not required to give bond as such executor.

In witness whereof I have hereunto set my hand, subscribed my name, and affixed my seal this fourteenth day of July in the year of our Lord one thousand eight hundred and ninety-six in my home at Washington, D. C.
Mary Beyer. [Seal.]

The above-written instrument was subscribed by the said Mary Beyer in our presence and acknowledged by her to each of us, and she at the same time published and declared the above instrument so subscribed to be her last will and testament, and we at the testator's request and in her presence and in the presence of each other have signed our names as witnesses *hereto and[116] written opposite our names our respective places of residence.

P. J. Brennan,

1418 F St. N. W., Washington, D. C.

Wade H. Atkinson,

707 12th St. N. W., Washington, D. C.

Thomas C. Smith,

1133 12th St. N. W., Washington, D. C.

The parties named as defendants were Louis Beyer, the husband of the testatrix:

186 U. S.

NOTE.—As to what undue influence will avoid a will—see note to *Kerr v. Munsford* (W. Va.) 2 L. R. A. 668; *Middleditch v. Williams* (N. J. Eq.) 4 L. R. A. 738; and *Davis v. Strange* (Va.) 8 L. R. A. 261.

Louis Beyer, Junior, a nephew; Helen B. Johnson, a niece; Louis Beyer, Junior, as executor, and Meyer Cohen and Adolph G. Wolf, trustees in a deed of trust executed by the husband of the testatrix on May 13, 1897. The ground of attack was the alleged mental incapacity of the testatrix and undue influence on the part of Louis Beyer, Junior, and Helen B. Johnson. The personal property belonging to the testatrix was of little value, but she owned certain real estate, subject to a trust deed, which in the bill was alleged to be of the value of \$25,000 over and above the encumbrance. Louis Beyer, Junior, and Helen B. Johnson, answering separately, denied mental unsoundness and undue influence; alleged that the will was duly executed, and challenged the jurisdiction of the court, sitting as a court of equity, to entertain the bill. The trustees pleaded that the bill stated nothing entitling the complainant to relief in equity, and averred that their deed of trust was a valid lien. Louis Beyer demurred generally. On June 20, the court having made no ruling upon the question of jurisdiction, the parties signed this stipulation:

"It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the court may make an order certifying certain issues, to be named in said order, to be tried by a jury of the circuit court, and that the findings by said jury upon said issues shall be returned to this court; whereupon a decree shall be entered in accordance with said findings, all rights of appeal as in cases of issues from the orphans' court being hereby reserved."

And thereupon the court made this order:

[117] "Ordered by the court this 20th day of June, 1899 (the parties to this cause consenting hereto), that the following issues to be tried by a jury be, and they hereby are, certified to the circuit court, to wit:

"First. Was the said Mary Beyer at the time of the alleged execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will and testament, of sound and disposing mind, memory, and understanding, and capable of executing a valid deed or contract?

"Second. Was the execution of the said paper-writing bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention, or undue influence practised or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them or by any other person?

"Third. Were the contents of the paper-writing bearing date July 14th, 1896, and purporting to be the last will and testament of said Mary Beyer, known to her at the time of the alleged execution thereof?"

This order was assented to by all the parties. In pursuance thereof the case came on for trial before Mr. Justice Cole and a jury, and the jury, after hearing the testimony and the instructions of the court, answered each of the questions in the affirmative. A motion for a new trial was overruled by the
186 U. S.

presiding judge. A stipulation was entered into by the parties that the full report of the testimony and proceedings had before Mr. Justice Cole and the jury should be produced, read, and heard by the equity court as a part of the record on the hearing in that court and in the appellate court to which the cause might be carried by either or any of the parties. Thereupon a full report of the proceedings was presented to Mr. Justice Barnard, holding the equity court, who, on May 14, 1900, filed an opinion sustaining the verdict of the jury, and directing a decree in accordance with the prayers of the bill. From that decree Louis Beyer, Louis Beyer, Junior, and Helen B. Johnson appealed to the court of appeals. On December 6, 1900, the court of appeals affirmed the decree. From that decree Louis Beyer, a severance being had, appealed to this court.

Messrs. Henry E. Davis and Franklin H. Mackey argued the cause and filed a brief for appellant:

Proof of the strength and clearness of the testator's mental condition at the time of making the will affords a strong presumption of the absence of all coercive influence.

27 Am. & Eng. Enc. Law, p. 504; Schouler, Wills, §§ 225, 226, 242; *Latham v. Udell*, 38 Mich. 238; *Shailer v. Bumstead*, 99 Mass. 112.

Isolated and disconnected circumstances are not permitted to outweigh the usual presumption of the law that a person of intelligence and capacity who executes a will does so without imposition or undue influence.

Schouler, Wills, § 239; *Boyse v. Rossborough*, 6 H. L. Cas. 6; *Marx v. McGlynn*, 88 N. Y. 357; *Fritts v. Denemberger*, 12 N. J. Eq. 129.

If the provisions of a will are just, natural and reasonable, these facts will do much to show that it was the proper will of the testator.

27 Am. & Eng. Enc. Law, p. 502.

The harmony of the will with the testator's habitual disposition and affection is worthy of much consideration.

Allen v. Public Administrator, 1 Bradf. 378.

Mr. Clayton E. Emig argued the cause and filed a brief for appellee:

When a party to a cause leads the court to adopt a certain mode of procedure in a case, which the court had the discretion to adopt or not to adopt, the party agreeing to such mode of procedure should not be allowed to object to it because the result has been adverse to him.

Strong v. Willey, 104 U. S. 512, 26 L. ed. 642; *Reynes v. Dumont*, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; *Kilbourn v. Sunderland*, 130 U. S. 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594.

Mr. Charles Poe also argued the cause and filed a brief for appellee:

It is too late to object to the manner chosen to have a jury trial.

Strong v. Willey, 104 U. S. 512, 26 L. ed. 642.

When two lower courts have agreed in their findings of facts, they are conclusive, unless something practically equivalent to fraud appears upon the face of the record.

Workman v. New York, 179 U. S. 555, 45 L. ed. 318, 21 Sup. Ct. Rep. 212; *The Carib Prince*, 170 U. S. 655, *sub nom.* *Wuppermann v. The Carib Prince*, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; *Compagnia de Navigaieon La Flecha v. Brauer*, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12.

[118] "Mr. Justice **Brewer** delivered the opinion of the court:

The appellant contends, first, that the supreme court of the District, sitting as a court of equity, had no jurisdiction of this cause; second, that the verdict of the jury was not sustained by the evidence; and third, that there was duress and coercion of the jury by the court, which resulted in an unjust verdict.

We pass the first question with the observation that, whatever might have been the conclusion if the defendants had stood upon their challenge of the jurisdiction, the agreement of the parties to submit certain questions to a jury, the trial before the jury and the stipulation for returning the testimony there taken to the equity court for consideration by the judge thereof, must be held a waiver of the objection to the jurisdiction. Under the Federal system the same judge may preside whether the court is sitting in equity or as a common-law court. While the pleadings and procedure are dissimilar, and the rights of the parties, especially in respect to juries, are different, yet in many cases a party who appears in one branch of the court and consents to a hearing and adjudication, according to the practice there prevailing, of an issue presented by the pleadings and in respect to a subject-matter, which is within the general scope of its jurisdiction, may be estopped from thereafter and in an appellate court challenging such jurisdiction. *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486. This is such a case. The determination of the title to real estate is within the scope of the general jurisdiction of a court of equity. The issue of undue influence in respect to any transaction such a court is competent to determine. The proceeding consented to, and in fact had, was practically the trial of a feigned issue out of chancery. It is too late now to raise the question of jurisdiction.

Passing to the second question, we premise by saying that "it is well settled that when the trial and the appellate courts agree as to the facts established on the trial, this court will accept their conclusion, and not attempt to weigh conflicting testimony. *Stuart v. Hayden*, 169 U. S. 1, 14, 42 L. ed. 639, 644, 18 Sup. Ct. Rep. 274, and authorities cited in the opinion. And this rule of concurrence with the conclusions of the trial and appellate courts is given more weight when in the first instance the facts

are found by a master or a jury. *Farrer v. Ferris*, 145 U. S. 132, 36 L. ed. 649, 12 Sup. Ct. Rep. 821, and cases cited in the opinion. These propositions we have often affirmed. At the same time there has always been recognized the right and the duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony it will set the verdict or report aside and direct a re-examination. And after having carefully examined the record in this case we are constrained to the conclusion that there is no testimony which justified the answer returned to the second question. On the contrary, if a will is set aside upon such a flimsy showing as was made of undue influence, few wills can hope to stand.

The facts are these: The testatrix was a woman sixty-five years of age; had been married forty-five years, but was childless; her relations with her husband and sisters were pleasant; her near relatives were two sisters, Caroline Le Fevre, the present appellee, and Mrs. Maus, the mother of Helen B. Johnson. Another sister had died many years ago, leaving two children, Charles Louis Smith (known in the record as Louis Beyer, Junior) and Helen C. Fenton. Louis Beyer, Junior, while a little child, and on the death of his mother, was taken by the testatrix and brought up as her son. There does not appear to have been any formal adoption, but he went by the name of Louis Beyer, Junior, and was recognized and treated as her son. He was twenty-seven years old at the time of her death. Helen B. Johnson was, as stated, the daughter of Mrs. Maus, a sister of testatrix. She, too, lived with the testatrix the most of her life, although it does not appear that she had been recognized as a daughter. The testatrix died of cancer in the abdomen. The first indications of trouble were in December, 1893, though at that time the appearances were of an ordinary *case of indiges- [120] tion, and the fact that it was cancer was not developed until sometime in the early part of 1896, the year in which she died. In the month of June of that year she went on a visit to the home of Helen Johnson's mother-in-law, 12 miles south of Richmond. She returned about the 1st of July, was about the house for a week or so after her return, and then took to her bed, dying on July 26. When spoken to, at different times prior to her visit to Richmond, about making a will she had declined, saying she intended the property should go to her husband; but being advised, either before or after her visit to Richmond, that in case she died without a will the property would go to her sisters and their descendants, she decided to have a will made, and so informed Louis Beyer, Junior, on Sunday, July 12; she also inquired if a will made on Sunday was valid, and was told by him, after an examination of a cyclopaedia, that it would be. He suggested an attorney living near, to whom she objected, whereupon he proposed to call in Mr. Brennan, who occupied an office in the same building in which he was employed.

This was satisfactory. Mr. Brennan was sent for. Witnesses were asked to attend, among them her regular physician. Mr. Brennan came in the afternoon, found her lying in bed, received instructions from her how she wanted the will drawn, and wrote it then and there. It was thereafter read to her, signed and acknowledged by her in the presence of himself, the regular physician, and a Mr. Sullivan, and signed by them as witnesses. That will was similar to the one finally executed, except that it devised the property to Louis Beyer, Junior, alone. Mr. Brennan took the will to his office. On examination he found that he had left out the word "heirs," so that, as he thought, only a life estate would pass to the devisee, and on Monday prepared a new will, exactly like the one which had been executed, with the addition of the word "heirs." He called on the testatrix and explained the change he had made; she then said that, inasmuch as there had to be a new will executed, she would like to have Mrs. Johnson included with Louis Beyer, Junior. Whereupon Mr. Brennan went to his office and wrote a will the third time, and on Tuesday went back to the house, and there it was [121] executed. *That is the will in dispute. It was taken by him to his office and kept in his hands until after her death. That the contents of this will were known to her at the time of its execution, and that she was "of sound and disposing mind, memory, and understanding, and capable of executing a valid deed or contract," were found by the jury, and were abundantly proved by the testimony, among the witnesses thereto being her regular physician, the minister who visited her, the lawyer who drafted the will, and others wholly disinterested.

Before noticing what is claimed to be evidence of undue influence, we remark that the will was not an unnatural one for the testatrix to make. As long as she supposed her husband would inherit the real estate, she declined to make any. She meant that he should have the benefit of the property. She found, however, that it was necessary for her to make a will in order to secure this result. He was an old man, and in the natural course of events could not be expected to live many years. It is not strange that, with the utmost affection for her sisters, she should prefer that, after he had had the enjoyment of her property, it should go to the nephew and niece who had made their home with her, who had been brought up by her, and one of whom, at least, was regarded as an adopted child. So she makes a will vesting the fee in them, but charged with the duty of furnishing a home to her husband as long as he lived, and relying upon their affection to give to him the comforts of a home such as they all had had together in the past. While she gave them the power of alienation, she coupled with it the proviso that whatever was done with this property they should still secure a home to him during his lifetime. She trusted much to their affection, but is this singular considering the length of time they had been members

of her family and that which she must have known to be the relation subsisting between them and him? Yet she did not leave provision for her husband entirely to their affection. She directed in terms that such provision should be made, and she doubtless believed that that direction would be binding, and it was binding. It was in the nature of a precatory trust, and so expressed as to be obligatory upon the devisees and enforceable in the courts. *Colton v. Colton*, *127 [122] U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164. It is no ground of criticism that others might have made a different will. That she did not give the fee to her husband, but to her adopted son and niece, burdened with this precatory trust, may have been owing to a fact which is, at least, suggested by the testimony, that her husband was visionary, and she feared might waste his property in developing some of his supposed inventions. That she was justified in placing confidence in the affection of the devisees for her husband is shown by the fact that they conveyed to him a large portion of the property upon hearing that he was dissatisfied with the contents of the will. It is true that sometime thereafter, owing to his contemplated marriage, the pleasant relations between him and them seem to have ceased, but this unfortunate condition does not prove that the testatrix did not at the time have good reason to trust in their affection for him.

Turning now to the testimony offered to show undue influence, it comes from two witnesses, Mrs. Stone, the daughter of the appellee, and Fanny Perry, a colored servant in the house of the testatrix. Mrs. Stone's testimony is mainly concerning the condition of the testatrix during her last sickness, and had a tendency to show that she was in a drowsy condition, if not unconscious, during the last fourteen days of her life, though as she was at the house of the testatrix only every other day, and then for but a few minutes at a time, her testimony was properly considered by the jury as of no great significance and overborne by that of the physician and other witnesses. She does testify to one thing in reference to Mrs. Johnson, which will be considered hereafter. The only other witness, and the one upon whom the appellee substantially relies, is Fanny Perry, the servant. Now, in respect to her testimony, and indeed all the testimony in the case, it must be observed that there is not a syllable tending to show that Louis Beyer, Junior, ever urged the testatrix to make a will, ever suggested or spoke to her in respect to the matter, and that all the connection he had with it was in response to requests to ascertain what would be the disposition of the property without a will, the validity of a will made on Sunday, and in suggesting the name of a lawyer to prepare the will and asking him to come. Now, to find that *the will was ob- [123] tained by undue influence on his part, when there is not the slightest syllable tending to show that he ever said or did a thing toward securing the execution of the will ex-

cept at her request, is a proposition which cannot for one moment be entertained. With this must also be remembered that the will which was first drawn, the one executed on Sunday, made him the sole devisee, and that it was intended by the testatrix to vest the property absolutely in him, so as to deprive the appellee and other of her relatives of any interest in the property. That it did not have that effect was owing to a mistake of the scrivener in omitting the word "heirs," a mistake which, when discovered by him, he proceeded promptly to correct, and only when the corrected will was presented to her did she authorize a change so as to include Mrs. Johnson. Suppose it were true that Mrs. Johnson did after the first will by her importunity persuade the testatrix to include her as a devisee, the change wrought no prejudice to the interests of the appellee. It took away nothing from her. It only added a new devisee, and that not the appellee,—another one to share in the property.

But now, let us see what is the testimony which is claimed to show that Mrs. Johnson exercised undue influence. Mrs. Stone testified that she boarded with the testatrix for a couple of years (and that was a year or two before the death of testatrix), and that during that time, when Mrs. Johnson seemed displeased at something, she heard the testatrix say that "it was because she did not make a will and she never intended to make a will." Fanny Perry testified that she lived with the testatrix about three years prior to her death; that Mrs. Stone called at the house on the Sunday when the first will was executed, and she heard Mrs. Johnson say to Louis Beyer, Junior, "You

[124]*stay with him and treat him right, and when he died he would do right by them. To which Mrs. Johnson replied: "This is the way you are going to treat me after I have been working for you all these years, and this will be all the thanks I'll get for doing it;" that after the testatrix had taken to her bed she asked her to make a will, but she said she would not, but would leave the property to her husband, to which Mrs. Johnson said: "Yes, you will leave it to him, and he will sink it in a boat or run mill;" and the testatrix replied: "Nellie, how can you talk about your uncle like that?" and also, "Nellie, you are harassing me to death." Whereupon Mrs. Johnson said she would go if the will was not made, and the testatrix replied: "You have run Mrs. Stone out of the house to get something when I die. You said she was waiting for a dead man's shoes, but you are the one to catch it."

1084

We put out of consideration the fact that Mrs. Johnson contradicts the witness and denies ever having urged the testatrix to make a will in her behalf or to make a will at all, and inquire whether, giving the fullest weight to this testimony, it warrants a finding that the execution of this will was secured by undue influence. We are clear that it does not. The conversations which the witness states were had while the testatrix was about the house and attending to her ordinary duties were conversations which might naturally be had between one brought up in the family, as Mrs. Johnson was, and one who had been to her as a mother. It would not be strange that having lived all her life in the family she felt that there was something due to her in respect to the disposition of the property. It will be remembered that it is not influence, but undue influence, that is charged, and is necessary to overthrow a will. The question No. 2 puts in the same category fraud, circumvention, and undue influence. Placing undue influence along with fraud and circumvention interprets the character of the influence. *Nescitur a sociis*. Surely there is nothing in these conversations which has in it anything suggestive of fraud or circumvention, nothing wrongful or misleading.

With reference to the last conversation detailed by the witness, that which took place after the testatrix had taken to her bed, it may be conceded that there is a display of urgency and petulance on the part of Mrs. Johnson and a rebuke on the part of the testatrix, but is there enough in it to justify a finding that the will was procured by undue influence? May not one situated as was Mrs. Johnson properly plead her claims for recognition in a will? May she not give her reasons why a will should be made and why property should not be left to a particular person without being subject to the charge of exerting undue influence? The only threat made by her was that she would go if the will was not made. We do not, of course, approve of such importunity to a sick person, and it may often be carried to such an extent that a jury is justified in finding that a will was executed in pursuance of it, and through undue influence, but these significant facts must be borne in mind in respect to this case: The witness, Fanny Perry, does not locate the time of this conversation, whether before the first will was executed or after. If before, plainly it had no effect upon the testatrix, for she made a will giving the property to her adopted son and leaving Mrs. Johnson out altogether. If after, while it may have had the effect of causing the insertion of Mrs. Johnson's name in the second, such change wrought no injury to the rights of the appellee. If the testatrix had made up her mind to give her property to an adopted child with a precautionary trust in behalf of her husband, then any change made in the devisees, as the result of whatever importunity, was a change which wrought no prejudice to the parties who were not named in either will.

We are clearly of the opinion that the jury

186 U. S.

were not, under the circumstances of this case, warranted in finding that the execution of the will was procured by fraud, circumvention, or undue influence practised or exercised upon the testatrix.

[126] One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish *it distinctly understood to be the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor.

The decrees of the Court of Appeals and of the Supreme Court of the District are reversed and the case remanded to the latter court, with instructions to set aside the decree in favor of the appellee, and for further proceedings in conformity to this opinion.

Mr. Justice **Harlan** and Mr. Justice **Gray** did not hear the argument, and took no part in the decision of this case.

EMANUEL FELSENHOLD, Claimant of
288 Packages of Merry World Tobacco,
Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 126-135.)

Internal revenue—coupons in tobacco packages—power of Congress to prohibit—appeal—certified questions.

1. The insertion, in a package of smoking and chewing tobacco, of a coupon printed on thin paper of inappreciable weight and without intrinsic value, which does not affect in any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax, is forbidden by the act of July 24, 1897, § 10, cl. 3 (30 Stat. at L. 151, chap. 11), which prohibits packing in, attaching to, or connecting with, such a package "any article or thing whatsoever," other than certain specified labels and stamps.
2. No unconstitutional regulation is made by the provision of the act of July 24, 1897, § 10, cl. 3 (30 Stat. at L. 151, chap. 11), prohibiting packing in, attaching to, or connecting with, packages of tobacco "any article or thing whatsoever," other than certain specified labels and stamps, although such provision is construed to prohibit the insertion in such packages of a coupon printed on thin paper of inappreciable weight and without intrinsic value, which does not affect in

any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax.

3. Questions which may be certified by the circuit court of appeals to the Supreme Court of the United States under the judiciary act of March 3, 1891, must present a distinct point or proposition of law, and not require the latter court to search the entire record, and in effect determine whether the judgment of the trial court should be affirmed or reversed.

[No. 205.]

Argued April 7, 8, 1902. Decided May 19, 1902.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit presenting questions as to the construction and constitutionality of the prohibition in the Dingley act of July 24, 1897, against packing other articles in packages of tobacco.

Statement by Mr. Justice **Brewer**:

This was a proceeding commenced in the circuit court of the United States for the district of West Virginia, seeking a forfeiture of certain tobacco. Attachment and monition were duly issued. The case was submitted upon an agreed statement of facts, and a judgment of forfeiture was entered. Whereupon the case was taken on error to the circuit court of appeals for the fourth circuit, which certified four questions.

*The facts as found in the agreed state-[127] ment are these: At times a practice prevailed among manufacturers of tobacco of placing in their packages of tobacco other articles of intrinsic value, such as penknives, etc. On November 4, 1891, the Commissioner of Internal Revenue issued this circular:

"Manufacturers of tobacco, in marking the gross, tare, and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, etc., so that the tare subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by the collectors to prevent foreign articles of any kind being included in any of the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else."

On July 24, 1897, Congress passed what is known as the Dingley bill. 30 Stat. at L. 151, chap. 11. The 3d clause of the 10th section thereof amended § 3394 of the Revised Statutes so as to read:

"None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them any article or thing whatsoever,

NOTE.—On the definiteness of questions to be certified—see note to Waco Water & Light Co. v. Waco (Tex.) 31 L. R. A. 392.

other than the manufacturers' wrappers and labels, the internal revenue stamp, and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal revenue laws; nor shall there be affixed to, or branded, stamped, marked, written or printed upon, said packages or their contents any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward."

[128] On the 23d day of September, in the year 1898, at the city of Wheeling, in the district aforesaid, the internal revenue collector of the United States seized 1,440 packages of chewing and smoking tobacco known by the name and brand of Merry World tobacco, weighing $1\frac{1}{2}$ ounces to the *package, and having a total weight of 150 pounds, and afterwards, on the 5th day of April, in the year 1899, J. K. Thompson, the marshal of the United States for the said district of West Virginia, in pursuance of the attachment and monition appearing in the record, took into his possession the said 1,440 packages of tobacco, and now holds the same in his possession.

At the time of the seizure by the collector there was in each of the packages a small slip of paper called a coupon, with printed words and figures on both sides thereof, which coupon had been placed within such package at the time when it was packed in the manufactory and prepared for sale. These coupons were all alike, and on each of them were the following words and figures, that is to say, upon one side thereof the following words and figures:

Merry World Tobacco Coupon.

With the tobacco packed herewith the purchaser has bought a definite share in any of the articles mentioned on the other side of this voucher.

We will send you postpaid any or all of the articles listed on the other side for the number of coupons as stated.

Mail these coupons to the Merry World Tobacco Co., Wheeling, W. Va., stating number of coupons sent, articles wanted, your name, street and number, city or town, county and state.

And on the other side the following words and figures:

Will send you postpaid for 20 coupons, 1 picture, 14 x 28, handsome water-color facsimile, 12 subjects.

30 coupons, 1 picture, 20 x 24, fine pastel facsimile, 12 subjects.

40 coupons, 1 picture, 20 x 30, beautiful Venetian scenes, 4 subjects.

50 coupons, 1 picture, 22 x 28, elegant water-color gravures, 2 subjects.

60 coupons, 1 picture, 22 x 28, magnificent water-color gravures, 4 subjects.

[129] No advertising or lettering on any of the above. Such excellent works of art have never before been offered, except *through dealers, at very high prices. They are suitable decorations for the most elegant home, and to be appreciated must be seen. See

descriptive catalogue mailed on application. Order by subjects.

20 coupons, 1 book of Popular Seaside Library, 300 titles by favorite authors.

50 coupons, 1 cloth-bound book, 160 titles by eminent authors. Catalogues of our books mailed on application.

25 coupons, 1 scarf-pin, solid sterling silver.

25 coupons, 1 pipe, genuine French briar.

40 coupons, 1 rubber tobacco pouch, self-closing.

75 coupons, 1 elegant pocketbook, finest quality leather, gent's or ladies'.

70 coupons, 1 pocket-knife, first quality, American manufacture razor steel, hand-forged, finely tempered blades. Stag handle. Your choice between jack-knife or pen-knife.

95 coupons, 1 fine razor, highest grade steel, hollow ground.

40 coupons, 1 bicycle lock, nicked, gent's sprocket or lady's with chain.

150 coupons, 1 cyclometer, 1,000 miles repeating. In ordering state size of wheel.

550 coupons, 1 excellent open-face watch. Guaranteed without qualification. Has all improvements up to date. It will wear and perform well for a lifetime if only ordinarily cared for.

Illustrated catalogue for the above mailed upon application.

This coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic value in itself, and has upon it no picture of any kind and does not affect, in any way, the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax. The value of the five cases of tobacco of 288 packages each is and was when they were seized as aforesaid fifty-four dollars (\$54). The packages were owned by Emanuel Felsenheld, who at the proper time intervened and claimed the property.

The following are the questions certified by the court of appeals:

*"First. Whether the 3d clause of the 10th [130] section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States.

"Second. Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition.

"Third. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under § 3455 of the Revised Statutes?

"Fourth. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described or was the judgment of forfeiture rendered in this case justified under § 3456 of the Revised Statutes?"

Mr. John De Witt Warner argued the cause and filed a brief for plaintiff in error:

To be constitutional, any statute depending upon implied powers of Congress must be a necessary or appropriate means towards the exercise of some express power.

McCulloch v. Maryland, 4 Wheat. 423, 4 L. ed. 605; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877.

It is the prerogative and duty of the Federal courts to inquire whether a statute defended under the implied powers of Congress is in fact necessary or appropriate to the exercise of some express power, and decide according as it finds the case to be.

Ex parte Whitwell, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 870; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Re Marshall*, 102 Fed. 323.

The Constitution gives Congress no right to exercise police power in the states.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497; *United States v. De Witt*, 9 Wall. 41, 19 L. ed. 593.

This statute is not in aid of the taxing power, or of any revenue interests, but is an attempted exercise by Congress of police power in the states, in conflict with the Constitution, and void.

United States v. De Witt, 9 Wall. 41, 19 L. ed. 593.

The literal meaning of a statute will be disregarded, if necessary, in order so to construe it as to be constitutional.

Cooley, Const. Lim. p. 218; *United States v. Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; *United States v. 132 Packages of Spirituous Liquors & Wines*, 22 C. C. A. 228, 40 U. S. App. 333, 76 Fed. 364; *State, Brown, Prosecutor, v. Union*, 62 N. J. L. 142, 40 Atl. 632; *Hartman v. Weitmeyer*, 8 Pa. Dist. R. 223; *Singer Mfg. Co. v. McCulloch*, 24 Fed. 667.

A statute will be so construed as to be rational and within the construction adopted in practice by administrative officers, even against its literal reading.

Reiche v. Smythe, 13 Wall. 162, 20 L. ed. 566; *Platt v. Union P. R. Co.* 99 U. S. 48, 25 L. ed. 424; *Houston & T. C. R. Co. v. State* (Tex. Civ. App.) 39 S. W. 390; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *United States v. Gue Lim*, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *Mace v. Buchanan* (Tenn. Ch. App.) 52 S. W. 505.

The business in which the vouchers, here called coupons, are used, is radically different from lottery or chance schemes, is unobjectionable, and is entitled to the protection of the courts.

People v. Gillson, 109 N. Y. 389, 17 N. E. 343; *Com. v. Moorhead*, 7 Pa. Co. Ct. 513; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 22 Atl. 4; *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559; *Re McKenna*, 126 Cal. 429, 58 Pac. 916; *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 46 Atl. 234.

Mr. Henry M. Russell also argued the cause and filed a brief for plaintiff in error: **186 U. S.**

Legislation relating to public morals belongs to the states alone.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

So long as the rights of the government with respect to taxes are not in any manner interfered with, the citizen has the right to conduct his business to suit himself.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

When the meaning of a statute is to be ascertained by the courts it is proper to consider the situation at the time when it was passed, the evil which existed and for which it was intended to provide a remedy.

Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424.

Even the broadest and most general language must be restricted in its application, and confined to the manifest purpose of the statute.

Reiche v. Smythe, 13 Wall. 162, 20 L. ed. 566.

Assistant Attorney General Beck and **Mr. Charles J. Faulkner** argued the cause and filed a brief for defendant in error:

If Congress has the constitutional power to enact regulations regulating and protecting the collection of the revenue of the government over a particular subject-matter, the means adopted by the Congress are conclusive upon the courts.

Hepburn v. Griswold, 8 Wall. 615, 19 L. ed. 523; *Legal Tender Cases*, 12 Wall. 539, 20 L. ed. 308; *Nichol v. Ames*, 173 U. S. 524, 43 L. ed. 795, 19 Sup. Ct. Rep. 522; *McCulloch v. Maryland*, 4 Wheat. 423, 4 L. ed. 605; *Re Kollock*, 165 U. S. 537, 41 L. ed. 816, 17 Sup. Ct. Rep. 444.

Where the meaning of the statute is plain it is the duty of the court to enforce it according to its obvious terms. In such a case there is no necessity for construction.

Thornley v. United States, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491.

In exercising the delicate constitutional duty of passing upon the validity of an act of a co-ordinate branch of the government, the court cannot be influenced in its action by the question whether or not the act, in the opinion of the judge, is one which will operate according to natural justice; nor is the "court at liberty to inquire into the motives of the legislature."

Ex parte McCordle, 7 Wall. 506, 19 L. ed. 264; *Cooley*, Const. Lim. chap. 7, §§ 4-6; *Com. v. McCloskey*, 2 Rawle, 374; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Veazie Bank v. Fenno*, 8 Wall. 548, 19 L. ed. 487.

It becomes the duty of the judge in construing the laws of Congress, wherever consistent with their context and language, to uphold their constitutionality.

Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *Parsons v. Bedford*, 3 Pet. 433, 7 L. ed. 732; *United States v. Coombs*, 12 Pet. 72, 9 L. ed. 1004; *Grenada County v. Brogden*, 112 U. S. 261, *sub nom. Grenada County v. Brown*, 28 L. ed. 704, 5 Sup. Ct. Rep. 125.

It is incumbent upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

Fletcher v. Peck, 6 Cranch, 128, 3 L. ed. 175; *Legal Tender Cases*, 12 Wall. 531, 20 L. ed. 305; *Veazie Bank v. Fenno*, 8 Wall. 548, 19 L. ed. 487; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 314, 43 L. ed. 713, 19 Sup. Ct. Rep. 465.

Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

McCulloch v. Maryland, 4 Wheat. 423, 4 L. ed. 605.

Let the end be legitimate and within the scope of the Constitution, and all means are appropriate which are plainly adapted to that end, and which are not prohibited.

Ibid.; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Civil Rights Cases*, 109 U. S. 51, 27 L. ed. 853, 3 Sup. Ct. Rep. 18; *Legal Tender Cases*, 12 Wall. 539, 20 L. ed. 308; *Hepburn v. Griswold*, 8 Wall. 615, 19 L. ed. 523.

The "purpose and end" of this statute is to raise revenue for the support of the national government by imposing a tax upon smoking and other tobacco, and to provide such regulations as in the judgment of Congress will protect the revenue and enforce the collection of the taxes levied.

Re Kollock, 165 U. S. 536, 41 L. ed. 816, 17 Sup. Ct. Rep. 444.

The Revised Statutes require that before any package of liquor, cigars, or chewing or smoking tobacco is sold there shall be placed upon it the stamp provided by law. The payment of that tax without putting the stamp upon the package is not a compliance with the law.

United States v. Jacoby, 12 Blatchf. 491, Fed. Cas. No. 15,462.

When a statute relates to a subject-matter within the constitutional competency of Congress to legislate upon, the presumption is that it serves a useful purpose.

United States v. 132 Packages of Spirituous Liquors & Wines, 22 C. C. A. 228, 40 U. S. App. 333, 76 Fed. 364.

Mr. Justice **Brewer** delivered the opinion of the court:

The first two questions may be considered together. There can be no doubt that the coupon comes within the letter of the statute. That prohibits packing in, attaching to, or connecting with, the package "any article or thing whatsoever" other than certain specified labels and stamps. If Congress intended excluding from the package absolutely everything not named, it used the words to express that intent, and could not have used any more strongly indicative of it. "Any article or thing whatsoever" is a descriptive clause as broad and compre-

hensive as could be selected, and since that clause is used, followed by an express exception, the coupon must come within the exception, or else it falls within the comprehensive clause. The debatable question arises upon the fact stated in the agreement *that the coupon is printed on thin paper of [131] inappreciable weight, without intrinsic value, and does not affect in any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax. There seems to have been a discussion in the internal revenue department whether Congress could rightfully prevent the insertion in the package of an article whose presence in no way affected the collection of the internal revenue tax, and therefore on the theory that Congress could not have intended an unconstitutional provision, whether the act should be construed as including such an article.

In the internal revenue legislation Congress has not simply prescribed that certain articles shall pay a tax, but has provided a series of rules and regulations for the manufacture and sale of such articles, including therein directions as to the size and form of packages, and such other matters as in its best judgment were necessary or advisable for the purposes of effectually securing the payment of the tax imposed. Now the contention is that the courts may supervise this system of rules and regulations, and if they find a provision which, in their judgment, in no way secures or facilitates the proper collection of the tax they may strike it down as something beyond the power of Congress. It is said that the only matter in which the national government is concerned is the tax; that it is in no manner responsible for what goes into the commercial world covered by its stamp; that it has no police power, no duty of caring for the health or safety of citizens or others who buy articles upon which its stamp is placed; that it does not guarantee either quantity or quality, and, in short, that its power is limited to such provisions as are essential or helpful in the collection of the tax.

It may be conceded that the government's stamp is not a guaranty of quantity or quality, and that no responsibility attaches to it, although the manufacturer puts into the packages less than the specified quantity of goods, or goods of inferior quality. But does it follow that the government has no power to prescribe that the packages which it stamps, upon which it collects a tax, shall contain the very articles, and only the articles, *which it purports to tax, and which [132] its stamp certifies that it has taxed? Take the matter of tobacco; can it be that a manufacturer may fill packages purporting to be of tobacco with half tobacco and half sawdust, and the government can pass no valid statute to prevent it? If the manufacturer is willing to pay a full tobacco tax on this package, half tobacco and half sawdust, must the government take the money, affix its stamp, and thus in effect certify that the contents are that which it has imposed a tax upon? Manufactured goods are not

necessarily sold in this country, but may be shipped to other countries and sold there, and can it be that the stamp of this government is absolutely worthless as an assurance that that which is within the package is the article which the government purports to have taxed? It is one thing to say that the government's stamp is not a guaranty of either quantity or quality, and that no liability attaches to it if the manufacturer imposes upon his customers by inserting something which is not that which is stamped, but it is a very different thing to hold that the government is absolutely powerless to legislate so as to protect the customer and prevent the manufacturer from putting within the package anything but the article which it proposes to tax. Whatever courts may rule as to the constitutional limits of the power of Congress the great majority of people here and elsewhere will believe in and rely upon the truthfulness of a certificate made by the government, and will be shocked to be told that it means nothing to them, but only money to the government.

It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable; that it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed; that in order to make such a regulation constitutional it is not necessary that there be, either expressly or by implication, an exception of those articles or things which by virtue of their minute size or weight do not apparently affect the collection of the tax. Congress may rightfully make the prohibition absolute, and the *courts may not draw a line [133] between the foreign substance, which is trifling in size or weight, and that which is of appreciable size and weight, and hold in reference to a particular package the act valid if the size or weight is appreciable, and invalid if it is not.

Among the regulations prescribed by Congress in its internal revenue legislation are many which are purely arbitrary, or at least the necessity of which for the collection of taxes is not apparent. For instance, Congress has directed (Rev. Stat. 3392) that cigars shall be put up in boxes containing 25, 50, 100, 250, or 500 each. There is no special efficacy in either of these numbers. Boxes containing 15, 30, or 60 cigars would apparently afford just the same facilities for taxation, and yet, can there be a doubt that Congress may make such a rule and compel each manufacturer to abide thereby? It has a right to select, and when it has made a selection, although there may be no special reasons for the specific numbers, and they are in fact arbitrarily selected, it may, for purposes of uniformity, compel compliance with the rule. So, if it should prescribe that at least nine tenths of every package, purporting to be a pack-

age of a particular kind of tobacco, and subject to a special tax, should be that particular kind of tobacco, would the manufacturer be permitted to make one third of the contents of some other kind of tobacco or any other substance? The proportion might be arbitrarily selected, it is true, but is it not clearly within the power of Congress in its regulations to make such arbitrary selection? And if it may say that not less than nine tenths of the contents shall be that particular tobacco, the subject of the tax, is it any the less within the power of Congress to prescribe that there shall be nothing in the package save that tobacco?

Indeed, the admission that the government may require that the contents of a package shall be partly of the goods which it taxes is a concession that it may also require the entire contents to be such goods.

There is in this statute no trespass upon the manufacturer's right to fully advertise his goods or to offer with the utmost freedom inducements for their purchase. He can put into the *box in which he ships his [134] packages all the advertising material he sees fit. That which is required is that each separate package shall be in its entirety a package of tobacco, and only tobacco. Beyond that the manner in which he shall sell, or the advertisement he shall make of his tobacco after the tax has been paid, and the packages have been stamped, is a matter for him to determine.

We are of opinion that it is within the power of Congress to prescribe that a package of any article which it subjects to tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to the tax.

Questions three and four do not come within the rules respecting the certification of questions by the court of appeals. Those rules were thus stated by the present chief justice in *United States v. Union P. R. Co.* 168 U. S. 505, 512, 42 L. ed. 559, 561, 18 Sup. Ct. Rep. 167, 169:

"It is settled that the certification provided for in §§ 5 and 6 of the judiciary act of March 3, 1891 (chap. 517, 26 Stat. at L. 826), is governed by the rules laid down in respect of certificates of division under the Revised Statutes. *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. ed. 445, 13 Sup. Ct. Rep. 594; *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *Graver v. Faurot*, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799; *Cross v. Evans*, 167 U. S. 60, 42 L. ed. 77, 17 Sup. Ct. Rep. 733.

"By those rules, as repeated in these cases from prior decisions, 'each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace

the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions.' *Fire Ins. Asso. v. Wickham*, 128 U. S. 426, 32 L. ed. 503, 9 Sup. Ct. Rep. 113; *Dublin Twp. v. Milford Sav. Inst.* 128 U. S. 510, 32 L. ed. 533, 9 Sup. Ct. Rep. 148."

[135] Neither of these questions presents a distinct point or proposition of law. Each invites us to search the entire record, and in effect determine whether the judgment of the district court should be affirmed or reversed. But as settled in the cases referred to in the last quotation, the court of appeals cannot thus send up a whole case for consideration and disposition.

We, therefore, answer the second question by saying that the coupons described are within the prohibition of the statute; the first, that the statute so construed is not in conflict with the Constitution of the United States. The third and fourth we decline to answer.

Mr. Justice **Gray** and Mr. Justice **White** did not hear the argument, and took no part in the decision of this case.

Mr. Justice **Peckham** dissented.

F. S. BOWKER, Managing Owner of Schooner *William H. Davenport*, *Appt.*,
v.

UNITED STATES, Owner of the Light-house Tender *Azalea*.

(See S. C. Reporter's ed. 135-142.)

Appeal—error to district court—final judgment—dismissal of cross libel.

A decree of a district court of the United States dismissing a cross libel in a suit in admiralty to recover damages sustained by one vessel in a collision with another is not a final judgment and therefore cannot be reviewed by the Supreme Court under the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), on the theory that the jurisdiction of the lower court was in issue.

[No. 247.]

Argued April 30, May 1, 1902. Decided May 19, 1902.

IN ERROR to the District Court of the United States for the District of New Jersey to review a decree dismissing a cross libel in a suit in admiralty. *Dismissed.*

See same case below, 105 Fed. 398.

Statement by Mr. Chief Justice **Fuller**:
The case is stated by the district court, in substance, as follows: On November 3,

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

1090

1899, a libel was filed on behalf of the United States in the district court of the United States for the district of New Jersey against the schooner *William H. Davenport*, her tackle, apparel, and furniture, and against all persons intervening therein, in case of collision, civil and maritime, seeking to recover the sum of \$5,000 damages alleged to have been sustained by the lighthouse tender *Azalea* in a collision with that schooner [136] on October 2, 1899, off Cornfield Point light-ship in Long Island sound. It was averred in the libel that the collision was in no way caused by the fault or negligence of those on board the lighthouse tender *Azalea*, but that it was solely due to the carelessness and negligence of those in charge of the schooner *William H. Davenport* in certain particulars stated. The libel concluded with the formal prayer that process might issue in due form of law against the schooner, her tackle, apparel, and furniture; that all persons interested might be cited to appear and answer; and that the schooner might be condemned and sold to pay libellant's claim with interest and costs; "and that the court will otherwise right and justice administer in the premises." Process in due form was issued against the schooner, and on November 8, 1899, the marshal filed his return certifying that on November 4 he had made due attachment of the schooner, and that the vessel was then in his custody. November 22, 1899, F. S. Bowker, managing owner, filed a claim to the schooner on behalf of her owners, a stipulation for costs and a stipulation for value, and thereupon the schooner was released from custody and restored to the possession of her owners. The claimant, Bowker, filed his answer to the libel December 11, 1899, denying that the collision was caused or contributed to by those in charge of the schooner, alleging that the collision and the damage resulting therefrom were caused wholly by the fault of the steamer *Azalea* and of those in charge of her, in certain particulars stated, and concluding with the prayer that the libel be dismissed with costs. December 29, 1899, Bowker, for and on behalf of himself and his co-owners, filed a cross libel against the United States seeking to recover the sum of \$6,000 damages alleged to have been sustained by the schooner and by her cargo in said collision. It was alleged in the cross libel that the collision was wholly due to the negligence and fault of the steamer *Azalea* and of those in charge of her, the particulars being set forth, and the prayer of the cross libel asked "that a citation, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction, may issue to the said respondents above named, citing and admonishing them to appear and answer all and [137] singular the matters aforesaid, and that this honorable court shall pronounce for the damages, with interest and costs, and will grant a stay of all further proceedings in the action of the said respondent brought by it in this honorable court against the schooner *William H. Davenport* by the filing
186 U. S.

of a libel against said schooner, on November 3, 1899, until security be given by said respondent, pursuant to the admiralty rules of the Supreme Court of the United States and the practice of this honorable court, to respond for the damages claimed in this cross libel, and that this honorable court will give to the cross libellants such other and further relief as in law and justice he may be entitled to receive, this said action being a counterclaim arising from the same cause of action for which the original libel was filed against the said William H. Davenport."

Citation was issued and served on the United States attorney for the district, who was the proctor of record for the libellant in the original suit. The United States attorney filed a notice of motion to quash the citation, February 14, 1900, and a motion to that effect was argued by counsel. December 17, 1900, the district court filed its written decision, holding that the cross libel could not be maintained because the court had no jurisdiction to entertain the cause or to enter a decree as prayed for against the United States, whereupon and on that day the court entered a decree that the citation be quashed and that the cross libel be dismissed with costs. 105 Fed. 398. The cross libellant thereupon appealed to this court and the appeal was allowed on the question of jurisdiction. The district court made a statement of the facts, to which a copy of the record was attached, and certified five questions in respect of jurisdiction under the cross libel to this court for decision.

Messrs. G. Philip Wardner and Eugene P. Carver argued the cause, and, with **Messrs. Convers & Kirlin and Carver & Blodgett**, filed a brief for appellant:

A cross bill is so far an independent suit as to authorize an appeal from a decree dismissing it on demurrer before the final disposition of the original bill.

Clutton v. Clutton, 106 Mich. 690, 64 N. W. 744. See also *Brooks v. Woods*, 40 Ala. 538; *Lehman v. Ford*, 47 Ala. 733; 1 Beach, Modern Eq. Pr. 446.

Where the substantial effect of a decree upon a cross bill is a complete determination of the cause, an appeal will lie.

Holgate v. Eaton, 116 U. S. 33, 29 L. ed. 538, 6 Sup. Ct. Rep. 224; *Blythe v. Hinckley*, 84 Fed. 228.

In equity the dismissal of the original bill usually *ipso facto* disposes of a cross bill in the same cause.

1 Beach, Modern Eq. Pr. § 447.

On the other hand, in admiralty a cause and a cross cause may be tried separately and separate decrees rendered.

The Dove, 91 U. S. 381, *sub nom. The Mayflower v. The Dove*, 23 L. ed. 354.

It follows that the dismissal of the original libel cannot affect the cross libel.

A cross bill in equity is so far auxiliary to, dependent on, and a part of the original cause that it would seem that the filing of the cross bill could not interfere with the

right of the plaintiff in the original cause to dismiss his bill at any time upon payment of costs, thereby also disposing of the cross bill.

Dan. Ch. Pl. & Pr. 1st Am. ed. from 2d Eng. ed. pp. 927-930.

In the admiralty, on the other hand, the cross libel is so far independent of the original cause that, if the dismissal of the original libel would injuriously affect the cross cause, it is probable that the original libellant 'would not be allowed to dismiss his libel upon payment of costs.

A decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.

St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6. See also *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Grant v. Phoenix Mut. L. Ins. Co.* 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; *Rouse v. Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. ed. 97, 10 Sup. Ct. Rep. 736; *Central Trust Co. v. Marietta & N. G. R. Co.* 1 C. C. A. 116, 2 U. S. App. 1, 48 Fed. 850; *Gumbel v. Pitkin*, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct. Rep. 616; *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L. R. A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 664; *Central Trust Co. v. Madden*, 17 C. C. A. 226, 25 U. S. App. 430, 70 Fed. 451; *Grant v. East & West R. Co.* 1 C. C. A. 681, 2 U. S. App. 182, 50 Fed. 795; *Internal Improv. Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Jacksonville, T. & K. W. R. Co. v. American Constr. Co.* 6 C. C. A. 249, 13 U. S. App. 377, 57 Fed. 66; *Klewer v. Scawell*, 12 C. C. A. 653, 22 U. S. App. 458, 65 Fed. 373; *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *The Alert*, 9 C. C. A. 390, 26 U. S. App. 63, 61 Fed. 113; *Forgay v. Conrad*, 6 How. 201, 12 L. ed. 404; *Blossom v. Milwaukee & C. R. Co.* 1 Wall. 655, 17 L. ed. 673; *Withenbury v. United States*, 5 Wall. 819, 18 L. ed. 613; *Standley v. Roberts*, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 836.

Assistant Attorney General Beck argued the cause and filed a brief for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

"This appeal is prosecuted under the 5th [138] section of the judiciary act of March 3, 1891 [26 Stat. at L. 826, chap. 517], providing 'that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.'"

By the 6th section the circuit court of

appeals, in cases within its appellate jurisdiction, may certify to the Supreme Court "any questions or propositions of law concerning which it desires the instruction of that court for its proper decision," and our 37th rule requires in such cases that "the certificate shall contain a proper statement of the facts on which such question or proposition of law arises."

The district court has observed that rule in form, but it is under the 5th section that our jurisdiction is invoked, and, as the record accompanies the statement, we are enabled to dispose of the appeal.

It was settled, soon after the passage of the act of 1891, that cases in which the jurisdiction of the district or circuit courts was in issue could be brought to this court only after final judgment. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Chicago, St. P. M. & O. R. Co. v. Roberts*, 141 U. S. 690, 35 L. ed. 905, 12 Sup. Ct. Rep. 123. The subject was carefully considered in the opinion of Mr. Justice Lamar in the first of these cases, and the conclusion reached was in accordance with the general rule that a case cannot be brought to this court in parcels. *Southern R. Co. v. Postal Teleg. Cable Co.* 179 U. S. 641, 45 L. ed. 355, 21 Sup. Ct. Rep. 249.

The preliminary question is, therefore, whether the decree dismissing this cross libel is a final judgment within the rule upon that subject. It was long ago held that a decree dismissing a cross bill in equity could not be considered, standing alone, as a final decree in the suit, and was not the subject of an independent appeal to this court under the judiciary act of 1789; and that it could only be reviewed on an appeal from a final decree disposing of the whole case. *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179; *Ex parte South & North Ala. R. Co.* 95 U. S. 221, 24 L. ed. 355.

[139] *It is argued that *Ayres v. Carver* is distinguishable from the case at bar because the 22d section of the judiciary act of 1789, under which the appeal in that case was taken, provided in terms for the revision of final decrees, whereas no specific mention is made of final decrees or judgments in § 5 of the judiciary act of 1891. But that difference was specifically disposed of in *McLish v. Roff*, as not affecting the principle that the decree must be final in order to be appealable.

Counsel quote the language of Mr. Chief Justice Waite in *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.* 108 U. S. 28, 27 L. ed. 639, 2 Sup. Ct. Rep. 8, that "a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined;" and insist that the decree on the cross libel has definitely determined the right of respondent to affirmative relief. But the litigation between the parties on the merits embraced the right of libellant to recover because of the fault of respondent, as well as the right of respondent to recover because

of the fault of libellant, and until the question as to which of the parties was at fault, or whether both were, is determined, that litigation cannot be said to have terminated. If the district court had held that it had jurisdiction to award affirmative relief against the United States on the cross libel, the cause would have stood for hearing on the whole case. Its decision that it did not have jurisdiction simply prevented respondent from obtaining affirmative relief over, assuming that the facts justified it. And however convenient it might be that the question of jurisdiction of the cross libel should be adjudicated in advance, it is nevertheless true that when a decree was rendered on the original libel, the error, if any, committed in dismissing the cross libel, could be rectified. That this course might result in delay, and perhaps sometimes in hardship, if it should turn out that jurisdiction could be exercised on the cross libel, is not a sufficient reason for entertaining an appeal, if the decree did not so dispose of the case as to enable this court to take jurisdiction.

Generally speaking, the same principles apply to cross libels as to cross bills, and this case affords no ground of exception therefrom. [140]

In admiralty, if the respondent desires to obtain entire damages against the libellant, or damages in excess of those claimed by libellant, a cross libel is necessary, although matters of recoupment or counterclaim might be asserted in the answer. *The Sapphire*, 18 Wall. 51, *sub nom. The Sapphire v. Napoleon III.* 21 L. ed. 814; *The Dove*, 91 U. S. 381, *sub nom. The Mayflower v. The Dove*, 23 L. ed. 354.

In *The Dove* a final decree was entered in favor of the libellants in the original suit, and a decree rendered at the same time dismissing the cross libel. No appeal was taken from the decree of dismissal, but the case was carried to the circuit court from the district court by appeal from the decree on the libel, which was affirmed, and the cause brought to this court.

The principal question involved on the appeal to this court was whether the submission to the dismissal of the cross libel in the district court by the parties who had filed it prevented them from making the same defense to the original libel that they might have made if no cross libel had been filed, and it was held that while the parties were bound by the decree of the district court dismissing the cross libel, the issues of law and fact involved in the original suit were not thereby disposed of.

In the course of some general observations, Mr. Justice Clifford, delivering the opinion, after remarking that causes of that kind might be heard separately, said: "Usually such suits are heard together, and are disposed of by one decree or by separate decrees entered at the same time; but a decision in the cross suit adverse to the libellant, even if the decree is entered before the original suit is heard, will not impair the right of the respondent in the original suit to avail himself of every legal and just de-

fense to the charge there made which is regularly set up in the answer, for the plain reason that the adverse decree in the cross suit does not dispose of the answer in the original suit. . . . Whether the controversy pending is a suit in equity or in admiralty, a cross bill or libel is a bill or libel brought by a defendant in the suit against the plaintiff in the same suit, or against other defendants in the original suit, or against both, touching the matters in question in the original *bill or libel. It is brought in the admiralty to obtain full and complete relief to all parties as to the matters charged in the original libel; and in equity the cross bill is sometimes used to obtain a discovery of facts. New and distinct matters, not included in the original bill or libel, should not be embraced in the cross suit as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross suit, and no others, as the cross suit is, in general, incidental to, and dependent upon, the original suit. *Ayres v. Carver*, 17 How. 595, 15 L. ed. 181; *Field v. Schieffelin*, 7 Johns. Ch. 252; *Shields v. Barrow*, 17 How. 145, 15 L. ed. 163."

In this case the cross libel was, as stated therein, "a cross libel brought under admiralty rule 53 of the Supreme Court of the United States, being a counterclaim arising out of the same cause of action as the suit brought by the United States against the said schooner William H. Davenport in a cause of collision, by a libel filed Nov. 3, 1899, in said court." The 53d admiralty rule provides that the respondents in a cross libel shall give security to respond in damages, unless otherwise directed, and that all proceedings on the original libel shall be stayed until such security shall be given.

The cross libel and the answer to the libel were consistent, the subject-matter of the libel and the cross libel was the same, and the latter, in no proper sense, introduced new and distinct matters. The cross libel occupied the same position as a cross bill in equity, and the general rule is that the original bill and the cross bill should be heard together and disposed of by one decree, although, where the cross bill asks affirmative relief, and is therefore not a pure cross bill, the dismissal of the original bill may not dispose of the cross bill, which may be retained for a complete determination of the cause. *Holgate v. Eaton*, 116 U. S. 33, 29 L. ed. 538, 6 Sup. Ct. Rep. 224, illustrates this. There the bill and cross bill were heard together, and it was held that the original bill must be dismissed, but that relief might be accorded on the cross bill. The cross bill was not filed merely as a means of defense, but of obtaining affirmative relief, and the defeat of the bill sustained *the disposition of the cause on the cross bill. Such might be the result here if it turned out on the hearing that the Azalea was in fault, and not the schooner, pro-

vided jurisdiction could be maintained to award relief against the United States. But in any point of view, the decree on the cross libel did not so finally dispose of the whole case as to entitle us to take jurisdiction under § 5 of the act of 1891.

Appeal dismissed.

Mr. Justice **White** and Mr. Justice **McKenna** dissented.

HENRY L. WARD, Treasurer, *Petitioner*,
v.

EDWARD JOSLIN.

(See S. C. Reporter's ed. 142-153.)

Corporations—loan and investment companies—acts ultra vires—guaranty of notes of third parties—individual liability of stockholders of foreign corporation—conclusiveness of judgment against corporation—appeal—review of denial of motion for new trial.

1. A guaranty by a loan and trust company, for a valuable consideration, of a promissory note given by one third party to another, and not negotiated by it, is *ultra vires* such a corporation organized under Kan. Comp. Laws 1885, p. 210, chap. 23, for the purpose of transacting the business of a loan and trust company and of buying and selling personal property, including commercial paper, with power to enter into "any obligation or contract essential to the transaction of its ordinary affairs," but forbidden to employ its property for any other purpose than to "accomplish the legitimate objects of its creation."
2. Obligations which a corporation had no right to incur because *ultra vires* are not dues from the corporation, within the meaning of Kan. Const. art. 12, § 2, providing that "dues from corporations shall be secured by individual liability of the stockholders," although the corporation may be estopped from denying the validity of such obligations.
3. A judgment against a corporation is not so conclusive on a stockholder, in an action to enforce his individual liability for a corporate obligation under the Kansas Constitution and laws, as to prevent his showing that because such corporate obligation was *ultra vires* he was not liable under such Constitution and laws.
4. The discretion of a trial court in denying a motion for a new trial cannot be reviewed by the Supreme Court of the United States.

[No. 245.]

Argued April 30, 1902. Decided May 19, 1902.

NOTE.—As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

On the right to enforce a stockholder's liability outside of the state of incorporation—see note to *Cushing v. Perot* (Pa.) 34 L. R. A. 737.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of New Hampshire in favor of defendant in an action to enforce the statutory liability of a stockholder in a Kansas corporation. *Affirmed.*

See same case below, 44 C. C. A. 456, 105 Fed. 224.

Statement by Mr. Chief Justice **Fuller**:

September 12, 1888, S. S. Hite and Mary L. Hite executed and delivered to one J. E. Ethell their promissory notes in writing of that date, whereby for value received they promised to pay to the order of Ethell on September 12, 1892, the principal sum named in each, with interest thereon at the rate of 7 per cent per annum, payable semi-annually, according to the tenor of eight interest coupons bearing interest and attached to each of the notes; and afterwards and before the maturity of the notes, Ethell indorsed, transferred, and delivered *them to Ward. At that time the Western Investment Loan & Trust Company, a corporation of Kansas, guaranteed in writing the payment of the notes in the following words indorsed on each: "For a valuable consideration the Western Investment Loan & Trust Company hereby guarantees payment of the within obligation, both principal and interest, at maturity." The notes not having been satisfied, Ward brought suit against the Western Investment Loan & Trust Company on the guaranties in the district court of Smith county, Kansas, and recovered judgment against the company by default; and execution having been issued on the judgment and returned *nulla bona*, Ward brought this action December 15, 1896, against Edward Joslin in the circuit court of the United States for the district of New Hampshire to recover of him as a stockholder in said Western Investment Loan & Trust Company, an amount equal to the amount of stock owned by him in said corporation.

The declaration contained two counts. The first alleged the recovery of judgment; the issue of execution and return *nulla bona*; insolvency of the company July 1, 1894, and its want of "property or assets of any kind or value whatever;" that defendant was the owner of one hundred shares of stock; and that, "by reason of the premises and by virtue of the Constitution and statutes of the state of Kansas, in such case made and provided, a right of action hath accrued" to plaintiff.

The second count alleged that the loan and trust company "was a corporation chartered and organized for the purpose of transacting a general investment loan and trust business, and under its charter, as it was authorized to do, indorsed and guaranteed the payment of notes and obligations negotiated by it;" that these notes and coupons "were in fact negotiated by said corporation, the Western Investment Loan & Trust Company, in the regular course of its busi-

ness;" that judgment was recovered and execution returned *nulla bona*; "and that by reason of the premises and by virtue of the Constitution, statutes, and laws of the state of Kansas in such case made and provided," the right of action had accrued.

*Among other special matters set up in de-[144] fense was "that the claim against the Western Investment Loan & Trust Company, upon which a judgment in favor of the plaintiff against said company was founded, was not a due from or debt of said corporation, for which the defendant as a stockholder in said corporation was liable under the Constitution and laws of Kansas." And that the Western Investment Loan & Trust Company "never had any authority to indorse the said promissory notes and obligations in the second count in plaintiff's declaration described, or to guarantee the payment of said notes and obligations."

A jury was waived and the cause submitted to the circuit court for trial, and the court made and filed its findings of fact and conclusions of law.

After finding that the defendant was a stockholder of one hundred shares of the par value of \$50 each in the company in question, the findings thus continued:

"I find as a matter of fact, upon the evidence contained in the record and upon the arguments, that Ward's claim against the trust company was upon a guaranty given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company.

"I find that the plaintiff brought an action at law in the district court of Smith county, in the state of Kansas, against the trust company, on December 23, 1892, on these guaranties, by a writ served upon the president of said corporation, and on March, 1893, recovered judgment thereon against the company for \$9,787.50, with interest at 12 per cent, and as shown in the record on December 11, 1893, \$4,924.75 was paid thereon, and on September 14, 1896, an execution issued for the balance and was returned wholly unsatisfied as shown by the officer's return printed in the record.

"I also find that the trust company was not a railway, religious, or charitable corporation, and the business which the corporation was authorized to do was 'to buy and sell personal property, including stocks, bonds, bills, notes, real and *chattel mort-[145]gages, and choses in action of every kind and description, and to transact the business of a loan and trust company;" that some time after the organization of the company, and before the defendant became a stockholder, the directors thereof resolved 'that the president and secretary of the company be, and they hereby are, authorized to guarantee the payment of all securities negotiated by the company by indorsing upon any such security one of the following forms of a guaranty,'—and the resolution of the corporation and the forms of guaranties print-

ed in the record are referred to and made a part of the findings.

"Ascertaining the relations of the parties under the contract, which resulted from the Kansas Constitution and the statutes and the defendant's ownership of stock, I find, so far as it is a question of fact, that the dues to be secured by the superadded stockholders' liability were such as were within the reasonable and proper scope of the business as contemplated by the parties, and that a guaranty of this character was not intended by the defendant stockholder, and was not contemplated by the Kansas Constitution as a due or a debt within such scope. I also find, so far as it is a fact, that it was not within the scope of the resolution which assumed to authorize the president and secretary to guarantee securities negotiated by the company, and there is no evidence that the defendant stockholder had knowledge that the company was assuming, through its president and secretary, to guarantee the payment of claims not negotiated by itself; and there being no evidence of notice, I find, as a matter of fact, that he was not aware of it.

"I also make a general finding for the defendant."

The rulings of law were stated in the opinion of the court set forth in the record, and reported 100 Fed. 676.

The circuit court ruled that "the relations of the parties are contractual, and the term 'dues' in the Kansas Constitution ought to be accepted as applying only to claims resulting from the legitimate and contemplated business of the corporation or company, such as arise in respect of transactions within the reasonable scope of the business contemplated; and, as between the creditor and the stockholder, they should not be extended [146] to claims which arise from the transaction of unauthorized business."

That "while under paragraph 1192 of the General Statutes of Kansas [1889] providing a remedy, a judgment against the corporation may be accepted under proper limitations as conclusive in a proceeding against the stockholder as to the amount and liability of the company upon claims in respect to transactions within the contemplation of the Constitution and of the parties to the contract, it should not be accepted as conclusive upon the question of the nature and character of the claims, for the reason that paragraph 1192 is only intended to give a remedy to the creditor in respect to the kind of claims contemplated by the Constitution. The judgment on this ground is accepted as conclusive, because it relates to a corporate affair, and because the stockholder's interests are supposed to be represented by the officers of the bank in respect to affairs within the scope of its contemplated, legitimate, and authorized transactions;" but the stockholder ought not to be concluded "as to the question whether the foundation and nature of the claim were within the fair intentment of the constitutional provision and the contract between the parties upon the ground of representation, for the reason 186 U. S.

that such a question is not one which, in the natural and usual course of litigation between the bank and the creditor, would be presented or adjudicated."

That "the contract under the Constitution is between the creditor and the stockholder, and the bank, in a proceeding against it by the creditor, to which the stockholder was not a party, would neither be called upon nor be expected or allowed to present such a question for adjudication."

That "the amount of the bank's indebtedness, or its liability, on a question of this kind could and would be put in issue in a suit between the creditor and the corporation; but whether such a due is within the scope of the contract between the creditor and the stockholder under the Constitution would not and could not be put in issue in a suit between a creditor and the bank to which the stockholder is not a party."

That "in the original case against the bank by the creditor, the question as to the character of the claim—whether it was one *contemplated by the contract between the [147] creditor and the stockholder—was neither presented nor litigated, nor was it in a situation to be presented or litigated; while in the case now under consideration the question is not whether the claim was an indebtedness or a due for which the bank was liable, which question was litigated and concluded by the judgment, but a question whether it was the kind of a debt or due which the statutory contract between the creditor and stockholder covered or contemplated. This precise question, as has been said, was not presented—could not have been presented—in that case, and therefore is not concluded." That this judgment came within "an exception to the general rule that a judgment against the corporation is conclusive."

Plaintiff moved for a new trial, which was denied, and judgment entered for defendant. The case was taken on error to the United States circuit court of appeals for the first circuit and the judgment affirmed. 44 C. C. A. 456, 105 Fed. 224. This writ of certiorari was then issued.

Mr. William Reed Bigelow argued the cause, and, with *Messrs. E. L. Waterman and Park B. Pulsifer*, filed a brief for petitioner:

A judgment and execution against the corporation are conclusive on the stockholders, except when obtained by fraud or collusion.

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Ball v. Recse*, 58 Kan. 614, 50 Pac. 875; *Thompson v. Pfeiffer*, 60 Kan. 409, 56 Pac. 763; *Steffins v. Gurney*, 61 Kan. 292, 59 Pac. 725; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Dexter v. Edmands*, 89 Fed. 467.

It is immaterial that the judgment was rendered by default.

Steffins v. Gurney, 61 Kan. 292, 59 Pac. 725; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 760; *Holyoke Bank v. Goodman*

Paper Mfg. Co. 9 Cnsh. 576; *Gaskill v. Dudley*, 6 Met. 546, 39 Am. Dec. 750; *Milliken v. Whitehouse*, 49 Me. 527; *Came v. Brigham*, 39 Me. 35; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Wilson v. Pittsburgh & Y. Coal Co.* 43 Pa. 424.

The guaranty by the trust company of notes negotiated by a third party would not necessarily be *ultra vires*. The person who negotiated them may have done so as trustee for the company. There is no finding to the contrary. If negotiated by a trustee for the benefit of the company, they might be guaranteed by the company upon negotiation.

Talman v. Rochester City Bank, 18 Barb. 123; *Lyon, P. & Co. v. First Nat. Bank*, 29 C. C. A. 45, 55 U. S. App. 747, 85 Fed. 120; *Opdyke v. Pacific R. Co.* 3 Dill. 55, Fed. Cas. No. 10,546; *Marbury v. Kentucky Union Land Co.* 10 C. C. A. 393, 22 U. S. App. 267, 62 Fed. 335; *Baxter v. Washburn*, 8 Lea, 1; *Rogers Locomotive & Mach. Works v. Southern R. Asso.* 34 Fed. 278; *New York Security & T. Co. v. Lombard Invest. Co.* 73 Fed. 537. See also *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. 392, 19 L. ed. 117; *Green Bay & M. R. Co. v. Union S. B. Co.* 107 U. S. 98, 27 L. ed. 413, 2 Sup. Ct. Rep. 221; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Ft. Worth City Co. v. Smith Bridge Co.* 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339.

It is not *ultra vires* for a banking institution to put assets in the name of an individual as trustee.

Schofield v. State Nat. Bank, 38 C. C. A. 179, 97 Fed. 282.

Acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.

Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; *McNitt v. Turner*, 16 Wall. 352, 21 L. ed. 341; *Carpenter v. Rannels*, 19 Wall. 138, 22 L. ed. 77; *Cornett v. Williams*, 20 Wall. 226, sub nom. *Nash v. Williams*, 22 L. ed. 254; *Keely v. Sanders*, 99 U. S. 441, 25 L. ed. 327; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

When a contract is not, on its face, necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid.

Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; *Lexington v. Butler*, 14 Wall. 282, 20 L. ed. 809; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Fuller v. Scott*, 8 Kan. 25; *Waynick v. Richmond*, 11 Kan. 488; *Bissell v. Michigan S. & N. I. R. Cos.* 22 N. Y. 258; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295; *Chautau-*

qua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; *Farmers' Loan & T. Co. v. Curtis*, 7 N. Y. 466; *Alward v. Holmes*, 10 Abb. N. C. 96; *Roussin v. St. Louis Perpetual Ins. Co.* 15 Mo. 244; *Hart v. Missouri State Mut. F. & M. Ins. Co.* 21 Mo. 91; *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321; *Union Water Co. v. Murphy's Flat Fluming Co.* 22 Cal. 620.

The charter of the trust company is broad enough to cover such choses in action as these guaranties secured by real estate.

Parkinson Sugar Co. v. Bank of Ft. Scott, 60 Kan. 474, 57 Pac. 126; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

A judgment on an *ultra vires* claim is just as conclusive as a judgment on any other claim.

Franklin County v. German Sav. Bank, 142 U. S. 93, 35 L. ed. 948, 12 Sup. Ct. Rep. 147; *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Wilson v. Deen*, 121 U. S. 525, sub nom. *Milne v. Deen*, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004; *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567; *Ætna L. Ins. Co. v. Lyon County*, 44 Fed. 329; *United States ex rel. Portsmouth Sav. Bank v. Ottawa Bd. of Auditors*, 28 Fed. 407.

A judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it.

Davis v. Brown, 94 U. S. 423, 24 L. ed. 204; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Comstock v. Crawford*, 3 Wall. 396, 18 L. ed. 34; *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283.

What is implied in a record, pleading, will, deed, or contract is as effectual as what is expressed.

Cornett v. Williams, 20 Wall. 226, sub nom. *Nash v. Williams*, 22 L. ed. 254; *United States v. Babbit*, 1 Black. 55, 17 L. ed. 94.

The conclusiveness of a judgment does not depend upon the reasons for the judgment, but upon the fact of a judgment.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *Citizens' Bank v. Brigham*, 61 Kan. 727, 60 Pac. 754.

A judgment by default is just as conclusive as one rendered after answer and contest.

Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733.

A judgment is binding although the cause of action was barred by a discharge in bankruptcy which was not pleaded.

Dimock v. Revere Copper Co. 117 U. S. 559, 29 L. ed. 994, 6 Sup. Ct. Rep. 855.

So, also, though barred by the statute of limitations, if it was not pleaded.

Schnack v. Boyd, 59 Kan. 257, 52 Pac. 874; *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911.

So, also, though barred by usury which was not pleaded.

Charles v. Davis, 62 N. H. 375.

A foreclosure decree is binding upon parties and privies as to defenses not set up.

Stout v. Lye, 103 U. S. 66, 26 L. ed. 428.

The nature of the liability and the time and mode of its enforcement are to be determined from the statutes, and not by the notions which particular courts may entertain as to what will be equitable and just in such cases. The provisions of the statute in question, which fix the liability of a stockholder, are plain and leave little room for interpretation.

Sleeper v. Norris, 59 Kan. 555, 53 Pac. 757.

Where a statute is clear and free from all ambiguity, the letter of it is not to be disregarded.

St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *Bate Refrigerating Co. v. Sulsberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651.

There is a presumption that the guaranties were within the powers of the corporation and its officers.

National Bank of Commerce v. Atkinson, 8 Kan. App. 30, 54 Pac. 8; *Sherman Center Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569; *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756; *Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 191, 25 L. ed. 321.

The contractual relation between the respondent stockholder and the petitioner creditor of the corporation is implied by law, and is not a question of fact in any sense.

Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Howarth v. Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888.

The word "dues" includes all contractual obligations.

Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Chase v. Curtis*, 113 U. S. 452, 28 L. ed. 1038, 5 Sup. Ct. Rep. 554; *Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513, 30 N. E. 692; *Herriek v. Wardwell*, 58 Ohio St. 294, 50 N. E. 903; *Flenniken v. Marshall*, 43 S. C. 80, 28 L. R. A. 402, 20 S. E. 788. See also *Grund v. Tucker*, 5 Kan. 70; *Haynes v. Brown*, 36 N. H. 545; *Smith v. Omans*, 17 Wis. 395; *Powell v. Oregonian R. Co.* 2 L. R. A. 270, 13 Sawy. 535, 36 Fed. 726, 3 L. R. A. 201, 13 Sawy. 543, 38 Fed. 187.

Kan. Gen. Stat. 1889, § 1192, is remedial, and not penal.

Framc v. Ashley, 59 Kan. 477, 53 Pac. 474; *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519; Kan. Gen. Stat. 1889, § 7281.

The trust company seems to have followed the usual course of business in Kansas.

Crissey v. Inter-State Loan & T. Co. 59 Kan. 561, 53 Pac. 867. See *Van Pelt v. Strickland*, 60 Kan. 584, 57 Pac. 498.

If the guaranty is made in the interest of the bank it would not be *ultra vires*, and, 186 U. S.

in any event, every presumption should be made in its favor.

Commercial Bank v. Cheshire Provident Inst. 59 Kan. 361, 41 L. R. A. 175, 55 Pac. 131; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 58 Kan. 175, 48 Pac. 847; *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596.

Mr. J. S. H. Frink argued the cause and filed a brief for respondent:

The guaranty was not within the powers of the corporation.

National Park Bank v. German-American Mut. Warehousing & Security Co. 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567.

The promise of the bank was beyond the scope of its powers, and absolutely null and void; the judgment rests upon no cause of action whatever.

Brownsville Taxing Dist. v. Loague, 129 U. S. 494, 32 L. ed. 780, 9 Sup. Ct. Rep. 327; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

This was a jury-waived case. The findings of fact by the court have the same force and effect as the verdict of the jury. The facts found by the trial justice are conclusive where there is sufficient evidence to support them, although it may be conflicting.

Grayson v. Lynch, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064.

The framers of the Kansas Constitution did not intend that stockholders should be responsible for every class of obligations.

McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831.

There may be a class of "dues or debts" for which a stockholder may not be liable.

Cook, Corp. 4th ed. § 224; *Whitman v. National Bank*, 176 U. S. 562, 44 L. ed. 589, 20 Sup. Ct. Rep. 477.

Judgments may be impeached for fraud and want of jurisdiction.

Ball v. Reese, 58 Kan. 614, 50 Pac. 875.

A judgment by default can give no validity to an absolutely unauthorized contract.

Lake County v. Platt, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567.

A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173.

Contracts made by a corporation after it has gone into liquidation are void.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Schrader v. Manufacturer's Nat. Bank*, 133 U. S. 67, 33 L. ed. 564, 10 Sup. Ct. Rep. 238.

The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption.

Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

When a case is tried by the court without a jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based. The question remains whether or not the facts found are sufficient to support the judgment, and rulings to which exceptions are duly preserved may be reviewed.

Plaintiff excepted to the refusal of the court to rule that upon all the evidence plaintiff was entitled to recover as matter of law, and also to the refusal to make other rulings requested, and to the rulings made. The correctness of these rulings was questioned in fifteen errors assigned in the circuit court of appeals, but they need not be recapitulated.

[148] *The circuit court found as facts that the guaranties on which plaintiff's judgment in the state court was based were not guaranties of the payment of securities negotiated by the company; that the business which the corporation was authorized to do was "to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company;" that the guaranty of these notes was not within the reasonable and proper scope of the business of the company; and that defendant had no notice that the company was assuming to guarantee the payment of claims not negotiated by itself. The court referred to a resolution of the board of directors authorizing the guaranty of securities negotiated by the company, and found this guaranty not within its scope.

This corporation was organized in 1888 under the general laws of Kansas, authorizing the creation of loan and trust companies, by voluntary association as prescribed, with the powers, among others, "to make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock;" and "to enter into any obligation or contract essential to the transaction of its ordinary affairs." The charter of each corporation was required to set forth "the purpose for which it is formed;" and the statute provided that: "No corporation created under the provisions of this act shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation." Kan. Comp. Laws 1885, p. 210, chap. 23, §§ 5, 6, 11, 26.

The purposes for which the corporation was formed were set forth in its charter, and were as found by the circuit court. The by-laws provided for a loan committee with power "to discount or purchase bonds, bills, notes, and other evidences of debt," but did not embrace the power to guarantee. As be-

fore stated, the circuit court found that these guaranties were not "within the reasonable and proper scope of the business, as contemplated by the parties."

The purview of the words "loan and trust" does not appear *to have been defined by [149] statute or decision in Kansas, but the declaration alleged that this company was organized "for the purpose of transacting a general investment loan and trust business, buying and selling commercial paper, obligations and securities," and it must be assumed that the general rule is applicable that such companies have no implied power to lend their credit, or to bind themselves by accommodation indorsements. They may guarantee paper owned by them, or paper which they negotiate in due course of business and the proceeds of which they receive, but the naked power to guarantee the paper of one third party to another is not incidental to the powers ordinarily exercised by them. The power as exercised here was certainly not "essential to the transaction of its ordinary affairs," nor within "the legitimate objects of its creation." And so far as the question might be resolved by the usage in Kansas, the findings were adverse to plaintiff.

In *Commercial Bank v. Cheshire Provident Inst.* 59 Kan. 361, 41 L. R. A. 175, 53 Pac. 131, a judgment against a bank on a guaranty, where the record did not contain any of the evidence, and there was a general finding for plaintiff, was sustained. The court said that it must be presumed that the guaranty "was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business;" and that while "it is true that, in this case, the paper itself does not indicate that the Commercial Bank ever owned it, nevertheless it may have received the proceeds and the guaranty may have been made strictly in the interest of the bank." But the findings in this case take it out of the range of that decision, and forbid resort to presumption to make out validity.

We are of opinion that, upon the facts found, the guaranties were given without authority.

The 2d section of article 12 of the Constitution of Kansas provides as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

*In *Woodworth v. Bowles*, 61 Kan. 569, 60 [150] Pac. 331, it was held that this constitutional provision was not self-executing, but required legislative action to give it effect.

Section 32 of chapter 23 of the Compiled Laws of Kansas of 1885 provided that when an execution had been issued against a corporation, and property could not be found on which to levy it, then "execution may be issued against any of the stockholders, to an extent equal in amount to the amount of

stock by him or her owned, together with any amount unpaid thereon; . . . or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 44: "If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; . . ."

Section 45: "If any stockholder pay more than his due proportion of any debt of the corporation, he may compel contribution from the other stockholders by action." Section 46: "No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." These sections were all carried forward into the Compiled Laws of 1889, with the same chapter and numbers, but that compilation also gives a general number, and the general number of § 32 is 1192. There was no compilation from 1889 to 1897. Sections 32, 44, 45, and 46 reappear in §§ 49, 50, 51, and 53 of chapter 66 of the General Statutes of 1897.

The word "dues" thus appears to have been regarded as equivalent to debts or that which is owing. Mr. Justice Story in *United States v. State Bank*, 6 Pet. 29, 36, 8 L. ed. 308, 310, said, in construing the statute there referred to: "The whole difficulty arises from the different senses in which the term 'due' is used. It is sometimes used to express the mere state of indebtedment, and then is an equivalent to owed or owing. And it is sometimes used to express the fact that the debt has become payable."

[151] *In *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477, it was said that "the word 'dues' is one of general significance, and includes all contractual obligations." Can an obligation which a corporation had no right to incur be a contractual obligation and the basis of "dues," as that word is used in the state Constitution? We do not think so. It appears to us that it was not intended by that instrument to impose individual liability on stockholders in respect of risks which they had not undertaken.

One of the grounds on which the doctrine of *ultra vires* rests, is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation.

The rule in this court is that a contract made by a corporation beyond the scope of its powers, expressed or implied, cannot be enforced, or rendered enforceable, by the application of the principle of estoppel. The rule in Kansas seems to be that when the contract has been executed and the corporation has received the benefits of it, the cor-

poration is estopped from questioning its validity, and so in respect of evidences of indebtedness purchased before maturity in good faith and without notice. *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596; *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 23 Pac. 569; *Alexandria, A. & S. F. R. Co. v. Johnson*, 58 Kan. 175, 48 Pac. 847. But we are not persuaded that if the defense of *ultra vires* had been interposed in the action against this company, and the facts had been found to be as they have been found here, the defense would not have been sustained in the courts of Kansas. If, however, under the state decisions, the corporation would be held estopped from denying the liability, it does not follow that the stockholders must therefore be held liable, if the obligation was in fact incurred without authority. In other words, alleged liabilities incurred without authority, and which do not come within the meaning of the word "dues," as used in the state Constitution, cannot be properly treated as brought within the scope of that word, simply because the corporation may [152] be so situated as to be estopped from denying their validity.

Whether in this case the corporation would have been estopped if it had made the defense of *ultra vires*, it did not make it, and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas Constitution. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506. But we did not there hold that it was not open for a stockholder to show that the judgment was not enforceable against him when rendered against the corporation on a contract beyond its power to make. It must be remembered that in the case before us the right of action accrued, and the action was accordingly averred to have been brought, "by virtue of the Constitution and the statutes of the state of Kansas in such case made and provided." We think it was not error to permit the stockholder to go behind the judgment so far as to show, or, at all events, to insist, for the judgment record introduced below disclosed the invalidity of the guaranties, that he was not liable under that Constitution and those laws.

In *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. ed. 564, 10 Sup. Ct. Rep. 238, it was ruled that, although the individual liability of the stockholders of a national bank, as imposed by and expressed in the statute, was for all its contracts, debts, and engagements, "that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business;" and that a judgment recovered against the bank in a suit commenced some years after it went into liquidation "was not binding on the stockholders in the sense that it could not be re-examined."

In *Brownsville Taxing Dist. v. Loague*, 129 U. S. 493, 32 L. ed. 780, 9 Sup. Ct. Rep. 327, it was held that if a petitioner for a writ of mandamus to compel the levy of a

tax to pay a debt evidenced by a judgment recovered on coupons of municipal bonds is obliged to go behind the judgment in order to obtain his remedy, and it appears that the bonds were void, and that the municipality was without power to tax to pay them, the principle of *res judicata* does not apply upon the question of issuing the writ. The petition in that case set up the judgment, and [153] averred that "petitioner's only remedy to enforce the collection of his judgments is that awarded by the act authorizing the issue of the bonds from which the coupons were detached upon which said judgments were obtained." And we held that as the relator was compelled to go behind the judgments as money judgments merely, "to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void, and that no such remedy exists."

As then the provision of the Constitution of the state of Kansas, if properly construed, imposes the liability in question only in respect of corporate indebtedness lawfully incurred, that is to say, in respect of dues resulting in regular course of business and in the exercise of powers possessed, plaintiff cannot recover in this action by virtue of the Constitution and laws of the state, on the facts found, and the judgment must be affirmed.

As to the denial of the motion for new trial it is not within our province to interfere with the discretion of the circuit court. *Judgment affirmed.*

Mr. Justice **Gray** did not hear the argument, or take any part in the decision.

JOSEPH A. NESBITT and Charles A. Moore, *Appts.*,
v.

UNITED STATES and the Sioux Indians.

(See S. C. Reporter's ed. 153-157.)

Indian depredation act of 1891—preservation of pending cases.

1. An affidavit of a claimant, accompanying a claim for compensation for Indian depredations, filed in the Interior Department before the passage of the Indian depredation act of March 3, 1891 (26 Stat. at L. 851, chap. 538), is not "evidence" within the meaning of § 2 of that act, preserving as pending cases those in which evidence had been presented, since the word "evidence" must be considered as referring to the prior act of 1872 (17 Stat. at L. 190, chap. 233), and the regulations authorized thereby, which required claims for such depredations to be accompanied by the depositions of two or more persons having personal cognizance of the facts.
2. A claim for compensation for Indian depredations is not relieved from the conditions

NOTE.—As to the effect of a statute to defeat or preserve pending civil actions—see note to *Pritchard v. Savannah Street & Rural Resort R. Co.* (Ga.) 14 L. R. A. 721.

of the act of March 3, 1891, § 2 (26 Stat. at L. 851, chap. 538), preserving as pending cases only those in which evidence had been presented, by the provision of § 4 of that act, that in considering the merits of claims presented to the court of claims any testimony, affidavits, or other papers on file in the Department, relating to such claim, shall be considered as competent evidence, as this provision is only applicable to the claim after it is presented to the court of claims.

[No. 578.]

Submitted April 18, 1902. Decided May 19, 1902.

A PPEAL from the Court of Claims to review a judgment sustaining a plea to the jurisdiction of that court of a petition filed under the Indian depredation act. *Affirmed.*

The facts are stated in the opinion.

Mrs. Belva A. Lockwood and **Mr. William H. Robeson** submitted the cause for appellants.

Assistant Attorney General Thompson submitted the cause for appellees. **Mr. Lincoln B. Smith** was with him on the brief.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **McKenna** delivered the [154] opinion of the court:

This is an appeal from a judgment of the court of claims sustaining a plea to the jurisdiction of the court to hear a petition filed by appellants under the Indian depredation act of 1891.

The purpose of the petition was to recover the sum of \$7,950 against the United States, for the value of eighteen head of mules and twenty-nine head of horses, alleged to have been taken and driven away by the Sioux Indians on or about the 25th day of July, 1864.

The plea to the jurisdiction of the court was based upon the fact that the depredation charged was alleged to have been committed "prior to the 1st of July, 1865, and that no claim for such depredation was ever presented to the Secretary of the Interior or the Congress of the United States, or any superintendent, agent, subagent, or commissioner, authorized under any act of Congress to inquire into such claims, within the meaning of the first proviso of the 2d section of the act of March 3, 1891."

Section 2 of the act of 1891 reads as follows:

"That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the government: *Provided*, That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed or has been or is pending prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, or subagent, or commissioner authorized under any act of Congress to in-

quire into such claims; but no case shall be considered pending unless evidence has been presented therein: *And provided further*, That all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred.” [26 Stat. at L. 851, chap. 538.]

[155] *The claim was filed in the Interior Department March 2, 1891, before the passage of the act, but it is contended by the government that it was not “pending” before the Secretary of the Interior because no evidence had been “presented therein.”

The affidavit of Joseph A. Nesbitt accompanied the claim, and was very full as to the locality and circumstances of the depredation. It also stated the attempts which were made to recover the animals and the failure of the attempts, and gave the names of the witness by whom the depredation could be proved.

The question in the case is whether such affidavit constituted the presentation of evidence of the claim so as to bring the claim within the statute.

Claims for Indian depredations filed in the Interior Department after 1872 were filed under the act of 1872. 17 Stat. at L. 190, chap. 233. Section 7 of the act reads as follows:

“That it shall be the duty of the Secretary of the Interior to prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims, as may be presented, subject to the rules and regulations prepared by him, and report to Congress at each session thereof of the nature, character, and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based: *Provided*, That no payment on account of said claims shall be made without a specific appropriation therefor by Congress.”

In pursuance of that act the Secretary of the Interior established the following regulations:

“1. Application for indemnity, or satisfaction for the loss or injury sustained, must be made by the claimant, his attorney, or duly authorized agent, . . . to the United States, . . . Indian agent, sub-agent, within whose jurisdiction or charge the nation, tribe, or band is to which the offenders or depredators belong.

[156] * “2. The necessary documents and proofs must accompany the application of the claimant, his attorney, or agent, and should be in legal form, and consist—

“First. Of the sworn declaration of the claimant, setting forth when and where the depredation was committed, and by what Indians, their tribe or nation being named; describing fully the property stolen or de-

stroyed, and giving the quantity of each article or number, condition, or quality thereof, and the just value of each article or piece of property at the time the same was so taken or destroyed. Should the depredation have been committed while the claimant was in the Indian country, he must state whether he was lawfully there, either having a license to trade with the Indians, a passport, or a permit from the proper Indian authorities, or was *en route* through said country to a place of ultimate destination at some point within the limits of any state or territory not included within the limits of the reservation for any nation or tribe of Indians set apart by treaty provision, or by executive order; and he in such declaration must further state whether any of the property so stolen or destroyed has subsequently been recovered by or for him, the claimant; and whether the claimant has at any time received part compensation therefor; and if so, how much, when, and from what source; and further, that the claimant has in no way endeavored to obtain private satisfaction or revenge.

“Second. Of depositions of two or more persons having personal cognizance of the facts or any of them as embraced in the declaration of the claimant, which depositions must set forth the means of knowledge which deponents have as to the fact of the depredation, when, where, by what Indians, and under what circumstances the depredation was committed, of what the property consisted that was so taken or destroyed by the Indians, describing it as fully as practicable, and stating the value thereof. If the deponents, or any of them, were at the time of the depredation in the employment of the claimant it must be so stated, and in what capacity. (Regulations Indian Department 1884, p. 81.)”

To the requirements of the act of 1872, and the regulations *authorized by it, the word “evidence,” in the act of 1891, must be considered as referring, and the claim of the appellant was not accompanied by such evidence. It was accompanied by the deposition of one of the claimants, but not of “depositions of two or more persons having personal cognizance of the facts or any of them as embraced in the declaration of the claimants.” Persons having such knowledge existed, it was stated, and their affidavits promised, but they had not been presented.

Nor is the petitioner helped by § 4 of the act of 1891, which provides that—

“In considering the merits of claims presented to the court any testimony, affidavits, . . . and such other papers as are now on file in the Departments . . . relating to any such claims, shall be considered by the court as competent evidence.”

That provision is applicable to the claim after it is presented to the court, and does not relieve from the conditions expressed in § 2. See *Weston's Case*, 29 Ct. Cl. 420, 424, where the provisions of the statutes and the reasons for them are clearly expressed.

Judgment affirmed.

FREDERICK WILLIAMS, *Petitioner*,
v.
GEORGE C. GAYLORD, Charles E. Mad-
drill, and Dwight T. Rolfe.

(See S. C. Reporter's ed. 157-168.)

*Courts—conclusiveness in Federal courts of
state decisions on state statutes—mining
corporations—sale or encumbrance of
mining ground—consent of stockholders.*

1. The decision of the supreme court of California, that any person who connects himself with the title of a mining corporation may take advantage of Cal. act April 30, 1880, prohibiting the directors of mining corporations from selling or encumbering its mining ground unless ratified by the stockholders, is binding on the Federal courts.
2. A state may require the consent of the stockholders of a foreign mining corporation as a necessary prerequisite to the sale or encumbrance of the mining ground owned by it within the state, as such a requirement is not a regulation of the internal affairs of the corporation, but has reference to the conduct by it of its business.
3. The Federal courts are concluded upon the question as to how an encumbrance by a mining corporation of mining ground in California may be ratified by the stockholders, by a decision of the supreme court of that state that the manner of ratification prescribed by Cal. act April 30, 1880, is exclusive.

[No. 208.]

Argued April 8, 9, 1902. Decided May 19, 1902.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming a judgment of a circuit court in favor of defendants in a suit to foreclose a mortgage executed by a mining corporation on mining ground in the state of California. *Affirmed.*

See same case below, 42 C. C. A. 401, 102 Fed. 372.

Statement by Mr. Justice **McKenna**:

This suit was brought by the petitioner as trustee of a mortgage made by the Gold Hill Mining Company, a corporation of West Virginia, upon certain mining ground in the state of California. Subsequently to the [158] execution of the mortgage *the corporation, in the conduct of its mining operations in the state of California, became indebted to the respondents for materials, labor, and

supplies. Mechanics' and materialmen's liens were filed by respondents and judgments obtained by them upon which executions were issued and the property mortgaged was sold. The respondents became its purchasers.

The corporation made default in the foreclosure suit, and a decree *pro confesso* was taken against it. The respondents pleaded their judgments and the titles which were claimed thereunder; and pleaded, further, that the mortgage was void because it had not been ratified by the stockholders of the corporation as required by a statute of California, passed April 30, 1880, and entitled "An Act for the Further Protection of Stockholders in Mining Companies," § 1 of which act is as follows:

"Sec. 1. It should not be lawful for the directors of any mining corporation to sell, lease, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way additional mining ground, unless such act be ratified by the holders of at least two thirds of the capital stock of such corporation. Such ratification may be either in writing signed and acknowledged by such stockholders or by resolution duly passed at a stockholders' meeting called for that purpose."

The circuit court sustained the defenses (96 Fed. 454), and its ruling was affirmed by the circuit court of appeals. 42 C. C. A. 401, 102 Fed. 372.

The mortgage was given to secure one hundred coupon bonds of \$500 each. They were dated July 1, 1890. The mortgage bore the same date, and the manner and authority for its execution, the record exhibits, as follows, being the minutes of a meeting held June 5, 1890:

The meeting was called to order by C. Littlefield, who nominated G. Livingston Morse, temporary chairman; nomination was seconded by W. W. Tucker and unanimously carried.

C. Littlefield then proposed W. W. Tucker for temporary *secretary; motion was sec- [159] onded by R. H. Pettigrew, Jr., and was unanimously carried.

Waiver of notice of incorporators was then agreed to by all present as per roll-call.

Roll-call of incorporators being made, all were found present as follows: M. J. Shoecraft, Calvin Littlefield, G. Livingston Morse, R. H. Pettigrew, Jr., and W. W. Tucker.

The chairman said: We were now ready for business, whereupon Mr. M. J. Shoecraft presented a duplicate copy of papers of incorporation, and a telegram from secretary of state of West Virginia, stating that the charter of this company was duly filed June 23, 1890, which was adopted.

On motion of W. W. Tucker, seconded by R. H. Pettigrew, Jr., it was—

Resolved, That the said Gold Hill Mining Company issue one hundred first-mortgage bonds, of the denomination of five hundred dollars each, each bond bearing date of July

NOTE.—As to the effect of decisions of state courts in Federal courts—see notes to *Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508; *United States ex rel. Butz v. Muscatine* 19 L. ed. U. S. 490; and *Elmendorf v. Taylor*, 6 L. ed. U. S. 290.

On regulation of business of foreign corporations by state—see note to *Boulware v. Davis* (Ala.) 9 L. R. A. 601.

On recognition or exclusion of foreign corporation—see notes to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 289; and *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

1, 1890, and bearing interest at the rate of ten per cent per annum, payable semi-annually, on the first day of January and July in each year, and to run five years from July 1, 1890; with the privilege of the said company paying off and redeeming the same sooner, by giving to the holders of said bonds six months' notice of the company's intention thus to do; to pay off said bonds and redeem the same on any day interest is payable, or on payment of six months' interest in advance; and the president and the secretary of said company are hereby authorized and directed to execute said bonds and mortgage for said company, and the said board hereby authorize and direct the seal of said company to be affixed to the same.

On motion of C. Littlefield, seconded by M. J. Shoecraft, the chairman, G. L. Morse, was elected trustee for the bondholders. Motion carried.

On motion of W. W. Tucker, seconded by R. H. Pettigrew, Jr., Mr. G. L. Morse was appointed to draw up a proper bond, have same executed and lithographed; also a stock certificate book of two hundred certificates, total cost not to exceed ninety-five dollars.

On motion of M. J. Shoecraft, seconded by [160] G. L. Morse, it was voted that the incorporators of the Gold Hill Mining Company be named as directors of said company. Motion carried.

On motion of C. Littlefield, seconded by M. J. Shoecraft, the company's seal was ordered to be made, and Mr. Shoecraft be a committee to have the same made. Motion carried.

Mr. Shoecraft reported that the by-laws were not quite ready, and the chairman suggested that he report a full set at a future meeting.

On motion, the meeting was declared adjourned to the second Tuesday in July, 8th inst.

W. W. Tucker,
Temporary Secretary.

It was testified that the gentlemen present at the meeting held all of the stock of the company.

The record also contains the minutes of a meeting held July 10, 1890, at which meeting a president, vice president, secretary, and treasurer and general manager were elected. The following resolution was passed:

"On motion of Mr. Morse, seconded by Mr. Pettigrew, resolved, That the directors of this company be authorized and directed to purchase of M. J. Shoecraft the mines formerly known as the Nevada City Gold Quartz Mining Company, and pay therefor one hundred and sixty thousand shares of the capital stock of this company, being its total issue, and twenty-five thousand (\$25,000) dollars in first-mortgage bonds. Motion carried.

"On motion adjourned, to meet at the call of the president."

It was also testified that a paper was "executed by the Gold Hill Mining Company 186 U. S.

for the purpose of correcting the form of the mortgage as originally executed."

The paper was introduced in evidence. It was dated August 28, 1890, and recited that—

"Whereas, by a resolution of the board of directors of the Gold Hill Mining Company, duly passed and adopted on the twenty-fifth day of June, 1890, and in accordance with and in pursuance of said resolution, a mortgage was executed and delivered *to G. Livingston Morse, as trustee for the use and purposes therein mentioned, on the first day of July, 1890, by the president and secretary of said company, they being authorized and directed in and by said resolution thus to do, and duly acknowledged by them, and the corporate seal of said company duly affixed to said mortgage by the like authority of said board of directors."

Certain mistakes were then stated to have been made in the mortgage, and the secretary, Calvin Littlefield, was given authority to correct them, and he and the president were directed and authorized to execute a paper on behalf of the company and to affix the corporate seal of the company thereto. The paper was duly executed and recorded in Nevada county, California. Other facts are stated in the opinion.

Mr. C. Walter Artz argued the cause and filed a brief for petitioner:

The effect which a statute of Massachusetts prohibiting work on the Lord's Day, under a penalty, should have on the rights of the parties to a collision cause pending in the district court, one of whom has violated the act in moving his vessel on that day, has been held not to be a question of the construction of a statute, but of the application of general rules of law to the case of a person who has violated such a statute.

Sawyer v. Oakman, 1 Low. Dec. 134, Fed. Cas. No. 12,404. See also *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.* 23 How. 209, 16 L. ed. 433; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974.

So, whether or not the construction and maintenance under authority of a state statute of a railroad owned by a corporation, is a matter in which the public has any interest of such a nature as to warrant taxation by a municipal division of the state in aid of it, is a question of general law, and not of statutory construction.

Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382.

It is the nature of the local rule of property itself, and not the fact of its casual local application, which determines the controlling effect of the state court decision laying it down.

Warburton v. White, 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404.

The decision of the supreme court of California in the case of *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, may, in a given instance, have the effect of determining the title to lands without the state.

Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; *Woodbury v. Allegheny & K. R. Co.* 72 Fed. 371. See also *Blackburn v. Selma, M. & M. R. Co.* 2 Flipp. 525, Fed. Cas. No. 1,467; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 447, Fed. Cas. No. 17,775; *Brown v. Chesapeake & O. Canal Co.* 73 Md. 607; *Penn v. Baltimore*, 1 Ves. Sr. 444; *Toller v. Carteret*, 2 Vern. 494; *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333; *Carrington v. Brents*, 1 McLean, 167, Fed. Cas. No. 2,446; *Lyman v. Lyman*, 2 Paine, 46, Fed. Cas. No. 8,628; *Rourke v. McLaughlin*, 38 Cal. 196; *Ward v. Arredondo*, Hopk. Ch. 213, 14 Am. Dec. 543; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

The decision cannot, therefore, be held to be of only local application.

A state cannot legislate upon the internal affairs of a foreign corporation.

Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360.

Such provisions as those in question refer to the internal administration of corporations, as opposed to the transaction of their business with strangers.

Campbell v. Argenta Gold & S. Min. Co. 51 Fed. 1; *First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. 439, 36 C. C. A. 633, 95 Fed. 23; *Wood v. Corry Waterworks Co.* 12 L. R. A. 168, 44 Fed. 147; *Beecher v. Marquette & P. Rolling Mill Co.* 45 Mich. 103, 7 N. W. 695; *Zabriskie v. Cleveland, C. & C. R. Co.* 23 How. 381, 16 L. ed. 488; *Hervey v. Illinois Midland R. Co.* 28 Fed. 169; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433, 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953.

Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, such action is the management of the internal affairs of the corporation.

Madden v. Penn Electric Light Co. 181 Pa. 622, 38 L. R. A. 638, 37 Atl. 817; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 154, 20 Atl. 1039.

A state cannot assume to make laws for the protection of stockholders in foreign corporations.

Cook, Stock & Stockholders, § 779; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 35 N. E. 932; *Demarest v. Flack*, 128 N. Y. 205, *sub nom.* *Demarest v. Grant*, 13 L. R. A. 854, 28 N. E. 645; *Coats v. Donnell*, 94 N. Y. 168; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360; *American Waterworks Co. v. Farmers' Loan & T. Co.* 20 C. C. A. 133, 36 U. S. App. 563, 73 Fed. 956.

The filing of a deed conveying the proper-

ty to the company, which was the only act performed within the state of California, in the case at bar, cannot in any respect be considered as the transaction of business in that state.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Gilchrist v. Helena, H. S. & S. R. Co.* 47 Fed. 593.

Mr. **Curtis H. Lindley** argued the cause, and, with Mr. *Henry Eickhoff*, filed a brief for respondents:

As the incorporators of the Gold Hill Mining Company in their charter specified that the purpose of the incorporation was to purchase, operate, manage, and work mines in the state of California, they necessarily contracted with reference to the laws of that state, and must be assumed to have known the laws of that state.

Pinney v. Nelson, 183 U. S. 144, *ante*, 125, 22 Sup. Ct. Rep. 52.

The construction placed upon such laws by the state courts of last resort is just as much a part of them, knowledge of which is imputed, as if such interpretation were incorporated bodily into the statutes; such construction is a part of the statute.

Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261; *Christy v. Pridgeon*, 4 Wall. 196, 18 L. ed. 322; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013.

The determination as to whether the statute in question was or was not applicable to foreign corporations must be reached from an interpretation of the statute, and this court will abide by the interpretation adopted by the state court.

Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

The ultimate force of a decision of a court of last resort of a state cannot be weakened by the suggestion that the case was decided without having been fully argued or without mature consideration of the question.

Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67.

A state may by its laws make stockholders of foreign corporations liable for debts contracted by such corporations while doing business in the state.

Pinney v. Nelson, 183 U. S. 144, *ante*, 125, 22 Sup. Ct. Rep. 52.

And there is no logical reason why it may not extend its hand to such stockholders to save them from pillage and their corporate property from fraudulent confiscation.

Ibid.

Upon the construction of the Constitution and laws of a state this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal Constitution or a rule of general commercial law.

Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554.

The question at issue is not one of "general commercial law."

Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; *Wilson v. Perrin*, 11 C. C. A. 66, 22 U. S. App. 514, 62 Fed. 629; *Brown v. Grand Rapids Parlor Furniture Co.* 22 L. R. A. 817, 7 C. C. A. 225, 16 U. S. App. 221, 58 Fed. 286.

The state of California had the right to prescribe the manner in which instruments affecting the title to real property in that state should be executed, and to define what should and what should not be considered a valid transfer or encumbrance of such property.

Cooley, Const. Lim. 150, 151; *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 67, 3 L. R. A. 523, 41 N. W. 443; *McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153, 6 L. ed. 583; *Hinde v. Fattier*, 5 Pet. 398, 8 L. ed. 168; *Livingston v. Moore*, 7 Pet. 469, 8 L. ed. 751; *Suydam v. Williamson*, 24 How. 427, 16 L. ed. 742; *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413; *Ober v. Gallagher*, 93 U. S. 199, 23 L. ed. 829; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Barrett v. Holmes*, 102 U. S. 651, 26 L. ed. 291; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159; *Randolph v. Quidnick Co.* 135 U. S. 457, sub nom. *Jencks v. Quidnick Co.* 34 L. ed. 200, 10 Sup. Ct. Rep. 655; *Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 34 L. ed. 346, 10 Sup. Ct. Rep. 1017; *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; *Merchants' & Mfrs.' Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

That two states may have precisely the same statutes on a given subject, and their respective courts place thereon constructions diametrically opposed, is no reason why Federal interposition should be invoked to compel uniformity.

Randolph v. Quidnick Co. 135 U. S. 457, sub nom. *Jencks v. Quidnick Co.* 34 L. ed. 200, 10 Sup. Ct. Rep. 655; *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; *Bramhall v. Flood*, 41 Conn. 72; *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; *Shelby v. Guy*, 11 Wheat. 361, 6 L. ed. 495; *Christy v. Pridgcon*, 4 Wall. 196, 18 L. ed. 322. See also *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013.

The California statute as construed by the California court demands that the ratification be made by the stockholders as pre-

scribed by the act.

McShane v. Carter, 80 Cal. 312, 22 Pac. 178; *Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co.* 130 Cal. 345, 62 Pac. 552.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

The circuit court and the circuit court of appeals based their judgments upon the act of 1880 as construed by the supreme court of the state of California, regarding that construction as binding upon the Federal tribunals. The conclusion is attacked by petitioner, and he urges the following propositions against it:

"I. The decision of the supreme court of California, to the effect that judgment creditors may take advantage of the act of 1880, is not binding upon the Federal courts either as constructive of that statute or determinative of a local rule of property.

"II. The act of 1880 does not apply to foreign corporations because the legislation of one state has no effect upon the powers and internal management of corporations organized in other states.

"*III. Even if it should be held that the [162] California statute (Statutes of 1880, p. 131) does apply to foreign corporations, the mortgage is valid, and a decree of foreclosure and sale should be directed."

(1) To sustain this proposition the petitioner makes a distinction between the construction of the statute and its application, conceding the binding force of the state decisions as to the former, but denying their authority as to the latter. The contention enjoins a review of the decisions of the supreme court of the state.

In *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, the plaintiff claimed title to mining property and certain appurtenant water rights under two deeds from the Nevada Reservoir Ditch Company, a mining corporation. He brought suit to enjoin the sale of the property under a judgment obtained against the company by one of its creditors. Judgment passed for the plaintiff in the trial court, but was reversed by the supreme court of the state. The latter court, by Hayne, Commissioner, said—

"And the important question arising on that appeal is whether the evidence is sufficient to show that the plaintiff was the owner of the property which the sheriff was proceeding to sell, and this depends upon whether the directors of said mining companies had power or authority to convey the property in the absence of a ratification by the stockholders as specified in the act of 1880.

"I. We think that the provision of said act goes to the power or authority of the directors. It cannot be construed to relate merely to their personal liability, for no penalty is imposed upon them, and to so construe it would be to practically nullify the act. In our opinion the directors of mining corporations have no power or authority to convey the mining ground without

the consent of holders of two thirds of the stock, given as prescribed by the act. And it follows without such consent the title does not pass. And if this be so, the question can be raised by anyone who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof.

[163] "Nor can the consent of the stockholders be presumed from 'the mere fact of the conveyance, whether under the corporate seal or not, for such consent or 'ratification' may be after the deed is executed, and hence is not necessarily or presumptively involved in the execution of such deed."

Counsel for petitioner says that the supreme court in its opinion not only construed, but applied, the act of 1880,—construed it in that portion of the opinion which denied authority to directors of mining corporations to convey mining property without the consent of the stockholders; applied it in that portion of the opinion which declares that without the consent of the stockholders the title of mining property does not pass, and that "the question can be raised by anyone who connects himself with the title of the corporation, . . . as well as by the stockholders thereof." This conclusion, it is asserted, is not warranted by the words of the statute, is opposed to the decisions of the courts of other states and of this court construing similar statutes, and is not binding upon the Federal courts. And it is urged that the circuit court of appeals "failed to distinguish between a decision of the state court construing the terms outlining the effect of the statute as enacted and a decision declaring that certain other persons not mentioned or referred to in the statute may by reason of relations existing between them and the stockholders, under general principles of corporation law, become beneficiaries of the statute under consideration." And it is further urged "that a case of the latter class does not construe a statute or establish a local rule of property, but is merely a decision upon the general law of corporate relations."

We are unable to accept the distinction. To accept it would deprive the state courts of the power to declare the implications of state statutes, and confine interpretation to the mere letter. The supreme court of California declared the effect of the act of 1880 as deduced from the language and purpose of the act, and this was necessarily an exercise of construction. The very essence of construction is the extension of the meaning of a statute beyond its letter, and it can seldom be done without applying some principle of law general in some branch of jurisprudence, and if whenever such application

[164] occurs the authority of the state courts to interpret the statute ceases, the Federal tribunals, instead of following, could lead those courts in declaring the meaning of the legislation of the states.

The construction of the act of 1880 was certainly directly presented to the supreme court of California, and that construction determined the judgment which was ren-

dered. The court declared that the provisions of the act extended "to the power or authority of the directors," and that without the consent of holders of two thirds of the stock the title did not pass. In other words, the title remained in the corporation; the property remained the property of the corporation; and hence the deduction of the court, "the question can be raised by anyone who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof." And this in consequence of the statute, and it is not the less so because the statutes of other states have been interpreted differently. It could hardly be contended that the legislature of California had not the authority to make such a consequence; and whether the legislature expressed its purpose or left it to inference, whether it expressed itself clearly or obscurely, the power of the state court to declare that purpose was none the less plenary.

McShane v. Carter was followed and affirmed in *Pekin Min. & Mill. Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679; *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269; *Johnson v. California Lustral Co.* 127 Cal. 289, 59 Pac. 595; *Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co.* 130 Cal. 351, 62 Pac. 552.

(2) That the act of 1880 applies to foreign corporations was decided in *Pekin Min. & Mill. Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679. That case, however, it is said, is practically overruled by *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360. Woodward was a stockholder in a mining corporation organized under the laws of the state of California. He brought an action against Miles, who was a director of the corporation, for \$1,000 damages for the violation of an act of the state (Stat. 1880, p. 400), which required the directors of the corporation to make, or cause to be made, posted, and filed, weekly reports of the superintendent.

"It is first contended," the court said, "that the act in question is unconstitutional for the reason that it operates only upon domestic corporations, and thereby allows [165] foreign corporations to transact business within this state upon more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state, in violation of art. 12, § 15. of the Constitution."

This was denied, and the act was held constitutional as being properly confined to domestic corporations because it was "directed to the internal affairs of the corporation, and not to its outside dealings or to the conduct of its business."

As to the conduct of the business of foreign corporations, the court said the state could "exercise full powers of control," but over their organization and internal government the state had no such power, because "the laws of the state did not have extraterritorial force." And further the court said: "The law is designed to protect stockholders of domestic corporations,

and to that end has declared that the directors of those corporations, the conduct of whose internal affairs is subject to the control of the legislature, shall do specific acts under a prescribed penalty for their failure and refusal."

The views expressed by the court were justified by the nature of the reports required to be made. They were of matters which alone concerned the stockholders,—did not affect in any way the rights of others. To make such reports was not doing business; it was only giving information of business done. But when a corporation sells or encumbers its property, incurs debts or gives securities, it does business, and a statute regulating such transactions does not regulate the internal affairs of the corporation. And it is certainly within the power of a state to say what remedies creditors of corporations shall have over property situated within the state. Therefore *Miles v. Woodward* is not an authority for petitioners' position.

(3) Even if it be held that the act of 1880 applies to foreign corporations, it is nevertheless contended that the mortgage is valid, and a decree of foreclosure and sale should be directed. In support of that position it is urged that (a) the meeting of June 25, 1890, at which the execution of the bonds and mortgage were resolved upon and authorized, though denominated a meeting of incorporators, was really a meeting [166] of stockholders; * (b) if this was not so, the corporation afterward, by its action of July 30, 1890, after the board of directors was organized, ratified the mortgage by the resolution which authorized its correction; (c) that not only those who participated in the meetings held more than two thirds of the stock of the corporation, but that the president, M. J. Shoecraft, at the time of the execution of the mortgage owned two thirds of the stock. In other words, it is urged that the corporation either executed the mortgage or ratified it, and that the stockholders both authorized and concurred in its execution. The evidence of the facts involved in these claims is the minutes of the meetings set out in the statement of facts and of the following testimony of a witness (Calvin Littlefield) for complainant:

Q. It appears that the following individuals were present at that meeting, namely: M. J. Shoecraft, Calvin Littlefield, G. Livingston Morse, R. H. Pettigrew, Jr., and W. W. Tucker. Can you tell me whether these gentlemen held all of the stock of the company at that time or not? A. They did.

Q. Do you know whether Mr. Shoecraft owned as much as two thirds of the stock of the company at the time when this mortgage was acknowledged? A. I do not.

Q. Have you the certificate book of the defendant company in your possession? A. I have.

Q. Tell me, if you can, the amount of stock in the name of M. J. Shoecraft at the 186 U. S.

date when the mortgage was acknowledged, namely, July 24, 1890? A. One hundred and sixty thousand shares.

Q. Shares at what value? A. Five dollars each.

Q. What was the entire capital of the company? A. Eight hundred thousand dollars—one hundred and sixty thousand shares.

Q. Can you tell me what date this mortgage was acknowledged by the president and yourself? A. I think the date of the acknowledgment.

Q. That is what? A. Twenty-fourth day of July, 1890.

Q. Do you know why the mortgage was dated the 1st? A. Yes.

*Q. Can you say why? A. The arrangement with the owner,—the first of July. By agreement the mortgage was to commence when the settlement ended.

Cross-examination:

Q. You say that on the 24th day of July the whole number of shares were issued to M. J. Shoecraft? A. I do.

Q. As appears by certificate No. 1? A. Yes.

Q. Certificate No. 1 (showing) is now before you? A. Yes.

Q. Is that in a book? A. Yes.

Q. What is it? A. The stock book.

Q. Certificate No. 1 has never been taken out of the book? A. It has not.

Q. It bears date the 24th day of July, 1890? A. It does.

Q. Certificate No. 1, marked Exhibit "C," has never been separated from its stub? A. It has not.

Q. And certificate No. 2 has never been separated from its stub? A. It has not.

Q. All the other certificates about which you have testified, from No. 3 to No. 21, inclusive, have been separated from their stub at some time or other? A. Yes, sir.

The witness also testified that shares were issued in certain amounts which were named and to certain persons who were named, "from certificate No. 1." A number of certificates which the witness testified about were introduced in evidence. They all bore date of July 24, 1890.

But as to the effect of this testimony and of the contentions of petitioners we are not called upon to express an opinion. The statute of California prescribed the manner of ratification to be "either in writing signed and acknowledged by such stockholders or by resolution duly passed at a stockholders' meeting called for that purpose." This manner of ratification was held to be necessary as we have seen, in *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, and that case has not been limited or varied by any subsequent case. And we have no doubt of the power of the state to so prescribe, not [168] only from its power over the manner of conveyance and the disposition of property situ-

ated within the state, but from its power over foreign corporations doing business within the state. *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. Nor can we contest that power, though we might, if we were permitted to exercise an independent judgment, construe the statute as only illustrative, and not as exhaustive of the manner of ratification.

Judgment affirmed.

Mr. Justice **Harlan** concurs in the judgment.

LEE LUNG, *Appt.*,

v.

I. L. PATTERSON, Collector of Customs for the Port of Portland, Oregon.

(See S. C. Reporter's ed. 168-177.)

Aliens—Chinese exclusion—jurisdiction of collector of customs—statutes—repeal by a subsequent treaty.

1. A collector of customs, by disregarding the certificates which, by the Chinese exclusion act of 1884, § 6 (23 Stat. at L. 117, chap. 220), are made evidence to establish a right of entry into the United States on the part of the persons presenting them, does not lose his jurisdiction finally to determine the right of such persons to enter the United States.
2. No abrogation of the provisions of the Chinese exclusion act of 1882 and the acts amendatory thereof, relative to the evidence which a member of the exempted class of the Chinese must produce to secure admission into the United States, was effected by the treaty of 1894 with China.

[No. 189.]

Argued and Submitted April 21, 1902. Decided May 19, 1902.

APPEAL from the District Court of the United States for the District of Oregon to review a judgment dismissing a petition in habeas corpus for want of jurisdiction to grant the relief prayed. *Affirmed.*

See same case below, 102 Fed. 132.

The facts are stated in the opinion.

Mr. **John H. Mitchell** argued the cause, and, with Mr. **Charles J. Schnabel**, filed a brief for appellant.

Assistant Attorney General **Hoyt** submitted the cause for appellee.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **McKenna** delivered the opinion of the court:

This is an appeal from a judgment which

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey* (N. C.) 4 L. R. A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136; and *United States v. 356 Caddies of Tobacco*, 20 L. ed. U. S. 235.

On the construction and operation of treaties—see note to *United States v. The Amistad*, 10 L. ed. U. S. 826.

dismissed a petition in habeas corpus on the ground that the court had no jurisdiction to grant the relief which was prayed. The petitioner*represented that he was a citizen of [169] the Chinese Empire, and for more than twenty years last past a merchant in the city of Portland, Oregon. He went on a visit to China, but returned to the United States in the month of October, 1898, on the ship *Monmouthshire*, accompanied, as he claimed, by his wife, whose name is Li Tom Shi, and by his daughter, whose name is Li A. Tsoi. The collector of customs at Portland promptly permitted him to land, recognizing his right to do so as a merchant, but denied the right and refused to permit his wife and daughter to land, although they were not laborers, and presented "certificates issued by the government of Hong Kong, and viséd by the consular representative of the United States at the colony of Hong Kong, China," which identified them as the wife and daughter respectively of petitioner, were "in all respects in full compliance with article 3 of the treaty of 1894, and in all respects in full compliance with § 6 of the act of Congress of July 5, 1884, and acts supplemental to and amendatory thereof," although compliance therewith, it was alleged, was not necessary. The collector made a pretended and partial examination of said certificates, "but no such examination as the law contemplates," asserted the right "to inquire into or decide *aliunde* the certificates," and ignored the same; and his said wife and daughter, it was alleged, "were each, wrongfully and unlawfully and in violation of their rights under the provisions of the treaty of 1894, refused entry into the United States." And it was further alleged—

"That immediately on the rendition of said alleged and pretended decision by the said collector of customs each of said persons, the said wife and daughter of your petitioner aforesaid, took an appeal from said alleged and pretended decision of said collector of customs to the Secretary of the Treasury of the United States; and your petitioner avers that the Secretary of the Treasury has never yet either examined into said appeals nor made any decision therein one way or the other, nor has said appeals or either of them ever been considered, examined, or decided, either by Q. L. Spaulding, Assistant Secretary of the Treasury, or by any other person except as hereinafter stated.

*"That on April 18, 1900, one W. S. Chance, [170] then chief of the special agents of the Treasury Department at Washington, D. C., pretended to examine said appeals and rendered a pretended decision therein, which pretended decision purports to affirm the alleged decision of the collector of customs aforesaid refusing to allow said Li Tom Shi and said Li A. Tsoi, wife and daughter of your petitioner, to enter the United States.

"Your petitioner avers that it is claimed, as your petitioner is advised and believes, by the collector of customs aforesaid, that said alleged decision by said W. S. Chance, as hereinbefore stated, is the decision of O.

L. Spaulding, Assistant Secretary of the Treasury; but your petitioner denies that said O. L. Spaulding, either as Assistant Secretary of the Treasury or otherwise, has ever made any examination of said appeals, or has ever made any decision therein one way or the other.

"And your petitioner further avers that the said O. L. Spaulding as Assistant Secretary of the Treasury has no authority or jurisdiction whatever to examine into or decide said appeals or either of them; that said O. L. Spaulding, as Assistant Secretary of the Treasury, has never been legally or lawfully designated by the Secretary of the Treasury to examine into and decide such appeals, and your petitioner avers furthermore that the Secretary of the Treasury has no jurisdiction or power whatever to designate or authorize Assistant Secretary of the Treasury O. L. Spaulding, or any other Assistant Secretary of the Treasury, to examine into or decide said appeals."

That the collector of customs, notwithstanding the invalidity of the alleged decision of W. S. Chance, and that the appeal had not been examined or decided by the Secretary of the Treasury, detained petitioner's wife and daughter on board the steamship Braemen and threatened and intended to send them back to China.

That the collector had no jurisdiction to make the decision he claims to have made, and that no examination or decision of the appeals as the law contemplates were ever made by the Secretary of the Treasury, or by any Assistant Secretary of the Treasury who had any jurisdiction or power to examine and *decide such appeals. That the wife and daughter of petitioner have the right to have their appeals decided, and until such decision the collector had no power or jurisdiction to send the wife and daughter of petitioner back to China; and should they be sent back they will be removed from the jurisdiction of the court. A writ of habeas corpus was prayed for.

The collector of customs made due return to the writ, and denied that Li Tom Shi was the wife of the petitioner, and that Li A. Tsoi was his daughter; denied that the certificates were in regular form, and alleged they were not in conformity with the laws of the United States, in that they were signed by one F. A. May, who was captain general of police of Hong Kong, and not the registrar general; that a Mr. Lockhart was registrar general, and that his name did not appear on the certificates. Denied that he (the collector) was without jurisdiction or that he ignored the certificates. Alleged that he took testimony, and on that testimony and the certificates he rendered his decision, as follows, refusing the said Li Tom Shi and Li A. Tsoi the right to land:

No. 1.

Office of the Collector of Customs, District of Willamette.

Portland, Oregon, April 7, 1900.

Now at this time comes on for hearing the application of Mrs. Li Tom Shi, a sub-
186 U. S.

ject of the Emperor of China, for admission to the United States as a wife of Lee Lung, and after hearing the evidence of applicant and witnesses on behalf of the applicant, and the evidence of Lee Lung and Miss Li A. Tsoi, and irregularity of consular certificate, and no evidence of marriage, and being at this time fully advised in the premises, it is ordered that the said Mrs. Li Tom Shi be refused a landing upon the ground that the evidence produced by said applicant is insufficient and unsatisfactory to prove her right to land.

[Seal.]

I. L. Patterson,
Collector of Customs.

A like decision was rendered in the case of Li A. Tsoi. The return admitted that the said persons took an appeal from the decision to the Secretary of the Treasury, but denied that the *Secretary had not examined[172] into said appeal or rendered a decision therein, and denied all the other allegations of the petition in regard to such appeal. Admitted that, under the decision of the Secretary of the Treasury affirming his (the collector's) decision, he held the said Li Tom Shi and Li A. Tsoi in his custody for deportation to the country from whence they came.

The certificates were attached to the return, but as the only criticism of them is that they were not issued by the registrar general of Hong Kong, they are omitted. They were signed "F. H. May, by registrar general, Hong Kong." They were sealed with the seal of the registrar general and certified to by R. Wildman, United States consul general.

The following was also attached to the return:

Division of Special Agents.

Treasury Department, Office of the Secretary,

Washington, April 18, 1900.

Collector of Customs,
Portland, Oregon.

Sir:—

The department has received your letter of the 11th instant, transmitting an appeal from your decision denying admission to Chinese persons named Li Tom Shi and Li A. Tsoi, the alleged wife and daughter of Lee Lung, a Chinese merchant domiciled in this country.

The applicants presented to you certificates in the form prescribed by § 6 of the act of July 5, 1884, executed by "F. H. May by registrar general," Hong Kong, and you state that Mr. May is the captain of police at Hong Kong, and not the registrar general. You are advised that certificates so issued are not valid, the incumbent of the office of registrar general at Hong Kong only being recognized as the proper authority for the issuance of such certificates.

The appeal filed in this case refers to the recent decision of the Supreme Court in the case of *The United States v. Mrs. Gue Lim et al.*, promulgated in Synopsis 22,056, wherein it was held that "when the fact is

established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child, of one of the members of a class mentioned in the treaty as entitled to enter, *then that person is entitled to admission without the certificate."

In this case Li Tom Shi is admitted to be the second and plural wife of Lee Lung, a Chinese merchant domiciled in this country, whose first wife resides in China, and it is claimed that Li A. Tsoi is the minor child of the said Lee Lung by said first wife.

The laws of the United States do not recognize plural marriages as valid, and while they may be so recognized in China, the said Li Tom Shi is not the valid wife of Lee Lung under our laws and in the light of the decision of the Supreme Court referred to.

In a letter addressed to the collector of customs at Port Townsend, Washington, it was stated that "in instances where women or minor children apply for admission at your port, claiming to be the wives or children of Chinese persons lawfully domiciled here as persons of the exempt class of Chinese, you should require such women or children to produce evidence sufficient to satisfy you that they are the wives or children of such persons."

In the cases under consideration the evidence presented in the case of Li A. Tsoi is conflicting and inconclusive, and not of the satisfactory character required.

Confirming department's telegram of this date, you are therefore advised that the appeals of Li Tom Shi and Li A. Tsoi are overruled and your decision denying them admission is sustained. The inclosures of your letter are herewith returned.

Respectfully,
O. L. Spaulding,
Assistant Secretary.
W. S. C.

The petitioner filed a reply to the return, in which he again averred the conformity of the certificates to law. Denied that they were required to be signed by the registrar general of Hong Kong, and averred, however, that the certificates were signed by M. A. May, "at the instance and under the direction of the registrar general and as and for him," and contained his seal. Again averred that the action of the collector in regard *to the certificates and the admission of evidence was in excess of his jurisdiction. Denied that the Secretary of the Treasury, by O. L. Spaulding, rendered any opinion affirming the decision of the collector; averred that the decision attached to the return shows on its face that it was the decision of W. S. Chance, chief of the special agents of the Treasury Department, and averred that "the pretended hearing before the collector of customs on the 7th day of April, 1900, as aforesaid, was had before your petitioner had secured any counsel, and he had no counsel present to advise him as to his rights before the collector of customs, and that such examination was without ju-

risdiction, perfunctory, and was not a thorough examination of the case."

The testimony of several witnesses was introduced before the district court against the objection of the district attorney. It showed that the petitioner was a merchant of Portland, Oregon; that he had gone back to China and there married Li Tom Shi according to the Chinese customs and with the usual Chinese ceremonies, but that he had another wife with whom he lived when in China, and that Li A. Tsoi was the daughter by that wife. It was testified that a man in China could have as many wives as he had means to support.

The district court, however, determined that it had no jurisdiction to review the action of the executive officers, and dismissed the petition. The court cited *Nishimura Ekin's Case*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336, and *United States v. Gin Fung*, decided by the circuit court of appeals of the ninth circuit, 40 C. C. A. 439, 100 Fed. 389. The district court said:

"These cases establish the doctrine that the collector of customs, in determining the right of Chinese persons to land, may act upon his own information and discretion, and that such action, however taken, is conclusive of the matter, subject to the right of appeal to the Secretary of the Treasury; that his decision, if he decides not to hear testimony, or not to give effect to evidence which the laws of Congress have provided shall be sufficient to establish the right to land in the first instance, or decides not to decide, is conclusive. Under the doctrine *of these cases, it is immaterial, so far as the [175] jurisdiction of this court is concerned, whether the petitioner's appeal to the Secretary of the Treasury is heard by the Secretary in person or by a subordinate official in his department, or is heard at all."

It was decided in *Nishimura Ekin's Case* that Congress might intrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. This doctrine was affirmed in *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967, and at the present term in *Fok Young Yo v. United States*, 185 U. S. 296, ante, 917, 22 Sup. Ct. Rep. 686, and *Lee Gon Yung v. United States*, 185 U. S. 306, ante, 921, 22 Sup. Ct. Rep. 690.

Counsel for petitioner concede the rule, but deny its application to the pending case. Their argument is that the 6th section of the act of 1884, regarding it in force, precludes inquiry beyond the certificates. The applicable provisions are quoted as follows: " . . . Such certificate, viséd as aforesaid, shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in

the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States, whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States, but such certificate may be controverted and the facts therein stated disproved by the United States authorities." [23 Stat. at L. 117, chap. 220.]

It is urged that the statute makes the certificates evidence, and that the collector had no power to disregard the certificates, and "whether he did not consider them at all and did not pass upon their validity or invalidity, as in either view of the case, we respectfully submit the collector is not chargeable merely with error, in which event his decision is not reviewable by the court, but with the more serious charge of having [176] *exceeded his jurisdiction, in which case, we submit, his decision is reviewable."

But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper.

The hearing before the collector is described in the petition as "pretended," but its extent, and upon what evidence, the record does not disclose. The record does show that appearance by counsel was not considered necessary, but "every facility for appearing" was given. And even if it were essential, in our judgment, could we conclude that the decision of the collector established that the certificates alone were considered?

It is further contended that the treaty of 1894 alone provides the evidence which a member of the exempted class of Chinese must produce, and abrogates the act of 1882 and the acts amendatory thereof, and also abrogates the treaty of 1880.

Article 3 of the treaty of 1894 is as follows:

"The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States they may produce a certificate from their government, or the government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart." [28 Stat. at L. 1211.]

This court, however, held adversely to the contention of petitioner in the case of *United States v. Lee Yen Tai*, 185 U. S. 213, *ante*, 186 U. S.

878, 22 Sup. Ct. Rep. 629, decided at the present term (April 12, 1902). In that case the 12th *section of the act of 1882 was more [177] immediately under consideration, but the reasoning applies to the 6th section as well.

Counsel for petitioner do not urge the insufficiency of the decision of Assistant Secretary Spaulding, therefore we may consider that it is conceded to have been made by the authority of the Secretary. The district court, however, in its opinion, seems to imply that, if there had been no hearing by the Secretary, the court, nevertheless, would have been without jurisdiction to restrain the deportation of the Chinese persons. On that we do not think it is necessary to express an opinion. There is an intimation to the contrary by the circuit court of appeals of the ninth circuit in the case of *United States v. Gin Fung*, 40 C. C. A. 439, 100 Fed. 389.

Judgment affirmed.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

Mr. Justice **Gray** did not hear the argument and took no part in the decision.

A. GALLAWAY *et al.*
v.

STATE NATIONAL BANK OF FORT WORTH, TEXAS.

(See S. C. Reporter's ed. 177, 178.)

Appeal—error to state court—necessity of giving security.

Leave to prosecute a writ of error to a state court without giving security as required by U. S. Rev. Stat. § 1000, cannot be granted under the act of July 20, 1892 (27 Stat. at L. 252, chap. 209), as that act has no application to proceedings in the Supreme Court of the United States.

[No. —]

Submitted May 19, 1902. Decided June 2, 1902.

Mr. **A. Gallaway** in *propria persona* submitted for the motion.

THE CHIEF JUSTICE:

This is an application for leave to prosecute a writ of error to a state court, without giving security *as required by § 1000 of the [178] Revised Statutes, under an act of Congress of July 20, 1892. 27 Stat. at L. 252, chap. 209.

The motion must be denied. Our ruling has uniformly been, and has been enforced in repeated instances, that that act has no application to proceedings in this court.

Motion denied.

S. D. HATFIELD and Nancy C. Rutherford,
Appts.,

v.

HENRY C. KING.

(See S. C. Reporter's ed. 178-181.)

Appeal — remanding cause — change in districts pending appeal.

The circuit court of the United States for the northern district of West Virginia is the court to which a cause appealed from the circuit court for the district of West Virginia, which, if it had been pending in that court on January 22, 1901, would have been transferred to the southern judicial district of West Virginia, created by an act of Congress of that date (31 Stat. at L. 736, chap. 105), will be remanded by the Supreme Court of the United States in order that the further proceedings ordered by its mandate may be had before the judge who rendered the original decree, in view of a provision of the 8th section of the act, that motions and causes submitted, in which evidence has been taken, shall be proceeded with and disposed of in the northern judicial district.

[No. 221.]

Submitted May 2, 1902. Decided June 2, 1902.

MOTION to amend a decree of the Supreme Court of the United States remanding a cause to the Circuit Court of the United States for the Northern District of West Virginia so that the case may be sent to the Circuit Court for the Southern District of West Virginia, created after the case had been docketed in the Supreme Court. *Motion denied.*

The facts are stated in the opinion.

Mr. Holmes Conrad submitted for the motion.

Mr. Maynard F. Stiles opposed.

Mr. Chief Justice Fuller delivered the opinion of the court:

In this case a decree was entered in favor of King on June 2, 1900, in the circuit court for the district of West Virginia, from which an appeal was allowed to this court, and the case docketed, and the record filed, January 3, 1901. Subsequently certain motions were made, on the submission of which it was contended by appellants that the decree against them ought to be set aside because they had not had the hearing in that court

[179] *to which they were entitled by law; that they were not served with process; and that counsel, unauthorized by them, had entered their appearance. The matter was submitted November 11, 1901, and decided February 24, 1902. *Hatfield v. King*, 184 U. S. 162, ante, 481, 22 Sup. Ct. Rep. 477. Our decree remanded the cause "to the circuit court [of the United States for the northern district of West Virginia], with instructions to set aside the decree as well as the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall

1112

seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require."

In the course of the opinion it was said: "It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence."

After the case had been docketed, and on January 22, 1901, an act was approved, which divided the state of West Virginia into two judicial districts, called the northern and southern judicial districts, and provided that the district judge of the district of West Virginia in office at the time the act took effect should be the district judge for the northern judicial district of West Virginia as thereby constituted. 31 Stat. at L. 736, chap. 105.

By the 8th section of the act it was provided that causes and proceedings then pending in the courts of the district of West Virginia, which would have been cognizable in the courts of the northern judicial district as created by the act, were transferred to that district; and similarly as to pending causes and proceedings falling within the new southern district.

This proviso was added: "Provided, that all motions and causes submitted and all causes and proceedings, both civil and criminal, including proceedings in bankruptcy now pending in said judicial district of West Virginia as heretofore constituted, in which the evidence has been taken in whole or in part before the present district judge of the judicial district of *West Virginia as [180] heretofore constituted, or taken in whole or in part and submitted and passed upon by the said district judge, shall be proceeded with and disposed of in said northern judicial district of West Virginia as constituted by this act."

We think it sufficiently appears from the record that this case, when decided below, was pending in the circuit court of the United States for the district of West Virginia, at Charleston, in the county of Kanawha, a county included in the southern district created by the act; and it involved lands situated in the counties now in that district.

The decree entered by this court, February 24, 1902, remanded the cause to the northern district of West Virginia, that the decree of the circuit court might be set aside, and certain proceedings be taken. A motion is now made to amend that decree so that the case may be sent to the southern district, not only in respect of final hearing and decree on the merits therein, but also as to matters involved on the motion treated of in our previous opinion, which we considered it best should be passed on by the judge who rendered the original decree, the correctness of which view is confirmed by observations of counsel.

The motions were twofold, to reverse the decree and to remand the cause for further

186 U. S.

proceedings in accordance with law, and also to proceed against certain persons as for contempt of court. We concluded that an investigation ought to be had, and that it ought to take place in the court where the wrong was asserted to have been done, and before the judge who had been imposed upon, if the charges were correct, as to which we expressed no opinion. And we did not feel constrained by the terms of the act to remand the case to the southern district; but, on the contrary, as by the proviso, motions, and causes submitted, in which the evidence had been taken in whole or in part, that is to say, matters *in gremio*, were to be proceeded with and disposed of in the northern judicial district, we regarded that proviso as broad enough to permit the course taken by us in the order made. While it may be said that a suit is pending even after decree rendered, yet the words "now pending," used in the 8th section, literally apply to cases remaining unheard and undecided, and no particular provision was therein made in reference to cases pending on appeal. Nevertheless it is true that if there had been nothing more in this case than a decree by this court, affirming or reversing the decree below, the case would have been remanded to the district in which the property in controversy was situated, and in which the case would have been brought if the new district had then existed. But, as will have been seen, the case was not determined on its merits here, and proceedings were thought necessary to be taken independent of the ultimate disposition of the case. Therefore we entered the decree of February 24, and, upon further reflection, have concluded that it should not be amended.

Motion denied.

Mr. Justice **Harlan** took no part in the consideration and disposition of this motion.

HANOVER NATIONAL BANK OF THE
CITY OF NEW YORK, *Plff. in Err.*,
v.
MAX MOYSES.

(See S. C. Reporter's ed. 181-192.)

Constitutional law—validity of bankruptcy act—extension to other than traders—uniformity—exemptions—delegation of power—due process of law—notice.

1. The bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541), is not unconstitutional because it provides that others than traders may be adjudged bankrupts, and that this may be done on voluntary petition.

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and 186 U. S.

2. The constitutional requirement that bankruptcy laws be uniform throughout the United States is not violated by the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541), because by the 6th section of that act bankrupts are allowed the exemptions prescribed by the state law in force at the time of the filing of the petition in bankruptcy.
3. The recognition of the local law by the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541), in the matter of exemptions, dower, priority of payments, and the like, does not render the act void as an attempt by Congress unlawfully to delegate its legislative power.
4. The failure of the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541), to provide for notice to creditors of the filing of a petition in voluntary proceedings, does not deprive such creditors of their property without due process of law, in view of the provisions of the act for ten days' notice of the first meeting of creditors, and of each of the subsequent steps in administration, and of the various provisions relative to the granting of a discharge, and for revocation of the same when procured by fraud or not warranted by the facts.
5. Creditors of a bankrupt are not deprived of their property without due process of law because the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541), does not require personal service of notice of the application for the discharge in voluntary proceedings.

[No. 203.]

Argued and Submitted April 7, 1902. Decided June 2, 1902.

IN ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment sustaining a demurrer to a declaration in an action against a bankrupt on a judgment recovered against him prior to his discharge in bankruptcy. *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

This was an action brought by the Hanover National Bank of New York against Max Moyses in the circuit court of the United States for the eastern district of Tennessee, November 20, 1899, on a judgment recovered against him in the circuit court of Washington county, Mississippi, December 12, 1892.

The amended declaration averred the execution of a certain promissory note by defendant payable to the bank of Greenville, Mississippi; the indorsement thereof to plaintiff in New York; default in payment, suit in the state court of Mississippi having jurisdiction *in personam* against defendant, who was then a citizen and resident thereof; recovery of judgment; and that the judgment "still remains in full force and effect.

Wilson v. North Carolina ex rel. Caldwell, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption* (Ind.) 2 L. R. A. 657; *Chauvin v. Valiton* (Mont.) 3 L. R. A. 194; and *Ulman v. Baltimore* (Md.) 11 L. R. A. 225.

unappealed from, unreversed, or otherwise vacated, and the plaintiff hath not obtained any execution or satisfaction thereof." It was also averred that after the rendition of the judgment in Mississippi, defendant changed his domicile and residence to the state of Tennessee, and thereafter, "not being a merchant or a trader, nor engaged in business or in any commercial pursuits, nor using the trade of merchandise, and being without mercantile business of any kind, filed his voluntary petition in bankruptcy in the district court of the United States for the southern division of said eastern district of Tennessee, under the act of Congress of the United States of America, approved July 1st, 1893, entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States,'" and was adjudged bankrupt, and "since August 1st, 1898," "granted an adjudication of his discharge in bankruptcy from all his debts, including that herein sued for."

It was admitted that the discharge was "good and effectual if said act of Congress and the proceedings thereunder are valid," but charged that the act was void because in violation of the Federal Constitution in many particulars set forth.

[183] Plaintiff also stated that it was and had continued to be domiciled in and resident in New York; that it was not a party to said proceedings in bankruptcy, nor did it enter its appearance therein for any purpose, nor did it prove its claim, nor did it in any way subject itself to the jurisdiction of the district court in said proceedings; that plaintiff was not served with process of any kind on said petition for adjudication, and had no notice, personal or otherwise, of the said proceeding by voluntary petition for adjudication; nor was any notice of the proceeding to adjudicate defendant a bankrupt given plaintiff, or anyone else, "nor is any notice of any kind of such proceeding to adjudicate a person a bankrupt upon his voluntary petition required by said act of Congress, and in this said act of Congress violates the Fifth Amendment," as does the "adjudication of defendant as a bankrupt;" that the situs of the promissory note, on which the judgment was rendered, was never within the jurisdiction of the district court; and that the court never acquired jurisdiction of plaintiff, nor of the debt sued on.

Demurrer was filed to the amended declaration, the demurrer sustained, and final judgment entered dismissing the suit. The circuit court stated that it took this action on the authority of *Leidigh Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 637. Thereupon the bank brought this writ of error.

Errors were specified as follows: That the discharge under the act of Congress of July 1, 1898, was a nullity, because:

"1. Said act violates the 5th Amendment to the Constitution of the United States in this:

"(a) It does not provide for notice as required by due process of law to the creditor

in voluntary proceedings for adjudication of bankruptcy and for the discharge of the debt of the creditor.

"(b) Ten days' notice by mail to creditors to oppose discharge is so unreasonably short as to be a denial of notice.

"(c) The grounds of opposition to a discharge are so unreasonably limited as, substantially, to deny the right of opposition to a discharge. Thereby the act is also practically a legislative promulgation of a discharge contrary to art. 3, § 1, of the Federal Constitution.

"2. Said act violates art. 1, § 8, ¶ 4, of the Constitution in this:

"(a) It does not establish uniform laws on the subject of bankruptcies throughout the United States.

"(b) It delegates certain legislative powers to the several states in respect to bankruptcy proceedings.

"(c) It provides that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions."

Mr. Marcellus Green argued the cause, and, with *Mr. Garner Wynn Green*, filed a brief for plaintiff in error:

The 5th amendment is a limitation upon the powers of Congress.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; *Eilenbecker v. Plymouth County Dist. Ct.* 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; *Brown v. New Jersey*, 175 U. S. 174, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

A statute conferring upon a tribunal power to finally dispose of the property rights of an individual, and failing to provide for notice, denies due process of law.

The fact of notice without a law authorizing it does not constitute the notice of the Constitution.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 456, 33 L. ed. 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474.

Insolvency systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice or an opportunity to be heard.

Baldwin v. Hale, 1 Wall. 233, 17 L. ed. 534.

Such proceedings are judicial in their nature, so that jurisdiction over the person of the creditor is essential. Notice is requisite to jurisdiction in such cases, and can no more be given in insolvency proceedings than in personal actions, when the party to be notified resides out of the state; and hence a discharge under a state insolvent law will not and cannot discharge the debt due to a citizen of another state, unless the latter appears.

Hawley v. Hunt, 27 Iowa, 303, 1 Am. Rep. 273; *Pratt v. Chase*, 44 N. Y. 597, 4 Am.

Rep. 718; *Soule v. Chase*, 39 N. Y. 342; *Hills v. Carlton*, 74 Me. 156; *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602.

A discharge under the laws of one government does not affect contracts made under another, in the absence of personal service on the owner.

M'Millan v. M'Neill, 4 Wheat. 213, 4 L. ed. 553; *Ogden v. Saunders*, 12 Wheat. 255, 6 L. ed. 620; 2 Rose's Notes on U. S. Repts. 568.

The power exists in the state, in the absence of an exercise by Congress of its power, to pass bankrupt or insolvent laws; and it is settled that such laws have no extra-territorial force.

Sturges v. Crowninshield, 4 Wheat. 198, 4 L. ed. 549; *Pennoyer v. Neff*, 95 U. S. 734, 24 L. ed. 572; *Ogden v. Saunders*, 12 Wheat. 255, 6 L. ed. 620; *Roller v. Holly*, 176 U. S. 403, 44 L. ed. 522, 20 Sup. Ct. Rep. 410.

A discharge under the bankrupt act by a district court of the United States is not a bar to a proceeding in the domicile of the debtor by a foreign—Canadian—creditor upon a contract made in Canada.

McDougall v. Page, 55 Vt. 187, 45 Am. Rep. 602; *Baldwin v. Hale*, 1 Wall. 228, 17 L. ed. 532; 1 Rose's Notes on U. S. Repts. 849.

A discharge in bankruptcy goes to the merits, and not to the process or remedy.

Van Reimsdyk v. Kanc, 1 Gall. 371, Fed. Cas. No. 16,871; *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602.

It belongs to the local, and not to the transitory, element of the jurisdiction of the court.

Lathrop v. Drake, 91 U. S. 517, 23 L. ed. 414.

It would seem, therefore, that bankruptcy proceedings could not be a proceeding *in rem*, and especially not in providing for a discharge.

The whole theory of the law is that bankruptcy and insolvency proceedings are essentially personal between debtor and creditor, and not that they are *in rem* against the status of the debtor.

Barnes v. Moore, 2 Nat. Bankr. Reg. 573.

The common practice is to administer property for the benefit of creditors in equity, but the court can only fix the rights of creditors in the *res* in the jurisdiction of the court, and without personal service can make no decree against nonresident creditors affecting the personal obligation of the debtor.

Pennoyer v. Neff, 95 U. S. 727, 24 L. ed. 570.

A proceeding by a debtor on his own *ex parte* application to have his property put into the hands of a receiver is absolutely void. There must be a defendant to an action; otherwise it is a nullity.

Barbour v. Albany Lodge, No. 24 Free & Accepted Masons, 73 Ga. 474; *Mexican Mill v. Yellow Jacket Silver Min. Co.* 4 Nev. 40, 97 Am. Dec. 510.

Jurisdiction of a court of bankruptcy over the proceedings in bankruptcy is local.

and may be exercised within the territorial limits of the district.

Lathrop v. Drake, 91 U. S. 517, 23 L. ed. 414; *Shearman v. Bingham*, 7 Nat. Bankr. Reg. 492, Fed. Cas. No. 12,762; 8 Rose's Notes on U. S. Repts. 714.

The jurisdiction of one district court is foreign to that of another, and jurisdiction *in rem* cannot be exercised beyond its territorial limits.

Re Devoe Mfg. Co. 108 U. S. 401, 27 L. ed. 764, 2 Sup. Ct. Rep. 894; 10 Rose's Notes on U. S. Repts. 579; *Piequet v. Swan*, 5 Mason, 35, Fed. Cas. No. 11,134; *Toland v. Sprague*, 12 Pet. 300, 9 L. ed. 1093; *Shearman v. Bingham*, 7 Nat. Bankr. Reg. 492, Fed. Cas. No. 12,762.

A Federal court can acquire jurisdiction only by service of process within the district, or by voluntary appearance.

Herndon v. Ridgway, 17 How. 424, 15 L. ed. 100; 5 Rose's Notes on U. S. Repts. 487; *United States v. American Lumber Co.* 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827.

A Federal court in one state cannot bring into its jurisdiction property in another state.

Booth v. Clark, 17 How. 322, 15 L. ed. 164; *Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. 172.

Proceedings to appoint a receiver have no extra-territorial effect. The only way to acquire jurisdiction of property and persons in a foreign district is by ancillary appointment of a receiver in that district.

Broom v. Armstrong, 137 U. S. 278, 34 L. ed. 651, 11 Sup. Ct. Rep. 73.

To give jurisdiction *in rem*, the subject proceeded against must be in the actual jurisdiction and control of the court; otherwise no jurisdiction exists.

Taylor v. Carryl, 20 How. 600, 15 L. ed. 1034.

If the proceeding is treated as *in rem*, there was not due process of law.

Ibid.

Added to the notice by the seizure in proceedings *in rem*, there must be, before condemnation, a monition published commanding all persons in interest to appear and show cause.

Windsor v. McVeigh, 93 U. S. 279, 23 L. ed. 916; *The Mary*, 9 Cranch, 126, 3 L. ed. 678; *Hassall v. Wilcox*, 130 U. S. 504, 32 L. ed. 1905, 9 Sup. Ct. Rep. 590; *Scott v. McNeal*, 154 U. S. 46, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *Hovey v. Elliott*, 167 U. S. 414, 42 L. ed. 220, 17 Sup. Ct. Rep. 841.

Bankruptcy proceedings require due notice regarded as proceedings *in rem*.

New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656, 23 L. ed. 336.

Proceedings *in rem*, or quasi *in rem*, are not exempt from the operation of the rule which makes service of notice in some form an essential to jurisdiction.

Cooley, Const. Lim. 2d ed. 498-499; Wells, Jurisdiction of Courts, § 88; Waples, Proceedings in Rem, §§ 588, 570 *et seq.*; *Woodruff v. Taylor*, 20 Vt. 65; *Denning v. Corwin*, 11 Wend. 647; *Freeman v.*

Thompson, 53 Mo. 196; *Feuchter v. Keyl*, 48 Ohio St. 366, 27 N. E. 860; *Yentzer v. Thayer*, 10 Colo. 64, 14 Pac. 53; *Dorr v. Rohr*, 82 Va. 359; *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 199; *Brudstreet v. Neptune Ins. Co.* 3 Sumn. 608. Fed. Cas. No. 1,793; *Schiltz v. Roenitz*, 86 Wis. 40, 21 L. R. A. 483, 56 N. W. 194.

That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give weight.

Roller v. Holly, 176 U. S. 409, 44 L. ed. 524, 20 Sup. Ct. Rep. 410; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 456, 33 L. ed. 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The seizure of the *res* in an *in rem* or quasi *in rem* proceeding will not be sufficient notice to persons in interest to authorize the court to proceed to a judgment of condemnation.

Cooley, Const. Lim. 5th ed. 497.

The act only provides for at least ten days' notice by mail of the steps of which notice is to be given, and this time is too short to be due process of law.

Roller v. Holly, 176 U. S. 409, 44 L. ed. 524, 20 Sup. Ct. Rep. 410.

Legislation cannot deprive a party of the right to resort to the courts for the adjudication of his rights, and the imposition of such unreasonable restrictions is not due process of law.

Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; 11 Rose's Notes on U. S. Repts. 336.

Reasonable limitations upon the remedy are valid.

Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; 11 Rose's Notes on U. S. Repts. 1059; *Campbell v. Haverhill*, 155 U. S. 615, 39 L. ed. 282, 15 Sup. Ct. Rep. 217.

The administration of this system and the decision of the rights of creditors thereunder are judicial, and not legislative, functions, and Congress cannot exercise them.

Cooley, Const. Lim. 5th ed. 106 *et seq.*

Matters of admiralty, jurisdiction of which was committed exclusively to the Federal courts, are not controlled by the local law of the state as at law and in equity.

Workman v. New York, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212.

The courts of the United States do not follow the rules of decision of the local state courts upon questions of general commercial law, but they follow the general rules of decision of the commercial nations of the world.

Brooklyn City & N. R. Co. v. National Bank of the Republic, 102 U. S. 14, 26 L. ed. 61; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 100, 44 L. ed.

89, 20 Sup. Ct. Rep. 33; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865.

The uniformity of duties, imposts, and excises which the Constitution demands is a geographical uniformity.

Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648; *Knowlton v. Moore*, 178 U. S. 85, 44 L. ed. 987, 20 Sup. Ct. Rep. 747.

The meaning of a word in one part of an instrument is one of the most satisfactory tests of its definition in other parts of the same instrument.

Woodruff v. Parham, 8 Wall. 131, 19 L. ed. 384.

The legislatures of the several states are by the bankruptcy act invested by Congress with plenary legislative power over subjects of which Congress has exclusive jurisdiction when it has exercised it, and the state courts have power to give effect to this act according to their construction of their local statutes, constituting part of the act.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606.

It is violative of the Constitution for Congress thus to abdicate its sovereignty.

Cooley, Const. Lim. 5th ed. 139; *Wayman v. Southard*, 10 Wheat. 42, 6 L. ed. 262; *People's Pass. R. Co. v. Memphis City R. Co.* 10 Wall. 50, 19 L. ed. 848; *Stoutenburgh v. Hennieck*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Re Rahrer*, 140 U. S. 545, *sub nom.* *Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; 6 Am. & Eng. Enc. Law, 2d ed. p. 1027; *Marshall Field & Co. v. Clark*, 143 U. S. 692, 36 L. ed. 309, 12 Sup. Ct. Rep. 495.

The legally accepted definition, in English jurisprudence, of a "bankrupt law," was, at the time of the adoption of the Constitution, an act by which honest creditors could compel fraudulent debtors who were traders to surrender all of their property to pay ratably all of their just debts.

4 Coke Inst. 277; 2 Bl. Com. p. 471; 2 Kent Com. 389.

The English acts were the source and basis of the bankruptcy clause in the Constitution.

Sackett v. Andross, 5 Hill, 345; *Sturges v. Crowninshield*, 4 Wheat. 138, 4 L. ed. 534; *Federalist* No. 42; *Nelson v. Carland*, 1 How. 269, 11 L. ed. 127.

By the use of this term "bankruptcy," in the Federal Constitution, was meant what the term signified in the law of England at the time the Constitution was adopted.

6 Am. & Eng. Enc. Law, 2d ed. pp. 921, 925; *Carpenter v. Providence-Washington Ins. Co.* 4 How. 185, 11 L. ed. 931; *Annals of Congress*, 7th Cong. 2d Sess. 1802, 1803, p. 557; *Annals of Congress*, 8th Cong. 1st Sess. 1803-1804, p. 616; 4 El. Deb. 515; 4 El. Deb. 622; 3 Congressional Debates, 1826-1827, pp. 78-122; *Adams v. Storey*, 1 Paine, 79, Fed. Cas. No. 66; *Re Klein*, 1 How. 277, note, 11 L. ed. 131, note; *Nelson v. Carland*, 1 How. 265, 11 L. ed. 126; *Re Castleman*, 1 How. 281, 11 L. ed. 132; *Collins v. Blyth*, 1 How. 282, 11 L. ed. 132.

The power was delegated in this form, and it cannot be expanded by the donee of the grant beyond its express or necessarily implied terms.

Workman v. New York, 179 U. S. 561, 45 L. ed. 320, 21 Sup. Ct. Rep. 212.

Mr. George T. White submitted the cause for defendant in error. Mr. Francis Martin was with him on the brief:

The word "bankruptcy" was undoubtedly considered as equivalent to "insolvency," in 1787, when the Federal Convention was in session.

Kunzler v. Kohaus, 5 Hill, 317.

The constitutional grant of power to establish uniform laws on the subject of bankruptcy is not limited to passing enactments similar in scope and operation to those in force in England when the Constitution was adopted. It gives Congress plenary power over the subject of bankruptcy; under one limitation only, that the laws passed upon that subject shall be uniform throughout the United States.

Silverman's Case, 2 Abb. U. S. 243, Fed. Cas. No. 12,855; *Re California P. R. Co.* 3 Sawy. 240, Fed. Cas. No. 2,315; *Re Reiman*, 7 Ben. 455, Fed. Cas. No. 11,673; *United States v. Pusey*, 6 Nat. Bankr. Reg. 284, Fed. Cas. No. 16,098.

Notwithstanding the fact that the law operates differently in different states, the provisions of the law are nevertheless uniform, and the act is constitutional.

Re Beckerford, 1 Dill. 45, Fed. Cas. No. 1,209; *Re Jordan*, 8 Nat. Bankr. Reg. 180, Fed. Cas. No. 7,514; *Re Smith*, 8 Nat. Bankr. Reg. 401, Fed. Cas. No. 12,986; *Darling v. Berry*, 4 McCrary, 470, 13 Fed. 659.

The requirement of uniformity does not relate to the operation or working of the law in the different states or sections, and all that is required is that it shall be general and uniform in its provisions.

Darling v. Berry, 4 McCrary, 470, 13 Fed. 659; *Leidigh Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 637.

The spirit of the American law upon the subject of bankruptcies is radically at variance with that of the English.

Re Klein, 1 How. 277, note, 11 L. ed. 131, note.

The power given to Congress must be held to be general, unlimited, and unrestricted over the subject of bankruptcy; and consequently Congress had a right to provide for voluntary proceedings on the part of the bankrupt.

Re Reiman, 7 Ben. 455, Fed. Cas. No. 11,673; *Silverman's Case*, 2 Abb. U. S. 243, Fed. Cas. No. 12,855; *Re California P. R. Co.* 3 Sawy. 240, Fed. Cas. No. 2,315.

"Due process of law" means legal proceedings according to the course of the common law; and therefore an act which takes away a right to sue at common law is not unconstitutional, if it prescribes a proceeding and remedy appropriate to the nature of the case.

Newcomb v. Smith, 1 Chand. (Wis.) 71; 186 U. S. U. S. Book 46.

Gilchrist v. Schmidling, 12 Kan. 263; *Happy v. Mosher*, 48 N. Y. 313.

The guaranty that no person shall be deprived of life, liberty, or property "without due process of law" does not mean that the legislature may not change, alter, or repeal any principle, rule, or law which was a part of the common law before the adoption of the Constitution.

Noonan v. State, 1 Smedes & M. 562.

The principle does not demand that the law existing at any point of time shall be irrevocable, or that any forms of remedies shall necessarily continue.

Brown v. Lerce Comrs. 50 Miss. 468.

The provision that no person "shall be deprived of life, liberty, or property without due process of law" secures to everyone the right to have notice of any proceeding by which his rights of life, liberty, or property may be affected, and to be afforded an opportunity to defend, protect, and enforce such rights in an orderly proceeding adapted to the nature of the case.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

The bringing of the debtor's property into the custody of the court, for the purpose of ultimately selling it and distributing the proceeds among all his creditors, affects only the property of the debtor, and is technically a proceeding *in rem*.

Shaulhan v. Wherritt, 7 How. 627, 12 L. ed. 847; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 91 U. S. 656, 23 L. ed. 336; *Graham v. Boston, H. & F. R. Co.* 118 U. S. 170, 30 L. ed. 201, 6 Sup. Ct. Rep. 1009; *Re Wallace*, Deady, 433, Fed. Cas. No. 17,094; *Re Banks*, 1 N. Y. Leg. Obs. 274; *Morse v. Godfrey*, 3 Story, 391, Fed. Cas. No. 9,856.

This is a proceeding wholly *in rem*, and it necessarily follows that actual notice to the creditors is not essential to the jurisdiction of the court.

Rayl v. Lapham, 27 Ohio St. 452.

The power of Congress on the subject of bankruptcies is plenary.

Silverman's Case, 2 Abb. U. S. 243, Fed. Cas. No. 12,855; *Re California P. R. Co.* 3 Sawy. 240, Fed. Cas. No. 2,315; *Re Reiman*, 7 Ben. 455, Fed. Cas. No. 11,673.

Congress in exercising that power has the right to pass a uniform bankruptcy act, even though it may impair the obligation of a contract.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

Mr. Chief Justice Fuller delivered the opinion of the court:

By the 4th clause of § 8 of art. 1 of the Constitution the power is vested in Congress "to establish . . . uniform laws on the subject of bankruptcies throughout the United States." This power was first exercised in 1800. 2 Stat. at L. 19, chap. 19. In 1803 that law was repealed. 2 Stat. at L.

248, chap. 6. In 1841 it was again exercised by an act which was repealed in 1843. 5 Stat. at L. 440, chap. 9; 5 Stat. at L. 614, chap. 82. It was again exercised in 1867 by an act which, after being several times amended, was finally repealed in 1878. 14 Stat. at L. 517, chap. 176; 20 Stat. at L. 99, chap. 160. And on July 1, 1898, the present act was approved.

The act of 1800 applied to "any merchant, or other person, residing within the United States, actually using the trade of merchandise, by buying or selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer," and to involuntary bankruptcy.

In *Adams v. Storey*, 1 Paine, 79, Fed. Cas. No. 66, Mr. Justice Livingston said on circuit: "So exclusively have bankrupt laws operated on traders, that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation to this subject." But this doubt was resolved otherwise, and the acts of 1841 and 1867 extended to persons other than merchants or traders, and provided for voluntary proceedings on the part of the debtor, as does the act of 1898.

[185] It is true that from the first bankrupt act passed in England, 34 & 35 Hen. VIII. chap. 4, to the days of Queen Victoria, the English bankrupt acts applied only to traders, but, as Mr. Justice Story, in his Commentaries on the Constitution, pointed out, "this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors." § 1113.

The whole subject is reviewed by that learned commentator in chapter XVI. §§ 1102 to 1115 of his work, and he says (§ 1111) in respect of "what laws are to be deemed bankrupt laws within the meaning of the Constitution:" "Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said that laws which merely liberate the person of the debtor are insolvent laws, and those which discharge the contract are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. . . . Again, it has been said that insolvent laws act on imprisoned debtors only at their own instance, and bankrupt laws only at the instance of creditors. But, however true this may have been in past times, as the actual course of English legislation, it is not true, and never was true, as a distinction in colonial legislation. In England it was an accident in the system, and not a material ground to discriminate, who were to be deemed in a legal sense insolvents, or bankrupts. And if an act of Congress should be passed, which should authorize a commission of bankruptcy to issue at the instance of the debtor, no court would on this account be warranted in saying that the act was uncon-

stitutional, and the commission a nullity. It is believed that no laws ever were passed in America by the colonies or states, which had the technical denomination of 'bankrupt laws.' But insolvent laws, quite coextensive with the English bankrupt system in their operations and objects, have not been unfrequent in colonial and state legislation. No distinction was ever practically, or even theoretically, attempted to be made between bankruptcies and insolvencies. And a historical review of the colonial and state legislation will abundantly show that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to bankrupt laws."

**Sturges v. Crowninshield*, 4 Wheat. 122, [186] 195, 4 L. ed. 529, 548, was cited, where Chief Justice Marshall said: "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion. This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law."

In the case, *Re Klein*, Fed. Cas. No. 7,865, decided in the circuit court for the district of Missouri, and reported in a note to *Nelson v. Carland*, 1 How. 265, 277, 11 L. ed. 126, 130, Mr. Justice Catron held the bankrupt act of 1841 to be constitutional, although it was not restricted to traders, and allowed the debtor to avail himself of the act on his own petition, differing in these particulars from the English acts. He said, among other things: "In considering the question before me, I have not pretended to give a definition (but purposely avoided any attempt to define) the mere word 'bankruptcy.' It is employed in the Constitution in the plural, and as part of an expression, 'the subject of bankruptcies.' The ideas attached to the word in this connection are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is,—To what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject,—distribution and discharge,—are in the competency and discretion of Congress. With the policy of a law letting in all classes,—others as well as traders,—and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the lawmakers."

[187] *Similar views were expressed under the act of 1867, by Mr. Justice Blatchford, then District Judge, in *Re Reiman*, 7 Ben. 455, Fed. Cas. No. 11,673; by Deady, J., in *Re Silverman*, 1 Sawy. 410, Fed. Cas. No. 12,855; by Hoffman, J., in *Re California P. R. Co.* 3 Sawy. 240, Fed. Cas. No. 2,315; and in *Kunzler v. Kohaus*, 5 Hill, 317, by Cowen, J., in respect of the act of 1841, in which Mr. Justice Nelson, then Chief Justice of New York, concurred. The conclusion that an act of Congress establishing a uniform system of bankruptcy throughout the United States is constitutional, although providing that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions, is really not open to discussion.

The framers of the Constitution were familiar with Blackstone's Commentaries, and with the bankrupt laws of England, yet they granted plenary power to Congress over the whole subject of "bankruptcies," and did not limit it by the language used. This is illustrated by Mr. Sherman's observation in the Convention, that "bankruptcies were, in some cases, punishable with death by the laws of England, and he did not choose to grant a power by which that might be done here;" and the rejoinder of Gouverneur Morris, that "this was an extensive and delicate subject. He would agree to it, because he saw no danger of abuse of the power by the legislature of the United States." Madison Papers, 5 Elliot, 504; 2 Bancroft, 204. And also to some extent by the amendment proposed by New York, "that the power of Congress to pass uniform laws concerning bankruptcy shall only extend to merchants and other traders; and the states, respectively, may pass laws for the relief of other insolvent debtors." 1 Elliot, 330. See also Mr. Pinkney's original proposition, 5 Elliot, 488; the report of the committee thereon, 5 Elliot, 503; and *The Federalist*, No. 42, Ford's ed. 279.

As the states, in surrendering the power, did so only if Congress chose to exercise it, but in the absence of congressional legislation retained it, the limitation was imposed on the states that they should pass no "law impairing the obligation of contracts."

In *Brown v. Smart*, 145 U. S. 454, 457, 36 L. ed. 773, 775, 12 Sup. Ct. Rep. 958, 959, [188] Mr. Justice Gray *said: "So long as there is no national bankrupt act, each state has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a state cannot by such a law discharge one of its own citizens from his contracts with citizens of other states, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency. . . . Yet each state, so long as it does not impair the obligation of any contract, has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction." Many cases were cited,

186 U. S.

and, among others, *Denny v. Bennett*, 128 U. S. 498, 32 L. ed. 494, 9 Sup. Ct. Rep. 134, where Mr. Justice Miller observed: "The objection to the extraterritorial operation of a state insolvent law is that it cannot, like the bankruptcy law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the state, so far as it does not impair the obligation of contracts, is conceded."

Counsel justly says that "the relation of debtor and creditor has a dual aspect, and contains two separate elements. The one is the right of the creditor to resort to present property of the debtor through the courts to satisfy the debt; the other is the personal obligation of the debtor to pay the debt, and that he will devote his energies and labor to discharge it" (4 Wheat. 198, 4 L. ed. 549); and, "in the absence of property, the personal obligation to pay constitutes the only value of the debt." Hence the importance of the distinction between the power of Congress and the power of the states. The subject of "bankruptcies" includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the states were forbidden to do.

The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical, and not personal, and we do not think that the provision of the act of 1898 as to exemptions is incompatible with the rule.

*Section 6 reads: "This act shall not af-[189]fect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition." [30 Stat. at L. 544, chap. 541.]

Section 14 of the act of 1867 prescribed certain exemptions, and then added: "And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four." [14 Stat. at L. 517, chap. 176.] This was subsequently amended, and controversies arose under the act as amended which we need not discuss in this case. Lowell, Bankruptcy, § 4.

It was many times ruled that this provision was not in derogation of the limitation of uniformity because all contracts were made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets. Mr. Justice Miller concurred in an opinion

to that effect in the *Case of Beckerford*, 1 Dill. 45, Fed. Cas. No. 1,209.

Mr. Chief Justice Waite expressed the same opinion in *Re Deekert*, 2 Hughes, 183, Fed. Cas. No. 3,728. The Chief Justice there said: "The power to except from the operation of the law property liable to execution under the exemption laws of the several states, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a [190] bankrupt law is that *of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution."

We concur in this view, and hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each state whatever would have been available to the creditor if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states.

Nor can we perceive in the recognition of the local law in the matter of exemptions, dower, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power. *Re Rahrer*, 140 U. S. 545, 560, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865.

But it is contended that as to voluntary proceedings the act is in violation of the 5th Amendment in that it deprives creditors of their property without due process of law in failing to provide for notice.

The act provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt" (§4a), and that "upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition." § 18g. With the petition he must file schedules of his property, and "of his creditors, showing their residences, if known, if unknown, that fact to be stated." § 7, subd. 8. The schedules must be verified, and the petition must state that "petitioner owes debts which he is unable to pay in full," and "that he is willing to surrender all his property for the benefit of

his creditors, except such as is exempt by law." This establishes those facts so far as a decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition. These are not issuable *facts, and notice is unnecessary, unless dismissal is sought, when notice is required. § 59g. [191]

As Judge Lowell said: "He may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes him at his word, and makes effectual provision, not only by civil, but even by criminal, process to effectuate his alleged intent of giving up all his property." *Re Fowler*, 1 Low. Dec. 161, Fed. Cas. No. 4,998.

Adjudication follows as matter of course, and brings the bankrupt's property into the custody of the court for distribution among all his creditors. After adjudication the creditors are given at least ten days' notice by publication and by mail of the first meeting of creditors, and of each of the various subsequent steps in administration. § 58. Application for a discharge cannot be made until after the expiration of one month from adjudication. § 14.

Form No. 57 gives the form of petition for discharge and the order for hearing to be entered thereon, requiring notice to be published in a designated newspaper printed in the district, and "that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated."

Section 14b provides for the granting of discharge unless the applicant has "(1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and, in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

The offenses referred to are enumerated in § 29, and embrace misappropriation of property; concealing property belonging to the estate; making false oaths or accounts; presenting false claims; receiving property from a bankrupt with intent to defeat the act; extorting money for acting or forbearing to act in bankruptcy proceedings.

It is also provided by § 15 that a discharge may be revoked, on application within a year, if procured by fraud and not warranted by the facts.

Notwithstanding these provisions, it is insisted that the want of notice of filing the petition is fatal because the adjudication *per se entitles the bankrupt to a discharge. [192] and that the proceedings in respect of discharge are *in personam*, and require personal service of notice. The adjudication does not in itself have that effect, and the first of these objections really rests on the ground that the notice provided for is unreasonably short, and the right to oppose discharge unreasonably restricted. Considering the plenary power of Congress, the subject-matter of the suit, and the common rights and inter-

ests of the creditors, we regard the contention as untenable.

Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law, and we cannot find anything in this act on that subject which would justify us in overthrowing its action.

Nor is it possible to concede that personal service of notice of the application for a discharge is required.

Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*, as Mr. Justice Grier remarked in *Shaughan v. Wherritt*, 7 How. 643. 12 L. ed. 854. And in *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 91 U. S. 662, 23 L. ed. 339, it was ruled that a decree adjudging a corporation bankrupt is in the nature of a decree *in rem* as respects the status of the corporation. Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile. If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree.

Judgment affirmed.

[193]

*CHIN BAK KAN. *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 193-201.)

Aliens—Chinese exclusion—jurisdiction of United States commissioner—appeal—concurrent findings of fact.

1. A lack in the complaint of positive averments of the facts and as to the official character of the person making it does not deprive a United States commissioner of his jurisdiction to determine the right of a Chinese laborer to remain in the United States.
2. The provision in the Chinese exclusion act of 1892, § 6 (27 Stat. at L. 25, chap. 60), that Chinese laborers without certificates may be "taken before a United States judge," is satisfied by a proceeding before a "justice, judge, or commissioner," which are the words used in § 12 of the act of 1882 (22 Stat. at L. 58, chap. 126), § 12 of the act of 1884 (23 Stat. at L. 115, chap. 220), § 13 of the

NOTE.—On direct review, in United States Supreme Court, of circuit and district court judgments and decrees—see note to *Gwin v. United States*, ante, p. 741.

186 U. S.

act of 1888 (25 Stat. at L. 476, chap. 1015), and § 3 of the act of 1892, while the act of March 3, 1901, § 1 (31 Stat. at L. 1093, chap. 845), expressly authorizes the district attorney to designate the commissioner before whom a Chinese person may be brought.

3. The mere assertion of citizenship cannot deprive a United States commissioner of his statutory jurisdiction to adjudge a Chinese person to be unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."
4. A re-examination of the facts bearing upon the question whether a Chinese person is unlawfully in the United States, which was decided in the affirmative by a United States commissioner and by a judge of the district court on appeal from the commissioner's decision, will not be entered upon by the Supreme Court on appeal, although such appeal was taken under the act of March 3, 1891, § 5, on the ground that the construction of a treaty with China was drawn in question, and the Supreme Court has, therefore, jurisdiction to dispose of the entire case.

[No. 525.]

Argued March 13, 14, 1902. Decided June 2, 1902.

APPEAL from the District Court of the United States for the Northern District of New York to review a judgment which affirmed a judgment of a commissioner of the United States for the Northern District of New York ordering the deportation of a Chinese laborer. *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

Complaint under oath was duly made before a commissioner of the United States for the northern district of New York, charging "that Chin Bak Kan did, on or about the 13th day of March, 1901, at Burke in said district, knowingly and wrongfully come from Canada, in the province of Quebec, into the northern district of New York, to wit: into Burke in the county of Franklin and state of New York, in the United States, he, the said Chin Bak Kan, being then and there a Chinese person and laborer, and a person prohibited by the laws of the United States of America from being and remaining in the United States, and he, the said Chin Bak Kan, then and there being such Chinese person as aforesaid, was then and there found unlawfully in the United States at Burke aforesaid, in violation of the acts of the Congress in such case made and provided."

A warrant for the apprehension of Chin Bak Kan was issued March 13, 1901, and he was arrested and brought before the commissioner. He was informed of the charge against him, advised that he would be permitted to make a statement without or with oath, or to refuse to make any statement or to answer any question put to him, and [194] was entitled to reasonable time to send for counsel and procure the attendance of witnesses. He pleaded not guilty to the charge, "but admitted that he had just

1121

come into the United States." He was thereafter represented by counsel. Subsequently a hearing and trial was commenced before the commissioner who issued the warrant. That officer having been taken sick, the hearing was continued and concluded before another commissioner, who found and adjudged upon the evidence as follows: "I now hereby find and adjudge that the said Chin Bak Kan is a Chinese person and laborer, that he is not a diplomatic or other officer of the Chinese or any other government, and unlawfully entered the United States, as charged in said complaint. And I further adjudge him, said Chin Bak Kan, guilty of not being lawfully entitled to be or remain in the United States. I further find and adjudge that he, said Chin Bak Kan, came from the Empire of China, but he has not made it appear to me that he was a subject or citizen of some other country than China. And I hereby order and adjudge said Chin Bak Kan to be immediately removed from the United States to the Empire of China. A certified copy of this judgment shall be the process upon which said removal of said Chin Bak Kan shall be made from the United States to the Empire of China. And said process shall be executed by the Hon. C. D. MacDougall, United States marshal for said district."

An appeal was prosecuted to the district court of the United States for the northern district of New York, but the appeal was dismissed, and the judgment for the deportation of the defendant was affirmed.

From the final order of the district court an appeal was then taken to this court.

Mr. Max J. Kohler argued the cause, and, with **Mr. B. Lewinson**, filed a brief for appellant:

The complaint was not made by any of the officers specified in the act of March 3, 1901.

French v. Edwards, 13 Wall. 506, 20 L. ed. 702; *United States v. Sapinkow*, 90 Fed. 654.

Even the original § 12 of the acts of 1882 and 1884 was regarded as almost too meager to confer jurisdiction on United States commissioners.

Re Chow Goo Pooi, 9 Sawy. 606, 25 Fed. 77.

The erroneous belief of the legislature that a statute is still in force, even though expressed in a statute, does not bind the courts.

United States v. Claflin, 97 U. S. 546, 24 L. ed. 1082.

It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.

Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977.

Such course is inconsistent with the fundamental principles of our government, by which executive and judicial powers are separated.

Hayburn's Case, 2 Dall. 409, note, 1 L. 1122

ed. 436, note; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

It constitutes an unauthorized delegation of judicial power.

United States v. Rider, 50 Fed. 406; *United States v. Keokuk & H. Bridge Co.* 45 Fed. 178. Compare *Rider v. United States*, 178 U. S. 251, 44 L. ed. 1057, 20 Sup. Ct. Rep. 838.

Such course is contrary to due process of law.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

And makes the prosecuting officer in some measure a judge in his own case.

Cooley, Const. Lim. 5th ed. pp. 410-413; 6 Am. & Eng. Enc. Law, 2d ed. p. 1054.

Chinese persons born in the United States are citizens of the United States.

United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

Persons claiming American citizenship cannot have their rights passed upon or violated by the application of such principles, which are applicable only to aliens.

Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

The laws applicable at the time of the arrest and trial of these defendants, even if they be regarded as aliens, required a complaint on oath, and not mere information and belief, as a prerequisite to the commissioner's taking jurisdiction.

Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977;

United States v. Long Hop, 55 Fed. 58.

Complaints on information and belief alone, stating no sources or grounds of information or belief, are insufficient to confer jurisdiction.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406; *Ex parte Hart*, 28 L. R. A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; *Ex parte Lane*, 6 Fed. 34; *United States v. Turcaud*, 20 Fed. 621; *United States v. Sapinkow*, 90 Fed. 654.

The commissioner had no jurisdiction over appellants because of their claim of American citizenship.

United States v. Yee Mun Sang, 93 Fed. 365; *Re Look Tin Sing*, 10 Sawy. 353, 21 Fed. 905; *Re Yung Sing Hee*, 36 Fed. 437; *Ex parte Chin King*, 35 Fed. 354; *Re Tom Yum*, 64 Fed. 485; *Gee Fook Sing v. United States*, 1 C. C. A. 211, 7 U. S. App. 27, 49 Fed. 146; *Re Di Simone*, 108 Fed. 942.

United States commissioners are not "judges in the constitutional sense."

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406; *Todd v. United States*, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889.

And are not vested with any part of the judicial power of the United States.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440.

The deportation procedure in Chinese ex-

clusion cases has not been sustained as an exercise of judicial power, but as a constitutional method of dealing with conceded aliens, whose rights might have been left to the determination of purely executive officers.

Re Chaw Goo Pooi, 9 Sawy. 606, 25 Fed. 77; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Li Sing v. United States*, 180 U. S. 486, 45 L. ed. 634, 21 Sup. Ct. Rep. 449; *United States v. Hom Hing*, 48 Fed. 635; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977.

The commissioner's right to punish for contempt committed before him has been denied, because he exercises none of the judicial power of the United States, under the Constitution.

Re Mason, 43 Fed. 510; *Ex parte Perkins*, 29 Fed. 909; *Ex parte Doll*, 7 Phila. 595, Fed. Cas. No. 3,968. Compare *United States v. Schumann*, 2 Abb. U. S. 523, Fed. Cas. No. 16,235.

Every proposed Chinese witness is himself subject to arrest and liable to be deported without cause, if he meets with government disfavor, so that the Chinese inspectors maintain a reign of terror among the Chinese, inconsistent with giving honest government evidence in these cases, and bound to elicit false testimony. This is not due process of law.

Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The question of citizenship being a jurisdictional one, this court is not bound by any finding against it that may be spelled out of the record.

Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939; *Re Cuddy*, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; *Ex parte Farley*, 40 Fed. 66.

Even on appeal in habeas corpus proceedings, the lower court cannot make conclusive findings of fact on jurisdictional questions, shutting out review of the facts.

Johnson v. Sayre, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773.

In fact there is no finding in the record on this material question in issue, and its absence nullifies the order of deportation.

Saltonstall v. Birtwell, 150 U. S. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 169.

Under § 3 of the act of 1892, even if a Chinese person was rejected, his right to remain here was to be determined by affirmative evidence in judicial proceedings, independently of any action by the collector.

Li Sing v. United States, 180 U. S. 486, 45 L. ed. 634, 21 Sup. Ct. Rep. 449; *United States v. Chin Fee*, 94 Fed. 828; *United States v. Wong Chung*, 92 Fed. 141.

The record shows that an appeal to the Secretary of the Treasury was taken from the action of the collector. Such determination by the collector, thus superseded, is not binding on the courts.

186 U. S.

Re Gin Fung, 89 Fed. 153; *United States v. Wong Chung*, 92 Fed. 141; *Re Monaco*, 86 Fed. 117. See *Passavant v. United States*, 148 U. S. 214, 37 L. ed. 426, 13 Sup. Ct. Rep. 572.

The intent to effect a repeal, by treaty, of a prior statute, can more lightly be inferred than the converse case, because the treaty involves the element of international faith, in addition to mere legislation; and in construing a statute claimed to be inconsistent with a treaty, the canon of construction—of finding unmistakably expressed legislative intent to violate treaty faith—must be applied.

Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295.

Assistant Attorney General Hoyt argued the cause and filed a brief for appellee:

Formal defects in the proceedings do not invalidate the statute, or the jurisdiction, or proceedings thereunder.

Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Chow Loy v. United States*, 50 C. C. A. 279, 112 Fed. 354.

The situation on this appeal is analogous to habeas corpus proceedings, in which, on original application, the only question is whether the proceedings complained of were wholly void, or whether there was no legal authority for the action resulting in the petitioner's detention.

Re McKenzie, 180 U. S. 536, 45 L. ed. 657, 21 Sup. Ct. Rep. 468.

In such cases the revision in the appellate court goes to the authority of the lower tribunal and the legality of its action, but does not pass upon the facts, or review the proceedings below when duly authorized.

Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; *Re Cortes*, 136 U. S. 330, *sub nom. Cortes v. Jacobus*, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Carter v. McClaughry*, 183 U. S. 365, *ante*, 236, 22 Sup. Ct. Rep. 181.

Uncontradicted evidence of interested witnesses to an improbable fact does not require judgment to be rendered accordingly.

Quock Ting v. United States, 140 U. S. 417, 35 L. ed. 501, 11 Sup. Ct. Rep. 733, 851; *United States v. Leung Quong*, 111 Fed. 1007; *Re Jew Wong Loy*, 91 Fed. 240. See also *Gee Fook Sing v. United States*, 1 C. C. A. 211, 7 U. S. App. 27, 49 Fed. 146; *United States v. Lee Pon*, 94 Fed. 827; *Re Louie You*, 97 Fed. 580.

A United States commissioner is a quasi judicial officer.

Re Kaine, 14 How. 103, 14 L. ed. 345; *United States v. Jones*, 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 515; *United States v. Allred*, 155 U. S. 591, 39 L. ed. 273, 15 Sup. Ct. Rep. 231.

A United States commissioner is a

"United States judge" within the meaning of § 6 of the act of 1892.

Re Wong Fock, 81 Fed. 558.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

[195] By § 1 of the act of May 6, 1882 (22 Stat. at L. 58, chap. 126), "it was provided that from and after the expiration of ninety days, and until the expiration of ten years, the coming of Chinese laborers to the United States should be suspended, and during such suspension it was made unlawful for any Chinese laborer to come, or, having come after the expiration of said ninety days, to remain within the United States.

By § 4 provision was made for certificates to be granted to such Chinese as were entitled, under the treaty of November 17, 1880, to go from, or come to, the United States, of their free will and accord, in order to identify them.

The 12th section of the act was as follows: "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States."

This section was amended by the act of July 5, 1884 (23 Stat. at L. 115, chap. 220), so as to read as follows: "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several states and territories of the United States are hereby invested with the same authority as [196] a marshal or *United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as enti-

1124

tlung such Chinese person to come into the United States, who may not have been permitted to land from any vessel by reason of any of the provisions of this act."

By § 1 of the act of May 5, 1892 (27 Stat. at L. 25, chap. 60), it was provided: "That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for the period of ten years from the passage of this act."

Sections 2, 3, and 6 were as follows:

"Sec. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: *Provided*, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

"Sec. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

"Sec. 6. And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective *dis- [197] tricts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge that, by reason of accident, sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing, it shall appear that he is so entitled to a

186 U. S.

certificate, it shall be granted upon his paying the cost.

"Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court.

"And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge."

Section 6 was amended by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14).

Article 1 of the treaty with China, proclaimed November 8, 1894 (28 Stat. at L. 1210), was: "The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited."

[198] Article 2 provided: "The preceding article shall not apply *to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of \$1,000, or debts of like amount due him and pending settlement. . . . And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required."

Article 5: "The government of the United States, having by an act of the Congress, approved May 5, 1892, as amended by an act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first-named act to be registered as in said acts provided, with a view of affording them better protection, the Chinese government will not object to the enforcement of such acts, and reciprocally the government of the United States recognizes the right of the government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled (not merchants as defined by said acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports."

In *United States v. Lee Yen Tai*, just decided (185 U. S. 213, ante, 878, 22 Sup. Ct. Rep. 629), the question was propounded to us by the circuit court of appeals for the second circuit on certificate: "Is § 12 of 'An Act to Execute Certain Treaty Stipulations Relating to the Chinese, Approved May 6, 1882,' as amended by § 3 of the amendatory act of July 5, 1884, repealed by the treaty or convention with China of December 8, 1894?" and that question we answered in the negative.

The act of March 3, 1901 (31 Stat. at L. 1093, chap. 845), provides:

"That it shall be lawful for the district
186 U. S.

attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States, or having unlawfully entered the United States, to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing.

"Sec. 2. That a United States commissioner shall be entitled to receive a fee of five dollars for hearing and deciding a case arising under the Chinese exclusion laws.

*"Sec. 3. That no warrant of arrest for viola- [199] tions of the Chinese exclusion laws shall be issued by the United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued."

The errors assigned may be grouped into those which presented the question of the effect of the treaty of 1894 by way of repeal, and these have been disposed of by our decision in *United States v. Lee Yen Tai*, 185 U. S. 213, ante, 878, 22 Sup. Ct. Rep. 629: those in respect of the assertion of citizenship and the action taken thereon; and certain objections of want of jurisdiction because of insufficiency of the complaint. The latter relate to lack of positive averment of the facts, and as to the official character of the person who made the complaint. The complaint was made by one Ketchum, and, although it was not therein stated, it appears from the official register of the government that he was a Chinese inspector, and as such authorized under the statute.

The charge was made on information and belief, but no objection was raised to the complaint on that ground, and we think the ruling in *Fong Yue-Ting v. United States*, 149 U. S. 729, 37 L. ed. 918, 13 Sup. Ct. Rep. 1016, applies that defects in complaint or pleadings do not affect the authority of the commissioner or judge or the validity of the statute.

Something is said in respect of want of jurisdiction in the commissioner because § 6 of the act of 1892 provides that Chinese laborers without certificates may be "taken before a United States judge;" but we concur in the views of the circuit court of appeals for the ninth circuit in *Fong Mey Yuk v. United States*, 113 Fed. 898, that the act is satisfied by proceeding before "a justice, judge, or commissioner." These are the words used in § 12 of the act of 1882; § 12 of the act of 1884; § 13 of the act of 1888; and § 3 of the act of 1892; while the 1st section *of the act of March 3, 1901, explicitly [200] authorizes the district attorney to designate the commissioner before whom the Chinese person may be brought. The words "United States judge," "judge" and "court," in § 6, seem to us to refer to the tribunal authorized to deal with the subject, whether com-

posed of a justice, a judge, or a commissioner. A United States commissioner is a quasi judicial officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court, and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense, as well as by the commissioner acting as a judge in the sense of the statute.

But it is argued that the commissioner had no jurisdiction to act because the claim of citizenship was made. The ruling in *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456, was to this effect: "A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States." It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision.

By the law the Chinese person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.

[201] *Section 13 of the act of September 13, 1888, provides that any Chinese person or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath, "by any justice, judge, or commissioner of any United States court," and when convicted, on a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. "But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district." [25 Stat. at L. 476, chap. 1015.]

It seems to have been assumed, during the years following the date of the act, and is conceded by the United States, that although most of its provisions were dependent upon the ratification of the treaty of March 12, 1888, and failed with the failure

of ratification, that this section is in and of itself independent legislation and in force as such. Accordingly in this case an appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the district court of the United States for the northern district of New York, and, upon hearing, the district court affirmed that judgment. From the judgment of the district court, this appeal was taken under § 5 of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 was drawn in question. Except in cases under that section where the question of jurisdiction alone is certified, we have power to dispose of the entire case, but as the jurisdiction of the commissioner is sustained, we are of opinion that we cannot properly re-examine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is, *a fortiori*, justified. The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated re-hearings on the facts.

Judgment affirmed.

*CHIN YING, Appt.,

[202]

v.

UNITED STATES.

(See S. C. Reporter's ed. 202.)

Aliens—Chinese exclusion—jurisdiction of United States commissioner—appeal—concurrent findings of fact.

This case is governed by the decision in *Chin Bak Kan v. United States*, ante, 1121.

[No. 526.]

Argued March 13, 14, 1902. Decided June 2, 1902.

APPPEAL from the District Court of the United States for the Northern District of New York to review a judgment which affirmed a judgment of a United States commissioner for that district ordering the deportation of a Chinese laborer.

Mr. Max J. Kohler argued the cause, and, with *Mr. B. Lewinson*, filed a brief for appellant.

Assistant Attorney General Hoyt argued the cause and filed a brief for appellee.

For contentions of counsel see their briefs as reported in *Chin Bak Kan v. United States*, ante, 1121.

Mr. Chief Justice Fuller: This case is similar to that just decided, and the judgment of the court below is affirmed.

Mr. Justice **Gray** did not hear the argument and took no part in these decisions.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

FIRST NATIONAL BANK OF DENVER,
COLORADO, First National Bank of
York, Nebraska, and Harris & Company,
Appts.,

v.

JOHN P. KLUG and Charles H. Wheeler.

(See S. C. Reporter's ed. 203-205.)

Direct appeal from district court—bankruptcy proceedings—jurisdiction of district court in issue.

A direct appeal to the Supreme Court of the United States from a judgment of a district court dismissing a petition in involuntary bankruptcy, entered after directing the jury to find that the alleged bankrupt was engaged chiefly in farming, and was therefore by the express terms of the bankruptcy act not subject to its provisions, cannot be maintained on the theory that the jurisdiction of the district court was drawn in issue within the meaning of the act of March 3, 1891, § 5 (26 Stat. at L. 826, chap. 517),—especially where no question of jurisdiction was certified by the district court, as required by that section.

[No. 599.]

Submitted May 5, 1902. Decided June 2, 1902.

APPEAL from the District Court of the United States for the District of Colorado to review a judgment dismissing a petition in involuntary bankruptcy. *Dismissed.*

The facts are stated in the opinion.

Messrs. Charles J. Greene and Ralph W. Breckenridge submitted the cause for appellants. *Mr. George L. Hodges* was with them on the brief.

Mr. John F. Shafroth submitted the cause for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The bankrupt act provides: "Any natural person, except a wage earner or a person [203] engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of \$1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act." § 4b.

In this proceeding by petition in invol-

NOTE.—On direct review, in United States Supreme Court, of circuit and district court judgments and decrees—see note to Gwin v. United States, ante, p. 741.

186 U. S.

untary bankruptcy filed against John P. Klug, a trial before a jury was had on the issue whether Klug was "engaged chiefly in farming," within the meaning of the act. The district court, upon the evidence, directed the jury to find that Klug was a farmer and engaged chiefly in farming, within the meaning of the act, and, the jury having found accordingly, entered judgment dismissing the petition with costs. Petitioners prayed an appeal directly to this court, which was allowed, and the district court thereupon made and filed its findings of fact and conclusions of law in pursuance of the 3d subdivision of General Order in Bankruptcy, 36.

Section 24 of the bankrupt act provides:

"a. The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

"b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." [30 Stat. at L. 544, chap. 541.]

Our jurisdiction of this appeal depends on the act of March 3, *1891, by the 5th section [204] of which an appeal or writ of error from or to the circuit or district courts will lie directly "in any case where the jurisdiction of the court is in issue," and in such cases "the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." In this case there is no such certificate, and, moreover, the district court had and exercised jurisdiction. The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned. *Mueller v. Nugent*, 184 U. S. 15, ante, 411, 22 Sup. Ct. Rep. 269; *Louisville Trust Co. v. Comings*, 184 U. S. 25, ante, 416, 22 Sup. Ct. Rep. 293; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

It is not contended that the case falls within either of the other classes of cases mentioned in § 5.

Section 25 provides:

"a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the fol-

lowing cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

"b. From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

"1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or

"2. Where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of [205] the *question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

This appeal does not come within those provisions.

Subdivision *d* of the same section is: "Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

The words "bankruptcy proceedings" are used in this section in contradistinction to controversies arising out of the settlement of the estates of bankrupts, as they are also so used in §§ 23 and 24. The certification referred to is that provided for in §§ 5 and 6 of the act of March 3, 1891, and this case in that particular does not fall within those sections.

Apart from § 25, the circuit courts of appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings, and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts might be reviewed here on certiorari, or in certain cases by appeal, under § 6 of the act of 1891. *Mueller v. Nugent*, 184 U. S. 1, ante, 405, 22 Sup. Ct. Rep. 269; *Huntington v. Saunders*, 163 U. S. 319, 41 L. ed. 174, 16 Sup. Ct. Rep. 1120; *Aztec Min. Co. v. Ripley*, 151 U. S. 79, 81, 38 L. ed. 80, 81, 14 Sup. Ct. Rep. 236.

But the question before us is whether this appeal was properly brought, and we do not think it was.

Appeal dismissed.

*LEE CLARK, *Plff. in Err.*,

v.

MONROE D. HERINGTON.

[206]

(See S. C. Reporter's ed. 206-212.)

Public lands—land grants to railroads—indemnity lands—selection of even-numbered sections in place limits—approval of selection by Land Department—cancellation without notice—bona fide purchaser for value.

1. Even-numbered sections of land within the place limits of the grant to the Union Pacific Railroad Company by the acts of July 1, 1862 (12 Stat. at L. 489, chap. 120), and July 2, 1864 (13 Stat. at L. 356, chap. 216), were not open to selection by the Missouri, Kansas, & Texas Railroad Company as indemnity lands in satisfaction of the grant by the act of July 26, 1866 (14 Stat. at L. 289, chap. 270), after the passage of the act of March 6, 1868 (15 Stat. at L. 39 chap. 20), doubling the price of the even-numbered sections of land within the place limits of the Union Pacific Railroad grants, and providing that they should be subject only to entry under the pre-emption and homestead laws.
2. The approval by the Land Department of the selection by a railroad company as indemnity lands of sections which, under an act of Congress, were subject only to entry under the homestead and pre-emption laws, did not operate to vest the title in the company.
3. A recovery of damages for a breach of a covenant of warranty in a conveyance by the grantee of a railroad company of lands selected by it as indemnity lands, which were open only to pre-emption and homestead entry, cannot be defeated by a contention that the Land Department, which had canceled such selection and patented the land to another party, was without power to make such cancellation because no notice had been given to the railroad company's transferees.
4. Innocent purchasers for value of lands unlawfully selected by a railroad company as indemnity lands are not protected by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376), unless they are citizens of the United States, or have declared their intention of becoming such citizens.
5. No protection is given to innocent purchasers for value of lands unlawfully selected by a railroad company as indemnity lands, by the act of March 2, 1896 (29 Stat. at L. 42, chap. 39), where the railroad company has never received any patent or certificate therefor.

[No. 223.]

Submitted April 14, 1902. Decided June 2, 1902.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Labette county of that state in favor of plaintiff in an action to recover damages for breach of a covenant of warranty. *Affirmed.*

See same case below, 62 Kan. 866, 62 Pac. 1116.

NOTE.—On land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

Statement by Mr. Justice **Brewer**:

On May 20, 1899, Monroe D. Herington, the defendant in error, recovered a judgment in the district court of Labette county, Kansas, against Lee Clark, for the sum of \$3,032.28, which judgment was affirmed by the supreme court of that state on November 10, 1900. Thereupon the case was brought here on writ of error.

[207] The facts are these: The action was one to recover damages for breach of warranty in the conveyance of a part of section 22, township 15, range 5, in Morris county, Kansas. The tract was outside the place and within the indemnity limits of the land grant made July 26, 1866 (14 Stat. at L. 289, chap. 270), to the Union Pacific Railroad Company, Southern Branch, a corporation whose name was subsequently changed to Missouri, Kansas, & Texas Railroad Company. The railroad company duly constructed its road, and, failing to obtain within the place limits the full quota of lands granted to it, selected, on October 22, 1877, the tract in controversy among others in lieu thereof. At the time of such selection the tract was unimproved and without actual occupation. The selection was approved by the Commissioner of the General Land Office, but no patent was issued. On September 5, 1884, the railroad company conveyed the land to Lee Clark. He conveyed by warranty deed. Herington is a subsequent grantee in the chain of title, and is also the assignee from Clark's immediate grantee of all his rights under Clark's deed, including the right to recover damages for any breach of the covenants therein contained.

The tract was in an even-numbered section and within the place limits of the grant, made by acts of Congress of date July 1, 1862 (12 Stat. at L. 489, chap. 120), and July 2, 1864 (13 Stat. at L. 356, chap. 216), to the Union Pacific Railroad Company, Eastern Division.

On July 21, 1886, the selection by the Missouri, Kansas, & Texas Railroad Company was canceled by order of the Commissioner of the General Land Office. Notice of this order was given to the railroad company, as also time to appeal therefrom, but no appeal was ever taken. On July 28, 1888, E. M. Cox, who had, on July 31, 1886, taken forcible possession of the land, filed his declaratory statement, claiming settlement. On July 26, 1889, he made final proof, paid the government price, and received his patent certificate. Thereafter on October 15, 1890, a patent was issued to him.

Messrs. James Hagerman, T. N. Sedgwick, and J. M. Bryson submitted the cause for plaintiff in error:

The land in controversy at the time it was selected for indemnity purposes was public land.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769.

The right to take such lands as indemnity lands has been affirmed by this court.

United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13.

The selection of indemnity land by the railway company perfects its right to it.

Southern P. R. Co. v. Bell, 183 U. S. 675, ante, 383, 22 Sup. Ct. Rep. 232.

The moment this land was selected by the railway company with the approval of the Land Department of the United States, and a certificate was issued to it, it became its private property, and as such was subject to local taxes and to barter and sale, to the same extent as any other property owned by the company.

Carroll v. Safford, 3 How. 441, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 330.

The act of July 26, 1866, must be construed with reference to the condition, at the time it was passed, of the country through which it was proposed to build the road designated in the grant.

Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606.

The fact that at the time of the grant Walters's entry on the land was of record and uncanceled is of no consequence whatever. If the land had been within the place limits of the grant, it would have passed to the company by virtue of the grant.

Northern P. R. Co. v. De Lacey, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791.

It was not within the jurisdiction of the Land Department to cancel the selection by the Missouri, Kansas, & Texas Railroad Company of the land in controversy, after its conveyance by the company, without notice to all the transferees of the company.

Hawley v. Diller, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986; *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208.

Whenever a tract of land is once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, proclamation, or sale will be construed to embrace or operate upon it, although no reservation is made of it.

Wilcox v. Jackson ex dem. M'Connell, 13 Pet. 498, 10 L. ed. 264; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634.

Mr. John H. Mahan submitted the cause for defendant in error:

The land was not within the grant proper, but within limits wherefrom indemnity land might be taken. It did not pass by the grant, but by selection. At the time the attempted selection was made, this tract had by express act of Congress been withdrawn and reserved, so that it was beyond the jurisdiction of the Department to make or approve a selection thereof, and hence the question of bona fide purchaser cannot arise. Until the selection was made and approved, the government retained the

title and power of disposal the same as if no grant had been made.

See *United States v. Missouri, K. & T. R. Co.* 141 U. S. 360, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 512, 33 L. ed. 695, 10 Sup. Ct. Rep. 341.

Mr. Justice **Brewer** delivered the opinion of the court:

The paramount Federal question is whether the Missouri, Kansas, & Texas Railroad Company was authorized to select as indemnity lands in satisfaction of its grant any even-numbered sections within the place [208] limits of the prior grant to the Union *Pacific Railroad Company. Upon this question *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13, is cited. The railway company, defendant in that case, is the successor in interest of the Missouri, Kansas, & Texas Railroad Company. The act making its land grant is the one referred to in the foregoing statement of facts, as made July 26, 1866. 14 Stat. at L. 289, chap. 270. It claimed, under the authority of that act, the right to take as indemnity lands even-numbered sections within the place limits of what is known as the Leavenworth road, in whose benefit a grant was made March 3, 1863. 12 Stat. at L. 772, chap. 98. The court held against this claim, saying (p. 370, L. ed. p. 770, Sup. Ct. Rep. p. 17):

"Now, it is clear that the even-numbered sections, within the place limits of the Leavenworth road, were reserved by the act of 1863, for purposes distinctly declared by Congress, and which might be wholly defeated if the Missouri-Kansas company were permitted to take them as indemnity lands under the act of 1866. The requirement in the 2d section of the act of 1863, that the 'reserved sections' which 'remained to the United States' within 10 miles on each side of the Leavenworth road, 'shall not be sold for less than double the minimum price of the public lands when sold,' nor be subject to sale at private entry until they had been offered at public sale to the highest bidder, at or above the increased minimum price; the privilege given to actual bona fide settlers, under the pre-emption and homestead laws, to purchase those lands at the increased minimum price, after due proof of settlement, improvement, cultivation, and occupancy; and the right accorded to settlers on such sections under the homestead laws, improving, occupying, and cultivating the same, to have patents for not exceeding 80 acres each, are inconsistent with the theory that the even-numbered sections, so remaining to the United States, within the place limits of the Leavenworth road could

be taken as indemnity lands for a railroad corporation."

While the two statutes making the Union Pacific railroad grants did not double the price of the even-numbered sections within the place limits, yet that was done by the act of March 6, 1868 (15 Stat. at L. 39, chap. 20), which in terms provided "that such sections shall be rated at \$2.50 per acre, and subject *only to entry under those [209] (the pre-emption and homestead) laws." The even-numbered sections within the place limits of the Union Pacific railroad grants were from that time therefore not open to selection as indemnity lands. It is true that this statute was not passed until after the grant to the Missouri, Kansas, & Texas Railroad Company, nor until after it had filed its map of definite location with the Secretary of the Interior, which appears from an agreed statement of facts to have been on January 7, 1868, but it was passed before the completed construction of the railroad and long before the selection made by the company, and it is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit. As said in *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 421, 28 L. ed. 794, 797, 5 Sup. Ct. Rep. 208, 212: "Until selection was made the title remained in the government, subject to its disposal at its pleasure." See also *Ryan v. Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 731, 28 L. ed. 872, 876, 5 Sup. Ct. Rep. 334; *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 232, 29 L. ed. 858, 860, 6 Sup. Ct. Rep. 654; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 408, 29 L. ed. 928, 929, 6 Sup. Ct. Rep. 790; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 375, 35 L. ed. 766, 771, 12 Sup. Ct. Rep. 13; *Hewitt v. Shultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; *Southern P. R. Co. v. Bell*, 183 U. S. 675, ante, 383, 22 Sup. Ct. Rep. 232.

It is contended by plaintiff in error that the selection by the railroad company, when approved by the Land Department, operated to convey the title as effectively as would a patent to it therefor; that the even-numbered sections within the place limits, although double minimum lands, were public lands and within the jurisdiction of the Land Department, and that hence the approval of the selection by the Land Department, even if erroneous, operated to vest the title in the company. But this is a mistake. The act of Congress provided in terms that such sections should be subject only to entry under the homestead and pre-emption laws, and the Land Department had no more

[210] power to turn one of those sections over to a railroad company *than it had to grant lands in a military or Indian reservation. While the lands were within the jurisdiction of the Land Department for some purposes they were not for all. The mode of their disposal was limited, and the Land Department had no authority to ignore that limited mode and dispose of them in any other way. This general doctrine as to the limitation of the powers of the Land Department has been affirmed by this court in many cases and under different circumstances. *Wileox v. Jackson ex dem. McConnel*, 13 Pet. 498, 10 L. ed. 264; *United States v. Stone*, 2 Wall. 525, 17 L. ed. 765.

It is further contended that it was not within the power of the Land Department to cancel the selection by the company, after the conveyance of the land by the company, without notice to all the transferees, and in support thereof *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208, and *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986, are cited. It is undoubtedly true, as held in those cases and others, that while the Land Department has full jurisdiction over the disposition of public lands,—a jurisdiction which may be exercised until the passing of the legal title by the issue of a patent or otherwise,—yet such jurisdiction cannot be exercised so as to destroy any equitable rights without notice to the claimants thereof. While that is true, the courts are not thereby debarred from an inquiry into and a determination of the validity of any equitable title. They do not assume any direct appellate jurisdiction over the rulings of the Land Department, and they accept the findings of that department as conclusive upon questions of fact. *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Quincy v. Conlan*, 104 U. S. 420, 26 L. ed. 800. But, notwithstanding this, prior to the issue of any patent a party may have rights in the land of one kind or another which courts will enforce. Thus, where the full equitable title to land has passed from the government to an individual, the land is subject to state taxation, although no patent has issued. *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339. Where, prior to the issue of a patent, land in possession of an individual is sought to be charged with state taxes, he may contest in the courts the liability of the land therefor on the ground that full equitable title has not passed to him, or that something yet remains

[211] to be done before *the rights of the government are ended. *Kansas P. R. Co. v. Prescott*, 16 Wall. 603, 21 L. ed. 373; *Union P. R. Co. v. McShane*, 22 Wall. 444, 22 L. ed. 747.

Again, even before the acquiring of even an equitable title to the land as against the

government, contracts made by actual settlers concerning their possessory rights and the title hoped to be acquired from the United States may be valid as between the parties thereto, and enforced in the courts. *Lamb v. Davenport*, 18 Wall. 307, 21 L. ed. 759; *Stark v. Starr*, 94 U. S. 477, 24 L. ed. 276.

Again, it is a well-known fact that many agricultural lands and many mining claims are held by their owners with only final receipts from the government and without the issue of any patent. Yet the rights which accompany title are exercised by the parties and enforced by the courts.

It will be noticed that this is not an action to recover the possession of any land, or one to quiet the title thereto. It is simply an action to recover damages for the breach of a contract in respect to the land, and the decision, in no respect controlling the action of the officers of the Land Department, is simply a determination of the rights which the parties have acquired by proceeding in the Land Department. This is clearly a matter of ordinary judicial cognizance, and one which by no statute of Congress or rule of the common law is excluded from such cognizance. *Garland v. Wynn*, 20 How. 6, 15 L. ed. 801; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 57, 37 L. ed. 72, 77, 13 Sup. Ct. Rep. 217; *Turner v. Sawyer*, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192.

A final contention in this matter is that the plaintiff in error is an innocent purchaser for value, and that, therefore, he and his grantees are entitled to be protected in their title by virtue of the act of March 3, 1887 (24 Stat. at L. 556, chap. 376), and March 2, 1896 (29 Stat. at L. 42, chap. 39). It is a sufficient answer to this contention that this defense was not set up in the state courts, and that it does not appear anywhere in the record that Clark, to whom the railroad company conveyed, or any subsequent grantee in the chain of title, was a citizen of the United States, or had declared his intention to become a citizen, and hence the act of 1887, which purports to confirm alone the titles of citizens or those who have declared their intention to become citizens, has no *application; that the act of 1896 [212] also has no application because that refers only to cases of lands patented or certified, and the confirmations of lands acquired by deed or contract from the party holding the patent or certificate, and here the railroad company never received any patent or certificate. In addition, prior to the passage of the act, a patent had been issued to Cox, and his title thus fully confirmed.

These considerations dispose of the only Federal question presented in the record, and, there appearing no error, the judgment of the Supreme Court of Kansas is affirmed.

Mr. Justice Gray took no part in the decision of this case.

BIENVILLE WATER SUPPLY COMPANY, *Appt.*,
v.
CITY OF MOBILE and John Curtis Bush,
Mayor Thereof.

(See S. C. Reporter's ed. 212-223.)

Constitutional law -- reserved power to amend corporate charters.

The absolute power of the Alabama legislature to revoke the exclusive feature of the franchise of a water company, under Ala. Const. art. 1, § 23, declaring that the legislature shall pass no act "making any irrevocable grants of special privileges or immunities," is not limited to cases where no injustice will thereby be done to the corporators, by art. 14, § 10, giving the general assembly power to alter, amend, or revoke a charter "when- ever in their opinion it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done to the corporators."

[No. 126.]

Argued January 22, 23, 1902. Decided June 2, 1902.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama to review a decree dismissing a bill to restrain the city of Mobile from building or operating a system of waterworks prior to the expiration of complainant's charter, or before the city should buy complainant's plant. *Affirmed.*

Statement by Mr. Justice **Brewer**:

On February 21, 1899, the appellant, as complainant, filed its bill in the circuit court of the United States for the southern district of Alabama to restrain the city of Mobile from building or operating prior to July 1, 1908, or before the city should have purchased the waterworks of the complainant, any system of waterworks connected with or having for its source of supply any stream of water in Mobile county. Upon answer and proofs the circuit court entered a decree dismissing the bill, whereupon an appeal was taken directly to this court.

[213] "The facts are these: In 1840 the city of Mobile made a contract with Albert Stein, which was ratified by an act of the legislature of the state, January 7, 1841. By this contract Stein received the exclusive right to supply the city with water from a stream called Three Mile creek, and the city the right to purchase his plant at a price to be fixed by arbitration. Stein constructed his plant, and it was for many years the sole source of supply. But it was not satisfactory, and hence the charter to the appellant. This charter was granted by two statutes, dated respectively February 19, 1883, and February 14, 1885. By these statutes the

company was given all the rights vested by contract or law in the city to purchase the Stein franchise and plant, and for that purpose was to be considered the assignee of the city; also generally the right to acquire by contract with the owners any franchise and plant for supplying Mobile with water, and in case of disagreement with the owners as to price, the right to condemn and take the said franchise and plant under the state's right of eminent domain. It was given for twenty years, and until a purchase of its plant by the city the exclusive right to supply the city with water from any source in the county of Mobile, other than Three Mile creek (the Stein source of supply), and when it should acquire the Stein franchise the exclusive right from that creek also, subject to this proviso:

"But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company."

It was required to begin its work within four years and to supply water within six years. It was also required to supply water at a cost to the consumers, not exceeding certain maximum rates fixed by the act, and to put fire plugs on any square at the request of the owners of three fourths of the improved property thereon. After twenty years the city was given the right to purchase the plant of the company at a price to be fixed by arbitration.

The owners of the Stein franchise endeavored by litigation to prevent the erection of the appellant's plant, but a decree in favor of the Bienville company was affirmed by this court. 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892.

Appellant constructed its plant and supplied the city of Mobile with water under contracts, the last of which would not have expired until July 1, 1900.

By an act of February 23, 1899 (Local Acts Ala. 1898-99, p. 1689), its charter was amended by striking out the word "exclusive," thus leaving a grant, but not an exclusive grant.

By an act of February 6, 1897, a new charter was granted to the city of Mobile, and by its terms express authority was given to the city to build or acquire public works, subject to the approval of its citizens by a majority vote. On August 2, 1897, there was submitted to vote and approved by a majority of citizens a proposition that the city should purchase, build, or otherwise acquire a system of waterworks to cost not exceeding \$500,000, and a system of sewerage to cost not exceeding \$250,000, to be paid for by bonds secured by a mortgage upon said public works.

By other statutes the city was given power to issue bonds secured by a mortgage on any plant which it should buy or construct; also power to acquire or condemn any property and the water of any stream in Mobile county excepting only Clear creek,

NOTE.—As to reserved power to alter, amend, or repeal corporate charters—see note to *Greenwood v. Union Freight R. Co.* 26 L. ed. U. S. 967.

the source of appellant's supply of water; and, third, to condemn all interest, legal or equitable, not owned by the city in the Stein plant.

Nothing had been done by the appellant under the right given it to purchase or condemn the Stein franchise and property, although its treasurer had in its behalf purchased interests in such franchise and property amounting to $54\frac{2}{100}$ per cent of the full value thereof. On February 18, 1898, the city council passed a resolution to purchase the Stein franchise and property. An arbitration was held, and on its report the city took possession of the property and filed a bill against the treasurer of the appellant to compel him to carry out the arbitration and purchase. The circuit court, however, held the arbitration illegal, and dismissed the bill.

[215] On February 21, 1899, appellant brought in the circuit court of the United States a suit in equity against the city. In the bill was set forth the contracts of appellant with the city, and it was contended that there was an implied agreement by the latter not to enter into competition. This suit was dismissed by the circuit court, and its decree was affirmed by this court. 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40. The present bill, filed on the same date, is based on the rights given to the appellant by its charter, and it is contended that any legislation authorizing the city to violate such charter rights is in conflict with that clause in the 1st paragraph of § 10 of art. 1 of the Federal Constitution which prohibits a state from passing any law impairing the obligations of contracts.

The Constitution of Alabama (1875), which was in force at the time of the transactions herein referred to, contained these several provisions:

"Article 1, section 23: That no *ex post facto* law, or any law impairing the obligation of contracts, or making any irrevocable grants of special privileges or immunities, shall be passed by the general assembly."

"Article 14, section 1: Corporations may be formed under general laws, but shall not be created by special act, except for municipal, manufacturing, mining, immigration, industrial, and educational purposes, or for constructing canals, or improving navigable rivers and harbors of this state, and in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered, amended, or repealed."

"Article 14, section 2: All existing charters or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place and business been commenced in good faith, at the time of the ratification of this Constitution, shall thereafter have no validity."

"Article 14, section 10: The general assembly shall have the power to alter, revoke, or amend any charter of incorporation now existing and revocable at the ratification of 186 U. S. U. S., Book 46.

this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done to the *corporators. [216] No law hereafter enacted shall create, renew, or extend the charter of more than one corporation."

Messrs. Frank P. Prichard, D. P. Bestor, and John G. Johnson argued the cause and filed a brief for appellant:

Such a contract as that here presented, between the state and the Bienville Water Supply Company, is ordinarily within the power of a state to make, is founded upon adequate consideration, and is inviolable.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 28 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The phrase, "that no injustice shall be done to the corporators," is one of those general restrictions on legislative power so common to state constitutions, which, from the necessities of the case, cannot be framed in more specific language.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

The question of compliance with such general constitutional restrictions is not a legislative question.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Com. ex rel. Atty. Gen. v. Pittsburgh & C. R. Co.* 58 Pa. 26.

Mr. D. P. Bestor also filed a separate brief for appellant:

The legislature has the power to alter, revoke, or amend, or to pass, a law which has the effect to alter, revoke, or amend in such manner only as will work no injustice to the corporators.

Tyrone Gas & Water Co. v. Tyrone, 195 Pa. 566, 46 Atl. 134; *White v. Meadville*, 177 Pa. 651, 34 L. R. A. 567, 35 Atl. 693.

This same principle of providing for just compensation when the legislature takes away or impairs the value of private property for public use is passed upon and upheld by this court.

Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43. See also *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394, 8 N. E. 119.

The Federal courts alone must decide whether or not the contract has been violated, regardless of state legislation.

McGaley v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Gelpeke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520.

Mr. B. B. Boone argued the cause, and, with *Mr. E. L. Russell*, filed a brief for appellees:

The general assembly has no power to grant an exclusive right or privilege.

This court has steadfastly adhered to the

principle that it would follow the construction put upon the constitution of a state by its highest court.

Polk v. Wendal, 9 Cranch, 98, 3 L. ed. 669; *Merchants' & Mfrs.' Nat. Bank v. Pennsylvania*, 167 U. S. 462, 42 L. ed. 237, 17 Sup. Ct. Rep. 829; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 154, 41 L. ed. 387, 17 Sup. Ct. Rep. 56; *Wilson v. North Carolina*, 169 U. S. 592, 42 L. ed. 870, 18 Sup. Ct. Rep. 435; *Brown v. New Jersey*, 175 U. S. 174, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819.

An exclusive privilege can be created only when the language used is such as to leave no reasonable doubt.

United States v. Fisher, 2 Cranch, 390, 2 L. ed. 314; *The Binghamton Bridge*, 3 Wall. 51, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137; *Stein v. Bienville Water Supply Co.* 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; *Pennsylvania R. Co. v. Canal Comrs.* 21 Pa. 22.

By the laws of Alabama the charter of a corporation is subject to amendment or repeal by future legislation.

Bibb v. Hall, 101 Ala. 98, 14 So. 98; Ala. Const. art. 14, § 10; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 189, 29 L. ed. 125, 5 Sup. Ct. Rep. 813.

The courts cannot interfere with matters of legislative discretion.

Fox v. McDonald, 101 Ala. 65, 21 L. R. A. 529, 13 So. 416; *Clarke v. Jack*, 60 Ala. 278, 31 Am. Rep. 38; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 298, 42 L. ed. 1044, 18 Sup. Ct. Rep. 594; *Spring Valley Waterworks v. Schottler*, 110 U. S. 374, 28 L. ed. 183, 4 Sup. Ct. Rep. 48. See also *License Tax Cases*, 5 Wall. 469, 18 L. ed. 500; *Perry v. Keene*, 56 N. H. 514; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 576; *United States v. Arredondo*, 6 Pet. 729, 8 L. ed. 561; 3 Am. & Eng. Enc. Law, p. 684.

The general assembly was the sole and final judge as to when a charter was injurious to the citizens of the state, and also was sole judge as to what was necessary to be done in amending or repealing a charter (the franchise), so that no injustice should be done to the corporators.

Wagner Free Inst. v. Philadelphia, 132 Pa. 612, 19 Atl. 297; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 428, 23 L. R. A. 264, 25 S. W. 75; *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 37 L. R. A. 504, 40 S. W. 705; *Macon & B. R. Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442.

The phrase used in article 14, § 10, "in such manner, however, that no injustice shall be done to the corporators," was put into the Constitution to prevent any oppression or wrong to corporators in reference to the property acquired by corporations while exercising their franchises, and to prevent interference with lawful contracts made by corporations while exercising their charter privileges.

Inland Fisheries Comrs. v. Holyoke Water Power Co. 104 Mass. 451, 6 Am. Rep. 247; *Miller v. New York*, 15 Wall. 498, 21 L. ed.

104; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 519, 21 L. ed. 139; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 754; *Sinking Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496; *Stearns v. Minnesota*, 179 U. S. 259, 45 L. ed. 180, 21 Sup. Ct. Rep. 73.

Mr. Justice **Brewer** delivered the opinion of the court:

There is such a similarity between the two suits commenced by plaintiff on February 21, 1899, as suggests a question whether the decision of the one should not be conclusive as to the disposition of the other. The parties were the same. In each the plaintiff set forth its charter and its contracts with the city, and each prayed a decree restraining the city from building or operating any system of waterworks for supplying the city. It is true the bill in the first case counted specially on the contracts made between the plaintiff and the city, and sought a restraint of the city only during the life of those contracts, while the bill in this case sets up more at large the charter rights of the plaintiff as given by the statutes of the state, contends that those rights are infringed by the subsequent legislation of the state and the action of the city thereunder, and seeks to restrain the city during the twenty years named in the plaintiff's charter and until the city shall buy the plaintiff's plant. But each of these seeks to restrain the city from the time of filing the bill. All the rights which the plaintiff had by virtue of its charter, and all the violations of such rights caused by the legislation of the state and the action of the city, existed at the time of the filing of the bills and during the lifetime of the contracts with the city, and could have been presented in the first suit and been among the matters to be considered in determining whether the plaintiff was entitled to the injunction sought. If the plaintiff was not entitled to an injunction during the lifetime of the contracts with the city it is not entitled to any similar relief after the expiration of those contracts. In other words, the plaintiff failed to set up in the first suit all its *grounds of relief. Can it be permitted in [217] this to set up additional grounds and obtain the very relief sought in the prior suit as well as additional relief, the same in kind though longer in duration? Will the law permit the splitting up into separate suits of different grounds for the same relief? Will not the judgment or decree in the first be held a final adjudication of the rights of the parties? It appears that the decree in the other suit was rendered in the circuit and affirmed in this court about seven months before the decision of the present case in the circuit court. As against this, it may be said that the decree in the other suit was neither pleaded nor proved, and no question of *res judicata* can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, but we take judicial notice of our own records,

and, if not *res judicata*, we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this.

But, passing this matter, and leaving out of consideration the special contracts directly between the plaintiff and the city, let us inquire whether any contract rights given to plaintiff by its charter have been violated by subsequent legislation of the state, and the action of the city under such legislation. Plaintiff contends that under its charter, as created by the acts of 1883 and 1885, it acquired the exclusive right to supply the city of Mobile with water from any stream in the county of Mobile, except Three Mile creek, and the right to purchase or condemn the Stein franchise and plant for supplying the city with water from Three Mile creek; that by the later legislation such exclusive right was in terms taken away, authority given to the city of Mobile to build waterworks and supply the city with water therefrom, and that the city had taken possession of the Stein plant, was operating that and was building a system of waterworks of its own, and that thereby its contract right was impaired in violation of the prohibition of the Federal Constitution.

[218] It becomes, therefore, necessary to see, not only the extent of the rights conferred upon plaintiff, but also under what constitutional conditions it received its grant, and what power was reserved to the state to modify the terms thereof. In the first place, the plaintiff did not receive the exclusive right to supply Mobile with water. The proviso in the charter reserved to the state the power to charter other companies for such purpose. Obviously the legislature contemplated the fact that in the future other sources of supply and other companies might be necessary in order to furnish an adequate supply for the growing city, and reserved to itself the right to make such provision as it should deem expedient therefor. It is true the companies which might be chartered were not to "interfere with the property rights or the rights of obtaining water pertaining" to the plaintiff. But manifestly "property rights" refer to rights in respect to tangible property, and thus construed the proviso forbade any interference by any new company with the plant of the plaintiff. In addition, it also forbade interference with the "rights of obtaining water pertaining" to the plaintiff. The plaintiff had not at the time of these transactions obtained the Stein franchise for obtaining water from Three Mile creek, and could only claim an exclusive right of obtaining water from other sources of supply within the county of Mobile.

The plaintiff, therefore, took its charter with notice that it was not given the exclusive right of supplying the city of Mobile with water, and it had not, at the time of these transactions, obtained that which its charter before amendment purported to authorize it to obtain, to wit, an exclusive right to all the sources of supply within the county. In reference to this the supreme
186 U. S.

court of Alabama, in an opinion filed on June 11, 1901 (*Mobile v. Bienville Water Supply Co.* 30 So. 446), and since the decree in the circuit court, used this language:

"It cannot be pretended that, in granting a charter to the complainant company in 1883, the legislature conferred on that company any exclusive privilege for supplying the city of Mobile and its inhabitants with water. All rights not exclusively granted to the complainant were reserved, and the rights thus reserved included the granting of a franchise to another corporation to carry on the same business in the same territory. *While the effect of granting such a [219] franchise, afterwards, to the city, might be to impair, and possibly by fair competition to ultimately largely destroy, the value of complainant's plant, it would not be in excess of legislative power to grant the franchise to the city, nor would it in anywise infringe the Federal Constitution, prohibiting a state legislature from passing laws impairing its obligations. If there is no contract, there is nothing in the grant on which the Constitution could act. The element of a contract by the state with the complainant company did not enter into the grant of its franchise to establish and operate a system of waterworks in Mobile. *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *State v. Hamilton*, 47 Ohio St. 52, 23 N. E. 935; *Scranton Electric Light & Heat Co.'s Appeal*, 122 Pa. 154, 1 L. R. A. 285, 15 Atl. 446; 2 Beach, Priv. Corp. §§ 22, 27."

By art. 1, § 23, of the Constitution of Alabama the legislature is prohibited from "making any irrevocable grants of special privileges or immunities."

The significance of this provision was considered by the supreme court of Alabama in *Birmingham & P. Mines Street R. Co. v. Birmingham Street R. Co.* 79 Ala. 465, 58 Am. Rep. 615, in which case it appeared that the city of Birmingham had given what was in terms an exclusive right to the plaintiff to construct a street railway along certain streets, and afterwards had given to the defendant the right to occupy the same streets with a railway. Considering the first grant by the city, the supreme court said: "If the power to grant such a franchise resided in this municipality . . . there can be no doubt, either of the jurisdiction, or of the duty, of a court of equity to protect the invasion of the right. . . . If, however, the power in question did not exist, then the grant would be void, so far as it purports to be exclusive in its nature;" and it was held that the city authorities had no power to grant the exclusive right claimed by the plaintiff. In the discussion of the question the court further used this language:

"What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by *the [220] legislature? It seems plain from the very

terms used that the evil intended to be specially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law, and are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic.

"The policy of the law, as now declared by our Constitution, is as clear in the condemnation of the grant of irrevocable exclusive privileges conferred by franchise, as that of the common law was in the reprobation of pure monopolies which were always deemed odious, not only as being in contravention of common right, but as founded in the destruction of trade by the extinguishment of a free and healthy competition. *Case of The Monopolies*, 11 Coke, 84b.

"The exclusive right of the appellee to the privilege claimed, in our opinion, cannot be sustained. The general assembly would itself have no power under the Constitution to make such a grant."

It is true that this case was not decided until the December term, 1885, which was after the passage of the last of the two statutes granting the charter to the appellant; and it is also true that in considering questions of an alleged state infringement of a contract we are not concluded by the exposition by the courts of the state of the terms of the contract or the effect of the legislation. At the same time, the opinion of the highest court of the state, even in contract cases, is entitled to most respectful consideration, and should not lightly be ignored.

It is contended by the appellant that § 23 of art. 1 must be considered as qualified by § 10 of art. 14, the section which gives the general assembly power to alter, amend, or revoke a charter "whenever, in their opinion, it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done to the corporators." It is said that while under this provision the judgment of the general assembly upon the question whether the charter is injurious to the citizens of the state may not be [221] subject to judicial examination, yet whether injustice has been done to the corporators is in the very nature of things a judicial question, and one which no action of the legislature can preclude the courts from considering. As a corollary from this it is argued that if in the opinion of the courts the attempted revocation works injustice to the corporators, it will be adjudged an invalid exercise of legislative power. This section is a new one in this court. It is found in the constitutions of more than one state and has been reviewed in some state courts. So far as they have expressed themselves the expressions have been in favor of the right of a judicial review. *Wagner Free Inst. v. Philadelphia*, 132 Pa. 612, 19 Atl. 297, is cited by the appellee, but that case simply holds that whether the charter is injurious to the citizens is a question of legislative determination. Further than that

the opinion does not go. *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75, is also cited. In that case a statute which in effect amended railroad charters was sustained. In the opinion the propriety of the amendment was discussed, a limitation to its scope declared, and in reference to a possible construction thereof the court observed (p. 436, L. R. A. p. 275, S. W. p. 84):

"An amendment to that extent would be, manifestly, unjust to the companies, and violative of the Constitution, which, while it grants the right to amend when in the opinion of the legislature the charter is injurious to the citizens, limits the right to do so to amendments that are just to the corporators."

Subsequently, in *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 37 L. R. A. 504, 40 S. W. 705, another section of the same statute was presented and sustained, *Leep v. St. Louis, I. M. & S. R. Co.* being cited with approval. This case was brought to this court on error, and affirmed. 175 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419. In *Macon & B. R. Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442, the application of a similar constitutional provision was considered, and upon it the court observed (p. 16, S. E. p. 444):

"No constitutional principles are infringed by exercising a reserved power to revoke special privileges or immunities, unless the provision of our own Constitution is violated, which forbids doing it in such manner as to work injustice to the corporators or creditors of the corporation. Whether the mode adopted *by the legisla- [222] ture in a given instance is just in this respect or not, whilst primarily a legislative question, may, if palpably decided wrong, become a judicial question."

It does not appear that the supreme court of Alabama has passed upon this specific question. We do not think it necessary to determine absolutely the precise meaning of this section or the limits of judicial inquiry under it. It may be simply declaratory, for courts have often held that it was beyond the power of the legislature, under the guise of an act amending or repealing a charter, to take away the property of the corporation. Clearly, the question is, in the first instance, presented for the consideration of the legislature, and a presumption of validity attends its action.

Obviously, from the several constitutional provisions which are quoted in the statement of facts, it was intended that the legislature should have the right of revocation and amendment, and that whoever took a charter should take it subject to that right. To what could such revocation or amendment extend? The possible rights of a corporation group themselves into three classes: First, the right to the tangible property which it may acquire; second, the right to do the specific things which are named in the charter; and, third, the right to exclude others from doing like things. It has been held that the right of revocation or amendment carries with it no right to ap-

propriate the tangible property belonging to the corporation. As said by Chief Justice Waite, speaking of the power of amendment, in *Sinking-Fund Cases*, 99 U. S. 700, 720, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496, 501: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." Nothing of this nature was, however, attempted by this legislation. The plaintiff was left in undisturbed possession of its tangible property. So we need not stop to consider what protection could be afforded if the attempt had been made to take away its property.

[223] The second class includes the powers of action granted to the corporation; in other words, the right to use the tangible property for the purposes of the charter. But none of these powers were taken away from the plaintiff. It was left free to use its plant in supplying the citizens of Mobile with water, and to charge and collect pay for its services. Hence no inquiry is pertinent in respect to the limitations, if any there be, on the right of the legislature to take away such powers.

The remaining class is of those rights which flow from exclusive provisions in the charter,—the right to prevent others from doing the same things. It cannot be doubted that such a right is valuable; that, for instance, it would be worth something to the plaintiff to have, not only the right of supplying Mobile with water, but also the right to exclude others, and thus prevent all competition. That which gives to a government patent for an invention its chief value is not the right to manufacture and sell the thing invented, but the right to exclude others from so doing,—the monopoly for the prescribed term of years. But the grant of a monopoly is forbidden by the Alabama Constitution. As said by its supreme court, in the quotation just made: "The general assembly would itself have no power under the Constitution to make such a grant."

By a separate section of the Constitution is affirmatively declared that the legislature shall pass no act "making an irrevocable grant of special privileges or immunities." While that body may grant special privileges and immunities, grant franchises to build waterworks, construct railways, or other works of public utility, and by a failure to duplicate a grant make it in effect for the time being exclusive, yet no one legislature can forestall action by a succeeding legislature, or bind the state by making the grant in terms exclusive. As much force and effect must be given to § 23 as to any other, and it was obviously the intent that, even if exclusive privileges were granted, the monopoly feature thereof should always be subject to revocation. In this section there is no suggestion of amendment or alteration. That which is distinctly provided is the absolute power of revocation. To hold that the exclusive

feature of plaintiff's grant could not be revoked because thereby injustice might be done to the corporators is simply to nullify § 23.

For these reasons we are of the opinion that *the decree of the Circuit Court was right, and it is affirmed.*

*FRED HARDY, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 224-230.)

[224]

Criminal law — continuance — examination of jurors — evidence — voluntary admissions.

1. It was not an abuse of discretion for the district court for the district of Alaska to refuse a continuance to a defendant charged with a capital crime, on a showing by his affidavit of the absence of witnesses who would testify that he was not at the scene of the crime at the time named in the indictment as the date of its commission and would also explain the possession of money found on his person, when nothing had been disclosed to indicate that the possession of such money by the defendant had any significance in connection with the charge, and the falsity of some of the statements in defendant's affidavit clearly appeared from the affidavits offered by the government in opposition to the motion.
2. Permitting the district attorney to ask a juror whether he has any conscientious scruples which would preclude him from rendering a verdict of guilty on circumstantial evidence, "in a case where the penalty prescribed by law is death," is not error on the theory that the question should state, "where the penalty prescribed by law may be death," because of a statutory provision which permits a jury finding a party guilty of murder in the first degree to add, "without capital punishment."
5. Voluntary statements made by a defendant before and after his preliminary examination are not inadmissible in evidence against him, because the provisions of 30 Stat. at L. 1319, chap. 429, §§ 307-311, with respect to statements pending an examination, were not complied with, although made to the magistrate who in fact conducted the preliminary examination.

[No. 502.]

Submitted April 28, 1902. Decided June 2, 1902.

IN ERROR to the District Court of the United States for the District of Alaska to review a conviction of murder. *Affirmed.* The facts are stated in the opinion.

Mr. Joseph F. Gould submitted the cause for plaintiff in error:

The accused is entitled to a continuance

NOTE.—On the right to a continuance in a criminal case—see *State v. Gibbs* (Mont.) 10 L. R. A. 749, and note.

On the admissibility in evidence of confessions—see notes to *Hopt v. Utah*, 28 L. ed. U. S. 262, and *Bram v. United States*, 42 L. ed. U. S. 568.

where he is brought to trial so speedily after his arrest or indictment that he cannot make a proper defense, or where he requires further time by reason of his close confinement in prison since his arrest.

4 Enc. Pl. & Pr. p. 834; *Metts v. State*, 29 Ga. 271; *Howell v. State*, 5 Ga. 48; *State v. Lewis*, 1 Bay, 1; *State v. Brooks*, 39 La. Ann. 239, 1 So. 421; *State v. Moultrie*, 33 La. Ann. 1147; *Newman v. State*, 22 Neb. 356, 35 N. W. 194.

Failure to grant the motion was clearly error and abuse of discretion.

Isaacs v. United States, 159 U. S. 487, 40 L. ed. 229, 16 Sup. Ct. Rep. 51; *Goldsby v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216; *Means v. Bank of Randall*, 146 U. S. 620, 36 L. ed. 1107, 13 Sup. Ct. Rep. 186.

Although the presiding judge has a discretion in ordering the business of his court and determining whether it is proper or not to postpone or continue a case, yet if a refusal to continue a case constitutes a flagrant abuse of that discretion it is sufficient ground, in accordance with the great preponderance of authority, for reversal of the judgment on appeal or error.

4 Enc. Pl. & Pr. p. 904.

The discretion to be exercised is not to be an arbitrary, but a sound judicial, discretion.

Irvine v. State, 20 Tex. App. 12; *State v. Poe*, 8 Lea, 647.

On trial for murder a continuance should be granted for the purpose of obtaining witnesses from Europe, where no laches is attributable to the defendant, and where only a short time has intervened between the arraignment and the trial.

State v. Klinger, 43 Mo. 127.

In the case of felony the prisoner is entitled, after being furnished with the names of the witnesses against him, to a reasonable time in which to bring testimony from the counties in which such witnesses live.

United States v. Stewart, 2 Dall. 343, 1 L. ed. 408, Fed. Cas. No. 16,401.

Solicitor General Richards submitted the cause for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

On September 10, 1901, in the district court for the district of Alaska, second division, Fred Hardy, plaintiff in error, was found guilty of the crime of murder, and sentenced to be hanged. Thereupon he sued out this writ of error.

In the record appear thirty-two assignments of error, but in the brief filed by his counsel only three are pressed upon our attention. First, it is claimed that the court erred in refusing the defendant a continuance. "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." *Isaacs v. United States*, 159 U. S. 487, 489, 40 L. ed.

229, 230, 16 Sup. Ct. Rep. 51, 52, and authorities there cited. See also *Goldsby v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216.

This proposition of law is not disputed, but it is contended *that abuse of discretion [225] is shown. The pertinent facts are as follows: The indictment charged the murder of Con Sullivan on June 7, 1901. The killing took place on Unimack island. The defendant filed in support of his motion his affidavit stating that he had been in custody since July 27; that at the time of his arrest he had \$685 upon his person, which was taken from him by the arresting officer; that one Captain Mackintosh, and one John Johnson, captain and mate respectively of the schooner Arago, upon which affiant came as a sailor from San Francisco to Unimack island, would testify that he remained on that vessel continuously from the time it left San Francisco until June 11; that the schooner, with the captain and mate on board, left Alaska prior to the finding of the indictment against him, but that he believed and had been informed that the vessel would probably return within a reasonable time, and if not that the depositions of the captain and mate could be obtained in San Francisco, the place of their residence. The affidavit further stated that two witnesses, whose names were unknown, who were both in the employ of the government on a boat named the Pathfinder, plying in the waters of the Northern Pacific ocean and the Behring sea, and which frequently called at Dutch Harbor—within 1 mile of the place where court was being held—would testify that they knew affiant in San Francisco from about March 26 to April 15, and then saw him in possession of a large amount of money, an amount in excess of \$1,500, a part of which was the money taken from him when arrested. The affidavit also stated that one Major Whitney, a paymaster of the United States Army, at San Francisco, would testify that on or about March 28 affiant, on his return from the Philippine islands as a soldier in the United States Army, was mustered out of the service at San Francisco; that said Whitney at that time paid affiant \$1,875; that the deposition of said Whitney could be obtained, as he was permanently stationed at San Francisco. By these witnesses defendant sought to show that he was on the schooner at the time the murder was charged to have been committed, and also to explain the possession of the money found on his person. But the date named in an indictment for the commission of the *crime of murder is [226] not an essential averment. Proof that the crime was committed days before or days after the date named is no variance. Again, accounting satisfactorily for the money found on his person made no defense. It is not stated in the affidavit that the deceased had money in his possession. There is nothing in the indictment to suggest that he had, and nothing had at that time been disclosed to indicate that the fact that the defendant was in possession of so much

money had any significance in connection with the charge. So that upon this presentation alone it could not be said that an abuse of discretion was clearly shown.

But, further, the government offered the affidavits of several parties, which were received without objection, three of whom testified that they had been soldiers in the United States Army, doing service in the Philippine islands, were convicted of some military offense, and sentenced to imprisonment at Aleatraz island military prison, San Francisco; that when they arrived at the prison, in the fall of 1900, the defendant Hardy was there as a military prisoner; that he was discharged therefrom the latter part of February or the first of March following, and one of them added that the defendant said that he had been sentenced for a term of five years and a forfeiture of all pay and allowances. Another witness, George Aston, testified that he came with the defendant from San Francisco on the schooner Arago; that affiant left the schooner on June 2, and that on June 20 he met the defendant Hardy, who told him that he had left the schooner three or four days after affiant; also that Hardy showed him a roll of paper money which he said was about \$1,200, and added: "You know this is more money than I had when I was on board the Arago." Another witness testified that the defendant told him that he left the schooner the day after the witness Aston. Another, that Hardy made a statement to him, which was afterward reduced to writing and signed by Hardy, that he left the schooner Arago about June 9, but could not tell the exact date. Some of these witnesses also testified to the defendant's being in possession of a gold watch and other articles, which he did not have when on the Arago, and which were afterward shown to [227] have belonged to the deceased, *and also to Hardy's contradictory statements as to how he obtained possession of those articles, statements which in themselves were, to say the least, singular, and tended to create strong doubts as to the truthfulness of his affidavit.

Under these circumstances it seems to us clear that the court did not abuse its discretion in refusing a continuance. It is true the trial was held in a remote part of the nation, and where facilities for securing the attendance of witnesses were not as great as in more thickly settled portions; but it is also true that many of the witnesses for the government were engaged in prospecting, men without settled abodes, and whose attendance at subsequent terms it might have been difficult to secure, and it must have been perfectly obvious to defendant and his counsel that the longer he could postpone the trial the greater the probability of the absence of witnesses against him. It was the right of the court to consider all these matters, and when it appeared clearly from the testimony that some of his statements were false the court might well have concluded that no reliance was to be placed on the others.

186 U. S.

The second assignment of error presented by counsel is that the court erred in permitting the district attorney to propound to juror Hayden the following question: "Q. Have you any such conscientious scruples or opinions as would prevent or preclude you from rendering a verdict of guilty in a case where the penalty prescribed by law is death, upon what is known as circumstantial evidence?" It is insisted that the district attorney should have been compelled to modify the question by striking out the words "where the penalty prescribed by law is death" and insert "where the penalty prescribed by law may be death," and this because of a provision in the statute which permits a jury finding a party guilty of murder in the first degree to add "without capital punishment." We see no objection to the question. The defendant was not prevented from asking the question in the qualified form which is suggested, nor was any question propounded by him ruled out. There was no impropriety in permitting the government to search the mind of the juror to ascertain if his views on circumstantial *evidence were such as to preclude him from [228] finding a verdict of guilty with the extremest penalty which the law allows.

Finally, it is insisted that the court erred in permitting the government to introduce in evidence a statement made by the defendant to one R. H. Whipple, United States commissioner, before whom the preliminary examination was had—a statement reduced to writing and signed by the defendant. Sections 307 to 311 inclusive of chap. 429 (30 Stat. at L. 1319) are relied upon to sustain this assignment of error. Those sections provide that on a preliminary examination, after the government's witnesses have been examined, the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him, that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him, that he is at liberty to waive making a statement, and that such waiver cannot be used against him on the trial; they further provide that if he does waive his right to make a statement a memorandum thereof shall be made by the magistrate, but the fact of the waiver cannot be used at the trial; that if he chooses to make a statement the magistrate must take it in writing, propounding only certain specified questions; that his answer to each of the questions must be read as taken down, and he given liberty to make any corrections that he desires, and that such statement, so reduced to writing, must be authenticated in the following form. It must set forth that the defendant was informed of his rights in respect to making or waiving a statement; it need not contain the questions, but must contain the answers, with the corrections or additions made by the defendant, it may be signed by him, but if he refuses to sign his reason therefor must be stated, as he gives it; and the whole must be signed and certified by the magistrate. The magistrate tes-

tified that before the preliminary examination was commenced the defendant voluntarily and without any suggestion insisted upon making a statement. Whereupon he, the magistrate, informed him that he was entitled to counsel, that he was under no obligations and need not make any statement, but that if he did it would be used against him on the trial, and also that if [229] he waited an opportunity *would be given to him to make a statement at the proper time; that notwithstanding this he insisted on making a statement, and it was then reduced to writing by the clerk of the court and signed and sworn to by the defendant; that after the examination had commenced and the testimony of witnesses for the government had been taken the statutory questions were put to him, and he was advised that he could then make a statement if he desired, but he refused to say anything. Upon this showing the statement was admitted in evidence. The magistrate also testified that after the examination was over and the defendant had been placed in jail the latter sent word that he wanted to talk with him about the case, and in an interview stated orally that his former statement was untrue, and volunteered a different account of the transactions. There was no contradiction of the testimony as to the circumstances under which these two statements—one written and the other oral—were made, except that in reference to the last statement defendant, when on the witness stand, testified that the magistrate “came up to the jail and ordered me to return to his office for the purpose of securing some information to arrest some other fellows, or get some points of me of other parties.” From this testimony it clearly appears that the statements were not made pending the examination or under the provisions of the statute, but voluntarily one before and the other after the examination; that the provision of the statute as to giving him notice pending the examination was complied with, and that at that time he declined to make any statement. So the question is whether voluntary statements made by a defendant before and after a preliminary examination are inadmissible in evidence because made to the magistrate who in fact conducted the preliminary examination. We know of no rule of evidence which excludes such testimony. Of course, statements which are obtained by coercion or threat or promise will be subject to objection. *Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183. But, so far from anything of that kind appearing, the defendant was cautioned that he was under no obligations to make a statement; that it would be used against him if he made one, and that there was a proper time for him to make one if [230] he so desired. *Without even a suggestion, he insisted on making, prior to the examination, a statement which was reduced to writing and by him signed and sworn to, and after the examination was over and he had been placed in jail, he had an interview with the magistrate and volunteered a further

statement. Affirmatively and fully it appears that all that he said in the matter was said voluntarily, without any inducement or influence of any kind being brought to bear upon him. Indeed, it is not claimed by counsel that there was any improper influence, his contention being only that the provisions of the statute with respect to a statement pending an examination were not complied with in respect to these statements. The statements were properly admitted in evidence. These are the only matters called to our attention. No errors appear in them, nor do we perceive any plain error otherwise in the record. The proof of defendant's guilt is clear and satisfactory, and the judgment is affirmed.

JOHN G. JENKINS and One Hundred and Forty Other Stockholders of the First National Bank of Brooklyn, *Plffs. in Err.*,
v.

BARZILLAI G. NEFF, President, and John Drescher, Jr., *et al.*, Assessors, Constituting the Board of Assessors of the City of Brooklyn for the Taxing Year 1897.

(See S. C. Reporter's ed. 230-238.)

Trust companies—powers—error to state court—conclusiveness of findings of fact—state taxation of national banks—discrimination.

1. No power to loan, discount, or purchase commercial paper was given trust companies by N. Y. Laws 1893, chap. 696, authorizing trust companies to exercise the powers conferred on individual banks and bankers by N. Y. Laws 1892, chap. 689, § 55, which provides that such banks and bankers may “take, receive, reserve, and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of 6 per cent per annum; and such interest may be taken in advance.”
2. No new powers were given to trust companies generally by the provision of N. Y. Laws 1892, chap. 689, § 163, that “every trust company incorporated by a special law shall possess the powers of trust companies incorporated under this chapter, and shall be subject to such provisions of this chapter as are not inconsistent with the special laws relating to such specially chartered company.”
3. Findings of fact in state courts are conclusive on a writ of error to such courts from the Supreme Court of the United States.
4. No discrimination against national banks in violation of U. S. Rev. Stat. § 5219, providing that taxation on their shares of stock shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens, is made by the system of taxation prevailing in New York in respect to trust companies, since it must be presumed that if such companies are using their funds in a strictly banking business, under an assumption of powers not in fact conferred by law, the state will take proper steps to

NOTE.—On state taxation of national banks—see notes to *McHenry v. Downer* (Cal.) 45 L. R. A. 737, and *Providence Bank v. Billings*, 7 L. ed. U. S. 939.

keep them within the statutory limits, and a neglect for a limited time to do so cannot be considered as an assent by the state to such an improper assumption of power.

[No. 198.]

Argued March 20, 1902. Decided June 2, 1902.

IN ERROR to the Supreme Court of the State of New York to review an order of that court affirming an assessment of the shares of stock in a national bank, affirmed by the Appellate Division of that Court and by the Court of Appeals. *Affirmed.*

See same case below in Court of Appeals, 163 N. Y. 320, 57 N. E. 408, in Appellate Division, 47 App. Div. 394, 62 N. Y. Supp. 321.

Statement by Mr. Justice **Brewer**:

This case is before us on a writ of error to the supreme court of the state of New York, and is brought to review a final order of that court affirming an assessment of the shares of stock in the First National Bank of Brooklyn. Under the practice prevailing in that state a writ of certiorari [231] was issued *out of the supreme court on August 13, 1897, on the petition of the stockholders of the First National Bank of the city of Brooklyn, now plaintiffs in error, directed to the board of assessors of the city of Brooklyn, requiring them to return all their proceedings relative to the assessment of the shares of stock of said bank. A return having been made the assessment was on October 6, 1899, confirmed, with some modifications not material to the present controversy. This order was affirmed by the appellate division of that court on January 9, 1900. 47 App. Div. 394, 62 N. Y. Supp. 321. On appeal to the court of appeals the order was by that court also affirmed (163 N. Y. 320, 57 N. E. 408), and the record remitted to the supreme court.

Messrs. Seymour D. Thompson and **Frank Harvey Field** argued the cause and filed a brief for plaintiffs in error.

Mr. James McKeen argued the cause, and, with **Mr. George L. Rives** filed a brief for defendants in error.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **Brewer** delivered the opinion of the court:

The right of the state to tax these shares of stock is not denied, but the contention of plaintiffs in error rests on the applicability of that part of § 5219, Rev. Stat. which reads "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." The purpose of this legislation was thus stated in *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 155, 30 L. ed. 895, 901, 7 Sup. Ct. Rep. 826, 835:

"A tax upon the money of individuals, in-
186 U. S.

vested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or *individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

The laws of New York in reference to taxation of the shares of stock in national banks are like those in respect to the taxation of shares of stock in state banks, and there are many of the latter in the state. So it is not suggested that the state makes any discrimination between state banks and national banks, but it is contended that the statutes of New York, in reference to the taxation of trust companies, are essentially different; that these trust companies are practically carrying on a banking business; that an enormous amount of moneyed capital is invested in them, and that as a result not merely a theoretical, but a practical and burdensome, discrimination is made against the moneyed capital invested in national banks. Commenting upon this it was said by Mr. Justice Woodward, delivering the opinion of the appellate division of the supreme court in the case at bar:

"It is conceded on the part of the relators that the stock of the First National Bank was assessed upon the same principle applied in the assessment of the stock of the state banks doing business in their immediate vicinity, and that this was done under the provisions of § 24 of the tax law of 1896. In order to pronounce this provision of the law invalid we must, therefore, convict the legislature, not alone of hostility to the national banks, but of hostility toward its own creations; we must reach the conclusion that the state of New York is, seeking, by an exercise of its taxing power, to advance one class of moneyed corporations at the expense of another, both of which have been created by the legislature, and both of which are engaged, presumptively, in promoting the interests of the people. There are no presumptions in favor of this idea, and there is no evidence in the case to show that any of the state institutions have ever complained of an inequality in taxation."

Further, in *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826, decided in 1887, the New York statutes in reference to the taxation of shares of stock of national banks were challenged on the ground of discrimination in favor of moneyed capital otherwise invested, *and several instances of such investment [233] were called to the attention of the court, among them that of trust companies, and it

received, as stated in the opinion, "separate consideration." It was held that the system of taxation prevailing in respect to them was not such as to vitiate the statutory methods of taxation of the shares of stock in national banks. It must be borne in mind that for a score of years prior to that decision there had been a series of cases coming to this court from different states, principally from New York, involving statutes with reference to state taxation of national banks, and that during these years changes had been going on in the legislation of the different states in order to conform to the rules laid down by this court in its successive opinions.

Counsel for plaintiffs in error insist that that case is not controlling, and for several reasons: One, because two amendments have been made in the legislation of New York, which it is said give full banking powers to trust companies, save in respect to the power of issuing circulating notes. The first is found in chap. 696, Laws of 1893, which added an 11th subdivision to § 156 of the banking law (Laws 1892, chap. 689), and which in terms authorizes trust companies: "11. To exercise the powers conferred on individual banks and bankers by § 55 of this act, subject to the restrictions contained in said section."

Section 55, referred to, provides:

"Every bank and individual banker doing business in this state may take, receive, reserve, and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of 6 per cent per annum; and such interest may be taken in advance, reckoning the days for which the note, bill, or evidence of debt has run."

[234] This legislation simply places trust companies on an equality with banks, whether corporate or individual, in respect to the matter of interest, and does not give to trust companies power to loan, discount, or purchase paper. Whatever powers trust companies had in respect to these matters were given by statutes which were in existence before the decision in *Mercantile Nat. Bank v. New York*. That which was in the mind of the legislature was evidently equality in respect to interest and usury. The doctrine that legislative recognition is equivalent to legislative grant is not pertinent. In order to come within the scope of that doctrine there should be in the language a clear recognition of a corporate entity or corporate power actually existing or claimed to exist. A grant of corporate life or corporate power is not made by implication, and the same rule obtains in respect to the matter of recognition. If the language of the legislature is satisfied, has full scope and effect, without reading into it either a grant or a recognition of corporate life or power, neither will be implied. And here so clear is it that the legislature was not contemplating the grant or recognition of any hitherto unauthorized power to loan, discount, or purchase paper, but had simply the thought of giving equality in the matter

of interest and usury, that it is inadmissible to hold that thereby an additional power, either of loan or discount or purchase, was given to trust companies.

The other change in the legislation referred to is found in § 163 of chapter 689 of the Laws of 1892, which provides that "every trust company incorporated by a special law shall possess the powers of trust companies incorporated under this chapter, and shall be subject to such provisions of this chapter as are not inconsistent with the special laws relating to such specially chartered company." But this gives no new powers to trust companies generally, but simply grants to such companies, incorporated under special laws, the powers of trust companies incorporated under the general statute, and subjects them to the same restrictions, unless inconsistent with their special charters. Clearly, there has been no change in the legislation of New York in respect to the powers of trust companies which calls for any limitation of the decision in *Mercantile Nat. Bank v. New York*.

Again, it is insisted that that case was submitted on an agreed statement of facts which neglected to disclose fully the manner in which trust companies carried on their business, and also that whatever might have been the facts at that time the testimony here presented shows that almost the entire volume of "the business of the trust compa-[235]nies is banking, pure and simple, and but a small fraction of it is the peculiar and ordinary business of trust companies; but that decision rested mainly upon the powers granted by the statutes of New York to trust companies, and it was held that, tested by such powers, they were not in any proper sense of the term banking institutions.

Further, although there is in the record quite an amount of testimony as to the assets and business of trust companies in Brooklyn, yet the case was determined by the supreme and appellate courts of New York upon findings of fact,—which findings do not sustain the contention of plaintiffs in error in this respect,—and it is well settled that the findings of fact in the state courts are on a writ of error conclusive with us. *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922, and cases cited therein; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, ante, 1058, 22 Sup. Ct. Rep. 747. In other words, we apply the law to the facts settled in the state courts, and we do not search the record to see if there be not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion.

Still, again, even if we were to pass beyond the findings of fact, and, searching the record, should be of the opinion that the testimony justified the contention of the plaintiffs in error that trust companies are mainly using their funds in the carrying on of a purely banking business,—and this under an assumption of powers not in fact bestowed by the legislation of the state,—

what effect would such conclusion have upon the question before us? It is to be presumed that if trust or other companies are exercising powers not conferred by law the state will take the proper steps to keep them within their statutory limits, and a neglect for a limited time to do so cannot be considered as an assent by the state to such an improper assumption of power. It is not to be assumed that the state is acting in bad faith; that it has so legislated that upon the face of the statutes a uniform rate of taxation upon all moneyed capital is provided, while at the same time it has designedly placed the grants of some corporate franchises in such form as to permit the use of moneyed capital in certain ways with peculiar and less stringent rates of taxation. Certainly there is nothing in this case to

[236] *indicate any want of good faith on the part of the state of New York. Whatever may have been the practices of trust companies, however much they may in fact have used their funds in a strictly banking business, there is no suspicion of a purpose on the part of the state to discriminate against national banks by permitting trust companies to do a banking business without being subject to the same rate of taxation that is enforced against moneyed capital invested in such banks. Counsel for plaintiffs in error notice several reports of the commissioners of taxes and assessments of the city of New York for years following the commencement of this suit in respect to the relative taxation of banks and trust companies, and it was stated on the argument that, as a consequence, perhaps, of these reports, legislation has been had with a view of correcting any supposed discrimination.

In reference to some other suggested differences between banks and trust companies in respect to the matter of taxation we make a further extract from the opinion of Mr. Justice Woodward, which in general we approve:

"It may not, in view of the importance of this question, be out of place to suggest that the statute under which the trust companies are organized does not compel the capital to be invested in United States bonds; it may be invested in 'bonds and mortgages on unencumbered real property in this state worth at least double the amount loaned thereon, or in the stocks or bonds of this state, or of the United States, or of any county or incorporated city of this state duly authorized by law to be issued.' The Banking Law, Laws of 1892, chap. 689, § 159. If the capital of the trust companies should be invested in bonds and mortgages, or other securities not exempt from taxation, there would be no inequality in the premises; and as they are not allowed the privilege of issuing notes to be circulated as money upon the security of their United States bonds, which is the real justification for the taxation which is assessed upon the shareholders of the national banks, we fail

186 U. S.

to find in the record any evidence of such a discrimination against the national banks as would justify us in holding that the law under which the trust companies operate, and the statutes under which they are taxed, [237] can have the effect of invalidating an otherwise valid statute. The fact that in a given instance, by reason of an exercise of a discretion as to the particular kind of securities purchased, a trust company may have a real or imaginary advantage over investors in the shares of a national bank is not a sufficient foundation for declaring an assessment invalid. It is essential, if the law of the state is to be declared invalid under the limitations expressed in the United States statute, that the enactment of the legislature shall evidence a disposition to evade or override the spirit of the limiting statute; and this is clearly not the case where it provides for equal taxation upon its own state banks, and where it does not require its trust companies, which, it may be conceded, come into a limited competition with the investors in the shares of national banks, to invest their capital in such a way as to necessarily exempt them from taxation upon a portion of their capital stock. If the state refused to allow its trust companies to invest in United States securities there might be a far greater cause for grievance. Trust companies are not organized primarily for banking purposes; they are designed for other purposes, as pointed out in the *Mercantile Bank Case*, and it was never the purpose of the Federal government to interfere with the policy of the state in reference to the formation and development of such corporations as it should judge expedient, even though it should be found necessary to invest them with some of the powers of banking associations as an inducement to perform the other duties and obligations imposed by the state. As was said in the *Mercantile Bank Case* in reference to savings banks, 'however large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation.'

While we have not discussed all the questions raised by counsel in their elaborate brief and argument, we have sufficiently indicated our views upon the general questions involved in the case, and, finding no error, the judgment of the Supreme Court of the State of New York is affirmed. [238]

Mr. Justice Gray did not hear the argument, and took no part in the decision of this case.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY, *Appt.*,

v.

J. FORREST MANNING and Harry E. Rupprecht, Trading as J. Forrest Manning & Company.

(See S. C. Reporter's ed. 238-256.)

Appeal—final decree—statutes — presumption that legislature acted advisedly—legislative regulation of telephone rates—reasonableness of rates.

1. A decree of the court of appeals of the District of Columbia reversing a decree of the supreme court of the District which dissolved a preliminary injunction and dismissed the complaint in a suit to restrain a telephone company from discontinuing its service, and remanding the cause for the entry of a final injunction in the language of the preliminary injunction, with a proviso that it should operate until such time in the future as the telephone company should voluntarily withdraw from business in the District,—is a final decree for the purpose of appeal to the Supreme Court of the United States.
2. Congress will be presumed to have acted advisedly and with full knowledge of the situation, in enacting the provision of the District appropriation act of June 30, 1898 (30 Stat. at L. 525, 538, chap. 540), regulating the rates which a telephone company may charge in the District of Columbia, although the committees appointed by each House to investigate charges for telephone service in the District never completed their work and made no report.
3. Rentals received by a telephone company from private telephone systems installed by it must, together with the expenses thereof, be excluded from consideration in inquiring into the reasonableness of the rates which telephone companies doing business in the District of Columbia are prohibited from exceeding by a provision in the District appro-

priation act of June 30, 1898 (30 Stat. at L. 525, 538, chap. 540).

4. The prohibition against charging or receiving "more than \$50 per annum for the use of a telephone on a separate wire," which is made by the District appropriation act of June 30, 1898 (30 Stat. at L. 525, 538, chap. 540), does not require a telephone company to furnish at that rate such additional equipment as wall cabinet and desk, auxiliary bells, etc., for which separate charges had theretofore been made.

[No. 363.]

Argued March 10, 11, 12, 1902. Decided June 2, 1902.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District dissolving a preliminary injunction and dismissing a complaint in a suit to restrain a telephone company from discontinuing its telephone service, and remanded the case with instructions to enter a decree granting a permanent injunction. *Reversed.*

See same case below, 18 App. D. C. 191.

Statement by Mr. Justice **Brewer**:

On July 14, 1898, the appellees commenced this suit in the supreme court of the District of Columbia, to restrain the defendant from discontinuing its telephone service to them.

Their bill alleged that the defendant was a corporation organized under the laws of the state of New York, and for a long time past engaged in the business of furnishing telephone *exchange service in the District [239] of Columbia; that with the assent and under the direction of the Congress of the United States and the commissioners of the District of Columbia it was occupying the

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

Legislative power to regulate telephone rates.

The power of the legislature to regulate the rates of a telephone company, although the telephone used is covered by a patent from the United States, is sustained in *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201, 5 N. E. 178; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Johnson v. State*, 113 Ind. 143, 15 N. E. 215; *Central U. Teleph. Co. v. State ex rel. Falley*, 118 Ind. 194, 19 N. E. 604.

In *Nebraska Teleph. Co. v. State ex rel. Yeiser*, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171, the power of the legislature to require a telephone company to furnish its telephone service for a reasonable compensation was assumed; but because the legislature had not prescribed the rates the court refused to compel it to furnish service for a specified amount, saying that what was a reasonable compensation was a legislative, and not a judicial, question.

The power of the legislature to regulate telephone rates and to authorize cities to regulate

them is not decided in *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278, 10 S. W. 197, but it is there held that, even if the legislature had such power, it had not conferred it upon the city, and an ordinance limiting the annual charge for use of a telephone was therefore invalid.

So, in *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657, the failure of the legislature to confer the power upon the municipality was fatal to its contention that it might fix maximum telephone charges as a lawful police regulation to prevent extortion.

A telephone company duly incorporated and organized under a statute giving it the right to occupy a city's streets and conduct its business therein cannot be affected by the subsequent adoption by the city of Wis. Rev. Stat. 1898, §§ 940c-940i, prescribing the manner in which franchises shall be granted, pursuant to which it established regulations for the maintenance and operation of a proposed extension of the company's plant and the conduct by it of its business, and prescribed the rates which it might not exceed. *State ex rel. Wisconsin Teleph. Co. v. Sheboygan* (Wis.) 90 N. W. 441.

For an extended discussion of the power of the legislature to fix tolls, rates, and prices, see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 188.

streets, avenues, and alleys of the city of Washington with its conduits and electric wires; that the plaintiffs had a contract with the defendant for such service, terminable by either party upon ten days' notice in writing; that on July 2 they gave notice of their intention to terminate such contract. The bill further alleged the passage by Congress on June 30, 1898, of an act limiting the charges for telephone service; that they desired to continue the use of the telephone service furnished by defendant, and had tendered the amount required to be paid under the act of Congress, but that nevertheless the defendant threatened to remove the telephone and its appliances now in the premises of plaintiffs and to discontinue its telephone service to them.

The defendant answered admitting its incorporation, its business of furnishing telephone service, the passage of the act of Congress, set forth its contract with the complainants and the correspondence in reference to the termination of the contract, and alleged that the act of Congress had no application to any individual desiring telephone service, but only to such service as might be rendered for the public to the District of Columbia; that if it did apply to individuals desiring telephone service the act was beyond the power of Congress, inasmuch as the rates prescribed in it were arbitrary, unjust, unreasonable, and unconscionable, because the service could not be furnished at the rates named therein without an actual loss to the defendant, thus practically working a deprivation of its property and property rights without just compensation or due process of law.

[240] A preliminary injunction was granted restraining the defendant from removing the telephone and its appliances from the premises of plaintiffs or discontinuing its telephone service. Other suits of a similar nature were commenced in the same court by different parties against the telephone company. An order of consolidation of all these suits was entered, but the subsequent proceedings were carried on in this suit, the testimony introduced being also used in the others, and their disposition the same as that made of this. A large volume of testimony was taken, and the case was submitted on pleadings and proofs. On February 28, 1900, a decree was entered dissolving the preliminary injunction and dismissing the bill of complaint, with costs. Mr. Justice Barnard, before whom the case was heard, was of the opinion that the rates fixed by the act were unreasonably low for the service and supplies to which they refer, and that, therefore, the act could not be sustained. An appeal was taken to the court of appeals of the District, which on May 21, 1901, reversed the decree of the supreme court and remanded the case with instructions to enter a decree granting the permanent injunction, as prayed for, but with a single modification. From such decree the case was brought to this court on appeal.

186 U. S.

Messrs. John W. Griggs and A. S. Worthington argued the cause and filed a brief for appellant.

Messrs. Arthur A. Birney and John J. Hemphill argued the cause, and, with Messrs. Henry F. Woodard and Arthur Peter, filed a brief for appellees.

Messrs. Arthur A. Birney, John J. Hemphill, and Henry F. Woodard also filed a supplemental brief for appellees.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice Brewer delivered the opinion of the court:

A preliminary question is whether the decision of the court of appeals is a final decree. We are of opinion that it is. After ordering a reversal of the decree of the supreme court, it adds: "And that this cause be, and the same is hereby, remanded to the said supreme court, for the entry of a decree granting the injunction in conformity with the opinion of this court." The closing sentence of the opinion is as follows: "For the reasons given the decree will be reversed, with costs, and the cause remanded for the entry of a decree granting the injunction in conformity with this opinion." Prior thereto it is stated:

"Congress could not, and did not, undertake to compel the defendant to remain in occupation of the field of operations and carry on business at the imposed rate against its will.

*"If the defendant, convinced that the rate [241] fixed by law is ruinously low, had suspended its business and abandoned all operations within the District, Congress would have no power over it other than to compel it to remove its obstructions from the streets and other public places. Nor would the courts, in such event, have any power to compel the defendant to give its services to any person. But the defendant cannot remain and carry on its former business in defiance of the law. Persisting in its business, it must be regarded by the courts as accepting the condition and coming under obligation to perform its services at the statutory rate. So persisting and at the same time refusing obedience, it is within the judicial power to compel defendant to observe the rate fixed by Congress until such time in the future as it may voluntarily withdraw from business or Congress may relieve.

"According to this view of the defendant's rights and obligations, the preliminary injunction was properly granted, and should have been perpetuated upon final hearing, with the limitation before suggested."

The preliminary injunction, thus referred to by the court of appeals, "ordered, that upon payment by the complainants to the defendant of the sum of \$12.50 as one quarter's rent for the use of the telephone described in their bill, the defendant, its officers, agents, and employees, be, and they are hereby, during the pendency of this suit restrained and enjoined from removing or attempting to remove from the premises of

1145

the complainants described in the bill of complaint the telephone and its appliances by said defendant heretofore placed therein, and from refusing or neglecting to connect the same with other telephones upon being requested so to do, and from neglecting or refusing to furnish telephone-exchange service to the complainants for the said telephone in the same manner as it has heretofore furnished such service."

[242] It thus appears that the court of appeals made a complete disposition of the controversy; that all that was left for the supreme court was the ministerial duty of entering a final injunction in the language of the preliminary order, with the proviso that it should operate until such time in the future as the defendant *should voluntarily withdraw from business in the District. Clearly this was a final decree. *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15, and cases cited in the opinion; *Mower v. Fletcher*, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799.

We pass, therefore, to a consideration of the merits. The legislation of Congress appears as a proviso in the District appropriation act, and is in the following words:

"Provided, That from and after the passage of this act it shall be unlawful for any person or any telephone company doing business in the District of Columbia to charge or receive more than fifty dollars per annum for the use of a telephone on a separate wire; forty dollars for each telephone, there being not more than two on a wire; thirty dollars for each telephone, there being not more than three on a wire, and twenty-five dollars for each telephone, there being four or more on the same wire." 30 Stat. at L. 525, 538, chap. 540.

In its answer defendant pleaded that this legislation "has no application to any individual desiring telephone service, but applies only to such service as may be rendered for the public to the District of Columbia, for the service rendered to said District for fire alarm, police, and other public purposes." This defense is undoubtedly based on the fact that the paragraph in which this proviso is found, entitled "telegraph and telephone service," consists solely of appropriations for salaries and supplies in connection with telegraph and telephone service. As the paragraph, therefore, deals solely with public expenditures, the contention is that the proviso is a qualification of such public expenditures. As said by Mr. Justice Story, in *Minis v. United States*, 15 Pet. 423, 445, 10 L. ed. 791, 799:

"The office of a proviso, generally, is either to accept something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

See also *Austin v. United States*, 155 U. S. 417, 431, 39 L. ed. 206, 211, 15 Sup. Ct. Rep. 167.

While this is the general effect of a proviso, yet in practice it is not always so limited. As said in *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47, '49:

"The general purpose of a proviso, as is [243] well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

In view of the general language of this proviso, it is not strange that appellant has not pressed this defense upon our consideration, and we are informed by counsel for the appellee that it was not called to the attention of the lower courts. We notice it only as leading up to a matter which is now presented. It appears by a stipulation of counsel that on February 1, 1898, while the District of Columbia appropriation act was pending in the House of Representatives, it was amended by adding the proviso in question. The amendment was not reported from any committee. The bill passed the House, February 2, and was thereupon sent to the Senate. On March 2, 1898, the committee on appropriations of the Senate reported the bill back to the Senate, recommending that the proviso be stricken out. This recommendation was rejected by the Senate on March 8, and the bill on that day passed. On the 9th day of March, on account of differences in respect to other parts of the bill, it was sent to a committee of conference. Prior to the passage of the act no investigation or inquiry was made by or at the instance of either House of Congress for the purpose of determining what would be fair and reasonable rates for telephone services in the District of Columbia, except as follows: On February 14, 1898, twelve days after the bill had passed the House and been sent to the Senate, the House adopted a resolution empowering a committee, appointed to investigate gas service in the District of Columbia, to investigate charges *for telephone service. On March 9, [244] the committee began this investigation. On July 8 the committee reported the testimony they had taken, and asked to be continued with full powers and leave to sit in vacation, and report at the next session of Congress. The same day the House adjourned *sine die* without taking any action upon the recommendation of the committee. On February 28, the Senate passed a resolution authorizing the Committee on the District of Columbia to investigate charges for telephone service, and on the 2d of March a

further resolution for the payment of expert accountants and stenographers. Immediately thereafter the committee, by a subcommittee, prepared to enter upon an investigation, and requested an expert accountant to examine the books of the defendant. On the 8th of March, after the Senate had rejected the amendment offered by the committee to strike out the proviso, the committee was discharged from further consideration of the matter. The act passed both Houses and was approved June 30. Now this quotation is made from the opinion in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 220, 10 Sup. Ct. Rep. 462, 467, 702:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States."

And upon it counsel for the company make these observations: "And if the legislature cannot authorize a commission to fix rates without giving the corporations interested an opportunity to be heard, it is hard to see how the legislature itself can do so, not only without giving an opportunity for a hearing, but, as is admitted to be the fact in this case, without making even any *ex parte* investigation."

[245] *But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action. Of course, whether a particular act was passed by Congress does not at all depend upon facts like these. In *Marshall Field & Co. v. Clark*, 143 U. S. 649, 672, 36 L. ed. 294, 303, 12 Sup. Ct. Rep. 495, 497, it was said:

"The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills
186 U. S.

which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable."

But while the conclusiveness of the authentication of the due passage of this act is in no manner impaired by the facts disclosed, yet those facts may be considered in determining what is the meaning and scope of the act. In *Blake v. National City Bank*, 23 Wall. 307, 319, 23 L. ed. 119, 120, where there was a question as to the meaning of a statute containing apparently contradictory provisions, it was said:

"Under these circumstances, we are compelled to ascertain the legislative intention by a recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records, and by giving such construction to the statute as we believe will carry out the intentions of Congress."

Again, in *Platt v. Union P. R. Co.* 99 U. S. 48, 64, 25 L. ed. 424, 429, this rule was laid down:

"But in endeavoring to ascertain what the Congress of 1862 *intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

And again, in *Church of Holy Trinity v. United States*, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511, reference was made to the reports of committees of each House with a view of ascertaining the purpose of Congress in the statute then in question.

So, while we may not infer, from the mere fact that the committees of investigation never completed their work, that Congress acted unadvisedly, yet, as each body authorized a full investigation by a committee, and, before a report was received from such committee, took the action which it did, it is fairly open for consideration whether the general language found in this proviso is not subject to some limitations or qualifications. In other words, Did Congress intend to cover the whole field of telephone service, wherein it was then carrying on an appropriate but unfinished investigation, or was it content with making a limited provision for the present, leaving to future consideration the question of additional legislation? Defendant pleaded that the proviso applied simply to "services rendered for the public to the District of Columbia." But it is difficult to find this limitation suggested by either its terms or its place in the statute. The prohibition is upon any person or any telephone company doing business in the District, and against charging or receiving more than \$50 per annum for the use of a telephone on a separate wire, etc. The language is general, and it is not easy to read in it a qualification or limitation upon the prior portion of the paragraph, to wit, that portion ap-

propriating money for salaries and supplies, no part of such salaries and supplies going to the telephone company.

We pass, then, to inquire whether any other limitation or qualification of the prohibition found in this proviso may fairly be read in its language. And we start with the proposition that it cannot be presumed that a legislature intends any interference with purely private business. It cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, and, [247] therefore, *although the language of a statute may be broad enough to include such private business, it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business Congress could not, if it would, prescribe what shall be charged therefor. In many buildings, both those belonging to the government or the District, and those belonging to private individuals, is what may be called a local telephone plant; that is, an arrangement of telephones by which parties in different rooms can communicate with each other; a system which is not connected with the general telephone exchange, and is no more public in its nature than the speaking tubes or call bells in a building. It is only for the personal use of parties in the building. By it those in the building cannot communicate with the general public, nor can such public reach parties in the building. It is simply a local convenience for the use solely of those who are in the building. Such combinations of telephone instruments in a single building, with no outside connections, are furnished by the defendant, and the rentals therefrom, as well as the expenses thereof, are entered in its books of account, and constitute a part of its business. The mere fact that such telephones are furnished by the company, which also does a public business, does not make them a part of such public business, or subject them to the regulation by Congress of its charges. A railroad company may, if authorized by its charter, carry on, not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation. So, in an inquiry into the reasonableness of the charges imposed by Congress in this legislation, it is essential that the receipts and expenses from such private telephone systems be excluded from consideration. It may be that the trial court did not take these receipts and [248] expenses *into consideration, but we refer to them because they are referred to in the testimony of some of the witnesses, and unless guarded against might be taken into ac-

count in the further investigation of this case.

Again, while a legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations with private capital and for private benefit, the language of such regulations will not be broadened by implication. In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter of the statute. Here the prohibition is against charging or receiving "more than \$50 per annum for the use of a telephone on a separate wire." What kind of a telephone service is contemplated, and how much goes with the telephone? It appears from the testimony that there are two kinds of equipment, one more expensive and more reliable than the other; that some of the company's subscribers are using the cheaper and inferior equipment. Was the statutory limitation of \$50 per annum intended as the limit for the superior or the inferior equipment? It also appears from the testimony that the defendant furnishes to some of its customers, besides the mere telephone, such additional equipment as wall cabinet, desk, auxiliary bells, etc., for which separate charges are made. Doubtless these additional appliances facilitate and tend to make more convenient and easy the business of telephoning, but they are not included in the terms of the statute, and all that is required by its language is the furnishing of the telephone. What equipment and appliances are essential, and what only matters of convenience, may not be clearly shown by the evidence, but obviously there can be no difficulty in securing proof thereof. Suppose, for instance, a legislature should prescribe the rates for the carriage of passengers by a railroad. If the language was limited to the mere transportation of the passengers it would not be held to include accommodations in a sleeper, although such sleeper belonged to the company and was used on its trains. Of course, if the statute in terms prescribed *charges for transportation car- [249] ried on in the manner that it had been carried on, it might include all the conveniences which had been theretofore furnished by the company, but when the statute simply prescribes a rate for transportation it will include only the ordinary and necessary facilities for such transportation, and not those conveniences which make travel more comfortable. So here, if this statute had in terms prescribed that the company should furnish the same conveniences and facilities for carrying on the telephone business that it had been wont to do in the past, it would be held to mean the equipment heretofore used and to include all these auxiliary matters, but when it is limited to the "use of a telephone" the courts cannot extend it beyond its terms and hold the statute to include things not named therein. The order which was directed by the court of appeals

was one restraining and enjoining the defendant from removing from the premises of the complainant "the telephone and its appliances by said defendant heretofore placed therein, and from refusing or neglecting to connect the same with other telephones upon being requested so to do, and from neglecting or refusing to furnish telephone exchange service to the complainants for the said telephone in the same manner as it has heretofore furnished such service." In other words, the decree directed the defendant to furnish, for \$50 per annum, the equipment with all the facilities and appliances which it had theretofore furnished, including, not merely the telephone on the separate wire, but the auxiliary matters heretofore referred to.

It may be that Congress, legislating simply for the use of the telephone, felt that the information it already possessed was sufficient to justify it in prescribing a reasonable charge therefor, at least for the inferior equipment, and did not wait for a full investigation in respect to the value of the use of the best equipment together with all these auxiliary matters. It may be that if all these matters are taken into account, and are within the purview of the statute, the conclusion of the trial judge was right, that no reasonable remuneration was furnished by the rates prescribed, whereas it may be that, excluding them, it will be evident beyond question that the charges pre-

[250] scribed *are reasonable and just. At any rate, the decree as directed by the court of appeals was erroneous and cast a burden upon the defendant to which it was not subjected by the legislation of Congress.

Before closing the opinion, one thing must be referred to. The court of appeals, not entering into any full inquiry as to the reasonableness of the charges, held that Congress had a right to prescribe them, whether reasonable or unreasonable, and that, in fact unreasonable and unremunerative, the only recourse of defendant was to retire from its business. This involves a question of constitutional law of great importance, upon which we at present express no opinion. The future investigation may relieve from any necessity of considering it. At any rate, it is well to have the facts settled before we attempt to determine the applicable law. And the facts should be settled by the trial court.

In *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 179, 44 L. ed. 417, 423, 20 Sup. Ct. Rep. 336, 340, a case involving the validity of railroad rates established by a commission in the state of South Dakota, and in which we found that there had been error in the methods pursued by the trial court for determining the question of reasonableness, we said:

"The question then arises, What disposition of the case shall this court make? Ought we to examine the testimony, find the facts, and from those facts deduce the proper conclusion? It would doubtless be within the competency of this court on an appeal in equity to do this, but we are constrained

to think that it would not (particularly in a case like the present) be the proper course to pursue. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions *are difficult, the interests are [251] vast, and therefore the aid of the trial court should be had."

In *Kansas v. Colorado*, 185 U. S. 125, ante, 838, 22 Sup. Ct. Rep. 552, the questions before us arose on demurrer to the bill. We declined to enter into any determination of the law based upon the allegations of the bill, but overruled the demurrer and required the parties to introduce the testimony in order that the real facts might be presented before any determination was had in respect to the law, saying at the close of the opinion: "The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence." It may be that in this case further evidence may be needed, and, if so, the trial court may provide therefor.

The decree of the Court of Appeals is reversed, and the case remanded to that court, with directions to remand the cause to the Supreme Court of the District of Columbia with instructions to that court to set aside its decree and inquire as to the reasonableness of the rates in the light of the construction we have given to the statute.

Reversed.

Mr. Justice **Gray** and Mr. Justice **Brown** did not hear the argument, and took no part in the decision of this case.

Mr. Justice **White** dissenting:

My dissent is constrained, not alone because of an inability to concur in the reasoning contained in the opinion of the court and the decree based on it, but also because the court has not decided a question which is necessarily involved in the cause, and which it is essential, in my opinion, to dispose of now in order that justice may be adequately administered. The case is this: The act of Congress of 1898 fixed the rate to be charged for telephone service in the District of Columbia. The plaintiff in error, by whom alone the business of affording telephone facilities was carried on in the District of Columbia, refused to comply with the act of Congress. In other words, the corporation, *though it continued to use [252] the public streets and places, without the use of which it could not carry on its business, asserted its right to disregard the act of Congress and to exact from the public

rates largely in excess of the limit fixed by Congress. This the corporation claimed the right to do under the assumption that the rates fixed by Congress, if enforced, would prevent it from reaping adequate remuneration, and hence the result would be the confiscation of its right to use its plant, thereby giving rise to the taking of its property without due process of law. Concerning this proposition, in the trial court, voluminous testimony was introduced, and after an elaborate hearing the court held that the enforcement of the rates fixed by the act of Congress would deprive the company of the right to remuneratively use its plant, and therefore the act of Congress was repugnant to the Constitution. The court of appeals of the District reversed the trial court, and held that it was the duty of the corporation, if it continued in business, to conform to the rates fixed by Congress. In reaching this conclusion the court did not pass on what would be the effect of the rates fixed by Congress if they were put in force, because the court concluded even although the rates established by the act of Congress would prevent the corporation from reaping adequate reward for the use of its plant, nevertheless the corporation was under the obligation, if it continued its business, to comply with the act of Congress. In effect, the court held although the corporation was not bound to continue in the business of furnishing telephone facilities, yet if it elected to do so, and therefore used the public ways and streets, the corporation could not lawfully set at defiance the act of Congress. And, reaching this conclusion, as previously stated, the court found it unnecessary to determine what would be the operation of the rates fixed by Congress, and abstained from so doing. The duty which the court thus held rested upon the company was deduced, not from general considerations, but from the particular relation of the company to the District of Columbia and the express conditions imposed by Congress in granting to the corporation the use of the streets or in legalizing such use.

[253] The finding of the court on this subject was stated in its opinion *as follows, and the accuracy of this statement was not controverted in the argument at bar. The court said:

"Congress has passed no act incorporating the defendant, or giving it license to carry on its business in the District of Columbia.

"The only recognition that it claims is to be found in certain items and clauses of appropriation bills, beginning with that of July, 1888. In that act it was provided, after an appropriation for telephone service, that the Commissioners of the District might authorize the wires of any 'existing telegraph, telephone, or electric-light company now operating in the District of Columbia' to be laid under the streets, alleys, etc., 'wherever in their judgment the public interest may require the exercise of such authority—such privileges as may be granted

hereunder to be revocable *at the will of Congress without compensation.*' 25 Stat. at L. 323, 324, chap. 676.

"An item continuing 'this authority for another term of Congress under the same condition was contained in the act of March 2, 1889. Id. 804.

"The act of August 7, 1894, authorized the erection and use of telephone poles in the public alleys, but the privilege was made subject to revocation at the will of Congress without compensation. 28 Stat. at L. 256, chap. 232.

"The act of March 3, 1897, provided that hereafter no wires shall be strung on any alley pole at a height of less than 50 feet from the ground at the point of attachment to said pole; and it was declared that nothing herein contained shall authorize the erection of any additional pole upon any street, avenue, or reservation.

"The usual condition of revocation *at will without compensation* was again added. 29 Stat. at L. 678, chap. 387."

Now this court, in reversing the decree of the court of appeals, and remanding the case for a new trial, does not consider or decide the only question upon which the court of appeals rested its decree, but, on the contrary, that question is passed by upon the theory that it can be more appropriately decided after a further investigation of the facts to be had on the new trial which the court orders. The action of the court is sustained in *its opinion upon sev-[254] eral propositions. Let me briefly consider them.

1st. As it is shown, there are various kinds of telephone service, some more complete and more expensive than others, and as the act of Congress does not contain a classification and a fixing of rates embracing all classes of such service, therefore it is decided that the case is not in a condition to be now disposed of finally, but must be remanded for a new trial in order that further testimony on this subject may be taken. But this involves a *non sequitur*. Conceding in the fullest degree that there are various kinds of telephone service, some more costly than others, and that the classification of the act of Congress does not embrace all kinds of such service, it is submitted that it should be now decided that the act of Congress applies to that which is customary and reasonable, and as to such customary and reasonable service compliance by the corporation with the act of Congress should be commanded. If it be that the decree below went further than this—which in my opinion it did not—then the decree should not be reversed, but should be modified so as to cause it to conform to the act of Congress, and as thus modified it should be affirmed.

2d. As the court finds that there are certain classes of telephones furnished by the company which are for private use and the charge for which Congress has no power to regulate, and as the court considers the proof as to the revenue derived from this

character of telephone is not clear, therefore it is held the case must be remanded to take testimony on this subject. But the testimony in the record on the subject of these private telephones is as full as it can be made on the new trial. The number of such telephones is shown, the revenue received from them is established, and the influence to be produced upon the result of the rates fixed by Congress by the elimination of charges for such telephones is as clear on this record as it can be made in any record which may hereafter come before us for consideration. It follows then, even under the assumption that the limitation upon the power of Congress as to such telephones be well taken, in my opinion no adequate reason is thereby afforded for not deciding the [255] controversy now presented by the *record. This is said, of course, under the assumption, *arguendo* only, that the rule as to private telephones announced by the court is correct.

But putting out of view all these considerations, and conceding that what has been previously said is erroneous, in my judgment the case ought not to be reversed and remanded without deciding the fundamental question which the cause presents which was decided by the court of appeals, and which, if the view taken by that court be sound, is controlling. Now that question lies at the very threshold of the case. It is wholly independent of, and cannot, in the slightest degree, be influenced by, any further investigation of fact which may be made on the new trial which is now ordered. I do not know how to more aptly illustrate the duty which exists to decide this question than by taking into view the situation as disclosed by this record. Certainly since the act of Congress was passed in 1898 the corporation has, in defiance of that act, continued to use for its benefit the public streets and property, and has in doing so imposed upon the public burdens which the corporation had no right to exact if the act of Congress was lawful. Beyond all question, this condition of things must now continue for a long period of time during the progress of the new trial which the court now orders. Let me suppose that, after the new trial, when the record again comes here, the rates as fixed by Congress will be found to be so low that they will compel the corporation to abandon the use of the public ways, and hence go out of business. What will be the duty of the court then? Will it not be compelled to decide the question which is now left undecided? Let me further assume that then the opinion of this court will be in accord with that expressed on the case now here by the court of appeals. Will it not necessarily follow that the corporation will be held during all the intervening time to have wrongfully violated the act of Congress, and to have unlawfully imposed upon the public? And yet all this wrong and all this abuse which must arise under the hypothesis which has been stated can be absolutely prevented if the 186 U. S.

court now decides the question it will necessarily be called upon to decide hereafter. To me it seems clear that it is no *answer to this [256] proposition to say that it may be, when the case hereafter is presented for decision, the court may conclude that the principle upheld by the court of appeals was erroneous. Concede this, and yet the duty of now deciding the question appears to me to be equally manifest. I submit whatever may be the conclusion as to the correctness of the principle announced by the court of appeals, that principle can never be overthrown upon the theory that there was no power in Congress to deprive the corporation of the use of the public streets and property without compensation, since in unequivocal and express terms the various permissions granted by Congress to the corporation to use the public streets provide in language, leaving no room for construction, that the power was reserved to Congress to revoke at its will and pleasure the right of the corporation to use the streets. It necessarily follows that the view announced by the court of appeals can in any event be disregarded only upon the theory that while power is in Congress to take away the right of the corporation to use the streets without giving it compensation, that an act fixing rates is not the exercise by Congress of such power. But if such be the correct view, then that interpretation, in the interest of a sound administration of the law and for the protection of the public, should be now declared. The reason for this is apparent, because, if such a principle were now announced, admonished by the opinion of this court, Congress will more advisedly be able to exert such further action as will prevent the corporation from using the public property in disregard of law, and save the public from extortion if it results from charging higher rates than those fixed by the law now under consideration.

While I am not authorized to say that Mr. Justice Harlan and Mr. Justice McKenna concur in the reasons which I have just given for my dissent, they request me to state that they also dissent from the opinion and decree of the court.

*MINNEAPOLIS & ST. LOUIS RAILROAD [257]
COMPANY, *Plff. in Err.*,

v.

STATE OF MINNESOTA *ex rel.* RAILROAD & WAREHOUSE COMMISSION.

(See S. C. Reporter's ed. 257-269.)

Constitutional law—regulation of railroad rates—joint through rates—reasonableness of rates.

1. A state legislature may authorize its rail-

NOTE.—On legislative power to fix tolls, rates and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton (Ky.) 33 L. R. A. 177.

On reasonableness of state limitation of railroad rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

road commission to reduce as unreasonable a joint through rate agreed upon by two or more railroads, and apportion the same among the several railroad companies interested.

2. A through rate is not necessarily reasonable because it does not exceed the aggregate of two reasonable local rates.
3. Through rates for hard coal in carload lots from Duluth, Minnesota, to interior points in that state, as fixed by the Minnesota Railroad and Warehouse Commission, are not so unreasonable as to amount to a taking of the property of the railroad without due process of law because, if such rates were applied to all freight, the road would not pay its operating expenses, in which are included interest upon bonds and dividends on stock, where hard coal in carload lots is a comparatively insignificant item of the total freight carried.

[No. 131.]

Argued January 23, 24, 1902. Decided June 2, 1902.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment affirming a judgment of the District Court of Ramsey County of that State which confirmed an order of the Minnesota Railroad and Warehouse Commission fixing railroad rates, and directed the issue of a writ of mandamus to compel compliance with such order. *Affirmed.*

See same case below, 80 Minn. 191, 83 N. W. 60.

Statement by Mr. Justice **Brown**:

This was a petition for a mandamus filed in the district court of Ramsey county by the state, upon the relation of the Railroad and Warehouse Commission, against the Minneapolis & St. Louis Railroad Company and several other railroad companies (the first of which alone answered and sued out this writ of error), to compel such companies to adopt and publish a joint through rate fixed by the commission upon shipments of hard coal in carload lots, from the city of Duluth to certain points in the southern and western parts of the state of Minnesota, and to enjoin them from demanding or receiving any greater sum for such through shipments than that fixed by the commission.

The facts are substantially as follows: The St. Paul & Duluth Railroad Company, a corporation of the state of Minnesota, operates a line of railroad from Duluth upon Lake Superior to the cities of St. Paul and Minneapolis. Its local rate upon hard coal in carload lots from Duluth to these twin cities was \$1.25 per ton, the reasonableness of which local rate is conceded. The Minneapolis & St. Louis Railroad Company, also a corporation of the same state, operates a line of road from St. Paul and Minneapolis southerly through Hopkins, a station 9 miles from Minneapolis, to Albert Lea in said state, thence still southerly to Angus in Boone county, Iowa. At Albert Lea and Angus it connects with other railroads, and by virtue of traffic arrangements has access to

all the principal markets. It also owns and operates a branch line extending from a connection with its main line at Hopkins, westerly 92 miles to Morton, Minnesota, at which point it connects with a railroad owned and operated by the Wisconsin, Minnesota, & Pacific Railroad Company, which extends westerly from Morton to Watertown in South Dakota. Winthrop is a station upon the line of the Minneapolis & St. Louis road between Hopkins and Morton, 60 miles west of Hopkins, and at the time the order of the commission was made the Minneapolis, New Ulm, & Southwestern Railroad had constructed and owned a short line of railroad extending south from Winthrop to New Ulm in Brown county. The capital stock of the last-named company was owned by the Minneapolis & St. Louis Railroad Company; but it was nevertheless a separate and independent corporation.

Both the St. Paul & Duluth Railroad Company and the Minneapolis & St. Louis company are fully equipped to conduct the business of common carriers, have complete track connections and transfer facilities at St. Paul and Minneapolis, and for a long time have been engaged in transporting hard coal in carload lots without change of cars from Duluth to the points upon the line of the Minneapolis and St. Louis road for a joint through rate, which had been established by the mutual agreement* of the com- [259] panies, and which had been divided between them according to that agreement. In dividing earnings under this joint tariff, to which not only the two principal defendants were parties, but the Minneapolis, New Ulm, & Southwestern company, and the Wisconsin, Minnesota, & Pacific company were also parties, there was first set apart to the St. Paul & Duluth company \$1 per ton for transporting the hard coal from Duluth to Minneapolis, the remainder being turned over to one or more of the other three companies participating in the carriage of the coal to its destination.

On September 22, 1898, the Railroad and Warehouse Commission, having resolved to investigate the reasonableness of this joint rate, made an order upon all these railroad companies to answer as to the reasonableness of such rate. The companies duly appeared and took part in the investigation, and on January 19, 1899, the commission made an order whereby it determined that the joint rate then in force for transporting hard coal from Duluth to the several stations west of the twin cities was unreasonable and unjust, and ordered a reduction to another rate found by the commission, which was published and served upon the companies, as required by the state laws, but was disregarded by the railroads interested. Under the rate so fixed the St. Paul & Duluth company was allowed \$1 per ton from Duluth to Minneapolis, which was the same price previously agreed upon between the parties, the remainder to be paid to the Minneapolis & St. Louis company, which was left to settle with the Minneapolis, New Ulm, and the Southwestern and the Wisconsin, Minnesota,

& Pacific companies for services rendered by those companies in the transportation of coal to points upon their respective roads. Neither of the companies filed or posted schedules of the new tariffs as required by law, and the plaintiff in error, the Minneapolis & St. Louis Railroad Company, on March 3, 1899, and six weeks after the commission made its order, withdrew all tariffs on hard coal in earload lots which had been established under agreement with the Duluth road.

[260] Whereupon this proceeding was taken in the district court of Ramsey county to compel the railroad companies to comply with the order of the commission. After trial, judgment was rendered by that court, confirming the order of the commission, directing the issue of a writ of mandamus as prayed; and the judgment so rendered was affirmed upon appeal by the supreme court of Minnesota in *State ex rel. Railroad & Warehouse Commission v. Minneapolis & St. L. R. Co.* 80 Minn. 191, 83 N. W. 60. Whereupon the Minneapolis & St. Louis Railroad Company, against which the full amount of the reduction by the commission was assessed, sued out this writ of error.

Mr. Albert E. Clarke argued the cause and filed a brief for plaintiff in error:

A law which assumes to establish and enforce a tariff which fails to afford and return reasonable compensation violates the Federal Constitution.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 687, 43 L. ed. 860, 19 Sup. Ct. Rep. 565.

A rate which is not productive of revenue sufficient to pay operating expenses, interest upon bonds, and a reasonable dividend upon stock, is unreasonably low and cannot be enforced.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Southern P. Co. v. California Railroad Comrs.* 78 Fed. 236.

The reasonableness of a schedule of rates for local business of a railroad company is to be determined by a comparison between the gross receipts and the cost of doing the business. It must be determined without reference to interstate business or profits derived therefrom.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Smyth v. Ames*, 169 U. S. 467, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Ames v. Union P. R. Co.* 4 Inters. Com. Rep. 835, 64 Fed. 179.

In determining whether a rate is reason-

able, the value of the property employed must be considered.

Smyth v. Ames, 169 U. S. 546, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Ames v. Union P. R. Co.* 4 Inters. Com. Rep. 835, 64 Fed. 177.

The rate per ton per mile fixed by the order of the commission is unjust and discriminative as compared with the reasonable rates charged and collected by other carriers for the same service.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 458, 33 L. ed. 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 687, 43 L. ed. 860, 19 Sup. Ct. Rep. 565.

The law deals with possibilities, not with impossibilities. To determine the exact cost of transporting the few earloads of coal hauled over these divisions is inpracticable and impossible.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 172, 177, 44 L. ed. 420, 422, 20 Sup. Ct. Rep. 336.

It is the duty of the trial court, from the evidence before it, to make a specific finding as to the cost of transacting the business involved in the litigation.

Ibid.

The power to regulate commerce does not include the power to interfere with private contracts.

Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 589, 22 L. ed. 176.

Neither at common law nor under the Interstate Commerce Act can a railroad company be compelled to haul the cars of another company over its line, if it has cars of its own which it desires to use for the transportation of traffic; nor can one carrier be required to advance or assume payment of the freight charges due a preceding carrier. Such matters are regulated by contract.

Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 470, Affirmed in 9 C. C. A. 409, 4 Inters. Com. Rep. 718, 15 U. S. App. 479, 61 Fed. 158.

A court cannot require a railroad company to contract with another carrier engaged in like traffic, for a joint through routing and joint through rate; nor can the court make such a contract for the parties.

Chicago & N. W. R. Co. v. Osborne, 3 C. C. A. 347, 4 Inters. Com. Rep. 257, 10 U. S. App. 430, 52 Fed. 914; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 537, 59 Fed. 400; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 625; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. 559.

A statute like this was held by the supreme court of Nebraska to be violative of the Federal Constitution.

State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co. 46 Neb. 682, 31 L. R. A. 47, 65 N. W. 766.

The doctrine of unlimited power of the state over corporations, their franchises and property, simply because they are created by the state, so frequently and positively affirmed by counsel, has no foundation whatever in the law of the country.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 406.

The right of a citizen to contract, relative to his own business, is both a property right and a right of personal liberty, and cannot be taken away.

Fraser v. People use of School Fund, 141 Ill. 181, 16 L. R. A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 71, 22 L. R. A. 340, 35 N. E. 62; *Harding v. People*, 160 Ill. 465, 32 L. R. A. 445, 43 N. E. 624.

The 14th Amendment to the Federal Constitution secures, not only the right of the citizen to be free from mere physical restraint of his person, but his right to be free in the employment of all his faculties; to use them in all lawful ways; to live and work where he will, and earn his livelihood in any lawful manner; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper, necessary, and essential to carry out the purposes above mentioned. These rights are inalienable.

United States v. Sweeney, 95 Fed. 450; *Allgeyer v. Louisiana*, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427.

A railroad carrier is, as a matter of legal right, entitled to earn and receive some profit upon its invested capital.

Southern P. Co. v. California Railroad Comrs. 78 Fed. 236.

The legal duty of the plaintiff in error is commensurate with its franchise; its franchise is confined to the transaction of business on its own line of road, and cannot be made to extend beyond it.

People ex rel. Hempstead v. Chicago & A. R. Co. 55 Ill. 95, 8 Am. Rep. 631.

The charter includes a contract that the state which grants it will not destroy the value of the carrier's property by compelling it to render service without just and reasonable compensation.

Cleveland Gaslight & Coke Co. v. Cleveland, 71 Fed. 610.

The fact that the plaintiff in error owned the stock of the Minneapolis, New Ulm, & Southwestern Company does not make it responsible for its management.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co.* 39 Fed. 143; *Atchison, T. & S. F. R. Co. v. Cochran*, 43 Kan. 225, 7 L. R. A. 414, 23 Pac. 151; *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.* 23 Minn. 359; *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* 34 L. R. A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 105; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 812.

One carrier cannot be compelled to contract to deliver shipments beyond its own line.

People ex rel. Hempstead v. Chicago & A. R. Co. 55 Ill. 95, 8 Am. Rep. 631.

Mr. Thomas D. O'Brien argued the cause, and, with *Messrs. W. B. Douglas* and *Ira B. Mills*, filed a brief for defendant in error:

It is not only the right, but the duty, of the state to so regulate the rates, charges, and methods of the carrier that for a reasonable compensation the public shall have a safe, efficient, and economical service.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, 171 U. S. 364, 43 L. ed. 198, 18 Sup. Ct. Rep. 888; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Steenerson v. Great Northern R. Co.* 69 Minn. 370, 72 N. W. 713.

We submit that it is the duty of the common carrier to take advantage of every favorable condition, so as to give the public the benefit of just as economical a service as is possible; and where it refuses to do so the state has the right, by proper legislative enactment, to compel it.

Worcester v. Norwich & W. R. Co. 109 Mass. 112.

The state has the power of regulation, in some degree and in some manner, of the business of the carrier.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

The Interstate Commerce Act contains a provision that, where connecting carriers voluntarily enter into joint-traffic arrangements, such joint rate must be reasonable. These provisions give the Interstate Commerce Commission jurisdiction as to such joint rates.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

It is difficult to see any difference in principle between this and compelling two carriers subject to state control to enter into such agreement.

The establishment of a joint through rate which is less than the sum of the two locals is not discrimination.

Chicago & N. W. R. Co. v. Osborne, 3 C. C. A. 347, 4 Inters. Com. Rep. 257, 10 U. S. App. 430, 52 Fed. 912.

The rate fixed by the commission being presumed to be correct, such presumption must be rebutted and overcome by competent evidence. Evidence of bonded indebtedness and of the amount of the capital stock only is not sufficient; the real inquiry is the fair and reasonable value of the property engaged and used in the business of the carrier; and this, together with its

operating and other necessary expenses, is taken as the basis upon which rates can be computed.

Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Mr. Justice **Brown** delivered the opinion of the court:

This case raises two questions: (1) The constitutionality of an act of the legislature of Minnesota passed in 1895, creating a railroad and warehouse commission and defining its duties (the material portions of which are printed in the case of *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115), in so far as it assumes to establish joint through rates or tariffs over the lines of independent connecting railroads, and by virtue of which it assumes to arbitrarily apportion and divide joint earnings; (2) whether the tariff fixed by the commission is wholly inadequate and not compensatory.

1. The constitutionality of the act of 1895 is attacked upon the ground that it authorizes the railway commission of the state to compel two or more railroad companies to enter into a joint tariff, and to make and adopt a joint rate for the transportation of property over the lines of such companies, as well as to make a division and to apportion the joint earnings among the several companies interested. It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable, and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be [261] performed. This argument in its various applications is one which has been addressed to and considered by this court in nearly every case in which the power of the state to regulate railway charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is impossible for the state to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers, and innkeepers; and the whole object of this class of legislation is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum. This legislation may be justified by the fact that these various occupations are necessarily to a certain extent monopolistic in their nature, and that in dealing with customers the parties do not stand upon an equality, the latter being practically compelled to submit to such 186 U. S.

terms as the former may choose to exact, unless the state shall, acting in the interest of the public, elect to interfere and prescribe a maximum of charges.

The argument for the railroad companies in this case assumes that, while the state may interfere as between the railways and their customers, the shippers of freight, it cannot do so as between the railways themselves, by fixing joint tariffs and apportioning such tariffs among the several railways interested in the transportation. The practical result of that argument is this, that if there were within a certain state five connecting roads of 100 miles each in length, which among themselves had established a joint tariff for the whole 500 miles, the state would be powerless to interfere with such tariff, though its right to do so would be unquestioned if the whole 500 miles were owned and operated by a single company. To state such a proposition is practically to answer it. Granting that a state has no right to interfere with the internal economy of a railroad farther than to secure the safety [262] and comfort of passengers, as, for example, to fix the wages of employees or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned.

There is an underlying fallacy in the argument of the railroad company in this connection, that the sum of two reasonable local rates cannot be unreasonable; and, as it is admitted that \$1.25 per ton is a reasonable local rate for transporting coal from Duluth to Minneapolis over the St. Paul & Duluth road, and that the local rates for coal from Minneapolis to the designated stations westward and southward are also reasonable, it is impossible that a through rate from Duluth to the same stations which does not exceed the aggregate of these two rates can be unreasonable. We cannot assent to this proposition. The practice of railways in this country is almost universally to the contrary, and a through tariff is almost always fixed at a less sum than the aggregate of local tariffs between near-by stations upon the same road. Doubtless the fixing of a lower through tariff is dictated largely by a desire of each road to get as much mileage as possible from its patrons, as well as by an effort to meet competition over other lines doing business between the same termini; but in addition to this there is an increased cost of local business over through business in the additional fuel consumed and the increased wear upon the machinery of each train involved in stopping at every station. These facts were noticed by Mr. Justice Brewer in the opinion of the court in *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336, in which he makes the following observations:

"Take a single line of 100 miles, with ten

stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same; but the time taken by the one is greater than that taken by the other. *Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight."

We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several states (*Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700), and that, if the power of the state commission were limited to the tariffs of a single road, it would be wholly inefficacious in a large number, if not in a majority, of cases,—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the state to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis & St. Louis company. It may also be said, in this connection, that in *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, we held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections of other roads for transferring cars from the lines or tracks of one company to those of another, as well as for facilities for the interchange of cars and traffic between their respective lines. The case did not involve the right of the commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion, they are in favor of such right. *See also *Burlington, C. R. & N. R. Co. v. Déy*, 82 Iowa, 312, 338, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98. All that we are required to hold in this case is that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the

legislature as if it related only to transportation over a single line.

2. The more difficult question is that connected with the reasonableness of the rates. The presumption is that the rates fixed by the commission are reasonable, and the burden of proof is upon the railroad companies to show the contrary. *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 173, 44 L. ed. 417, 419, 20 Sup. Ct. Rep. 336. Indeed, the act itself provides, § 3, subdivision C, "the rates established by said commission shall go into effect within ten days, . . . and from and after that time the schedule of rates so established shall be prima facie evidence in all the courts of this state that such rates are reasonable through rates for transportation of freight and cars upon the railroads for which such schedule shall have been fixed."

In fixing the through rates for hard coal in carload lots from Duluth to interior points in Minnesota, the commission set apart to the St. Paul & Duluth company \$1 per ton of the joint tariff, and as this was the same amount which that road had received under the prior arrangement, no question is made as to its reasonableness, and no appeal was taken by that road. The remainder of the joint tariff is paid to the Minneapolis & St. Louis company, plaintiff in error, which was left to settle with the other roads interested in the tariff.

According to the tariff fixed by agreement between the companies prior to the action of the commission a charge was made from Duluth to Hopkins, 9 miles from Minneapolis, of \$1.75, of which \$1 was paid to the St. Paul & Duluth road (160 miles) and the remainder, 75 cents, to the Minneapolis & St. Louis road for a transportation of 9 miles. This rate was gradually increased to stations beyond Hopkins until Norwood, 40 miles from Minneapolis, was reached, where it was fixed at \$2.50. The same rate was retained to Boyd, 153 miles from Minneapolis. This rate of \$2.50 appears to have been a purely arbitrary one, and indicates pretty clearly, as observed by the supreme court, that the defendant was either carrying coal to Boyd at a loss, or was collecting too much tariff per ton on the same article transported to Norwood, although there may have been, as observed by the court, commercial conditions which made them necessary. The commission reduced the rate to Hopkins from \$1.75 to \$1.32, and to Norwood from \$2.50 to \$1.57, gradually increasing that rate to Boyd, where it was fixed at \$2.48, but 2 cents less than that fixed by the joint tariff theretofore agreed upon. The average rate allowed per ton per mile to the Minneapolis & St. Louis road under the tariff so fixed by the commission was 1.115, while the old rate charged for this service was 1.784.

This rate, fixed by the commission only upon hard coal in carload lots, was not met by any showing that at the rates fixed by the commission there would be no profit or an insufficient profit upon the coal so trans-

ported, but by evidence that upon the hard coal received from Duluth for the year ending June 30, 1899, 2,483 tons, the proportion allotted to the Minneapolis & St. Louis company would be \$3,874.50, while if the commission's rates had been in effect for the same rate this proportion would have been \$2,464.78, a loss of revenue for the year of \$1,409.72, as shown more clearly by the following table:

Total tons of hard coal received from Duluth for year ending June 30, 1899	2,583 tons
M. & St. L. R. R. proportion on old rate, 2,583 tons @ \$1.50	\$3,874 50
Had commissioners' rates been in effect for same period, M. & St. L. R. R. proportion would be...	2,464 78

Loss of revenue to M. & St. L.

R. R. for year \$1,409 74

As suggested by the supreme court of the state, this loss seems to be a trifling one when we consider that the total freight earnings on the divisions affected by this order were over \$700,000 for that fiscal year.

[266] *The principal testimony, however, was intended to show that, if the rate fixed by the commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses. But it also appears that if the old rate upon hard coal in carload lots agreed upon by the roads were adopted as an average rate for *all* freights, the freight earnings of the road would have been largely increased. This would indicate that the rate fixed for coal must have been above the average rate, although coal is classified as far below the average.

It is quite evident that this testimony has but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried. It was not even shown that the joint tariff fixed by the roads themselves upon coal was not disproportionately high as compared with rates upon other articles or as gauged by a proper classification. The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots, and that even in proving that the cost of transporting *all* merchandise exceeded the rate fixed by the commission on this coal, the interest upon bonds and dividends upon stock were included in operating expenses. The propriety of the first is at least doubtful, the impropriety of the second is plain. We do not intend, however, to intimate that the road is not entitled to something more than operating expenses. It was shown that coal belongs to one of the lowest classes of freight, and this is particularly true of the coal received from Duluth at Minneapolis, which was delivered at the Minneapolis & St. Louis company upon their tracks at Minneapolis. Besides this, coal in carload lots was a comparatively insignificant item of the total

freight carried, being but 2,583 tons for an entire year. True, it may be difficult to segregate hard coal in carload lots from all other species of freight, and determine the exact cost to the company; but upon the other hand, the commission, in considering a proper reduction upon a certain class of freight, ought not to be embarrassed by any difficulties the *companies may experience in [267] proving that the rates are unreasonably low. The charges for the carriage of freight of different kind are fixed at different rates according to their classification, and this difference, presumably at least, is gauged to some extent by a difference in the cost of transportation, as well as the form, size, and value of the packages and the cost of handling them.

Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, we expressed the opinion (p. 541, L. ed. 847, Sup. Ct. Rep. 432), that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly reserved to the Interstate Commerce Commission by § 4 of that act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we never have decided that the commission may compel such reductions, we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular. As we said in *Smyth v. Ames* (p. 547, L. ed. 849, Sup. Ct. Rep. 434): "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is *entitled [268] to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." The very fact that the commission, while fixing the rate to Boyd at \$2.48, within 2 cents of the amount theretofore charged by the companies themselves, grad-

ually reduced that rate in proportion to the mileage, to Norwood, where it was fixed at \$1.57, while the company charged an arbitrary rate of \$2.50 to Norwood and to all the stations between Norwood and Boyd, tends, at least, to show that the rates were fixed upon a more reasonable principle than that applied by the companies.

In exercising its power of supervising such rates the commission is not bound to reduce the rates upon *all* classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate. It sometimes happens that, for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss; and while it may not be within the power of the commission to compel such a tariff, it would not, upon the other hand, be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders. Each case must be determined by its own considerations, and while the rule stated in *Smyth v. Ames* is undoubtedly sound as a general proposition that the railways are entitled to a fair return upon the capital invested, it might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it.

[269] It is sufficient, however, for the purpose of this case, to say *that the action of the commission in fixing the rate complained of as to this particular class of freight has not been shown to be so unjust or unreasonable as to amount to a taking of property without due process of law, and we therefore conclude that *the judgment of the Supreme Court must be affirmed.*

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *et al.*, *Plffs.*
in Err.,

v.

CITY OF NEW YORK.

(See S. C. Reporter's ed. 269-273.)

Error to state court—Federal question.

1. Assuming that the mere raising of a Fed-

eral question in the brief submitted to a state appellate court is sufficient to invest the Supreme Court of the United States with jurisdiction of a writ of error¹ to such court, under U. S. Rev. Stat. § 709, it must appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon; and such provision must be set forth.

2. A writ of error to a state court must be dismissed where no Federal question was raised in the record, and the case was disposed of in the state courts on a ground wholly independent of a Federal question.

[No. 234.]

Argued April 23, 24, 1902. Decided June 2, 1902.

IN ERROR to the Supreme Court of the State of New York to review a judgment denying a petition to vacate assessments for public improvements, affirmed by the Appellate Division of that Court and by the Court of Appeals. *Dismissed.*

See same case below, in Appellate Division of Supreme Court, 49 App. Div. 281, 63 N. Y. Supp. 52.

Statement by Mr. Justice **Brown**:

This was a petition of the New York Central & Hudson River Railroad Company, as lessee, and the New York & Harlem Railroad Company, as owner, to vacate certain assessments for regulating and grading, setting curbstones, paving, and other improvements to Vanderbilt avenue East, in the city of New York, upon the ground that the property in question had not been, would not be, and could not be, benefited in any manner by the improvements.

The successive steps towards the proposed improvements were the adoption of resolutions by the local municipal legislature, directing the improvements; the ascertainment of their cost; the making of a contract for their construction; and, finally, the assessment of the benefits upon the property, which in one case amounted to \$4,687.82 and in the other to \$12,626.72. Petitioners *filed before the board of assessors objections [270] to both assessments upon the ground that they were unfair, unequal, inequitable, and unjust, and greater than the amounts assessed upon surrounding property. The two proposed assessments with these objections were transmitted by the assessors to the board of revision, which confirmed them.

Thereupon the two railway companies filed this petition, setting up the facts above stated, and alleging that their lands assessed are held and occupied only and exclusively as a roadway upon which their tracks are laid, and over which their trains are run, and that there are no buildings or other improvements upon the land except such railway tracks; that the grade of Vanderbilt

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

avenue is from 10 to 18 feet above the level of petitioners' tracks; that there is no possible access from the land of petitioners to Vanderbilt avenue, but, on the contrary, that the roadway was constructed under a contract between petitioners and the board of public parks, and was depressed to its present grade, and solid stone retaining walls built upon and along the easterly and westerly sides of said land, in order that access to and from public streets and avenues, including that part of Park avenue or Vanderbilt avenue East, should be cut off and rendered impossible, and that no benefit could accrue to petitioners' lands by such improvements.

Petitioners prayed that the assessments might be vacated and the liens upon their lands discharged; but there is nowhere in the petition any claim of a Federal right, or a violation of the Constitution of the United States in any particular.

The case coming on to be heard before a special term of the supreme court, held on July 21, 1899, upon the petition, and testimony taken by consent, it was ordered that the prayer of the petition be denied. The railroad companies thereupon appealed to the appellate division of the supreme court, which affirmed the order of the special term. An appeal was taken to the court of appeals, where the order of the appellate division was affirmed, and the case remitted to the supreme court, which ordered the judgment of the court of appeals to be made the order and judgment of that court. No written opinion was filed by the court of appeals.

[271] *Whereupon the railway companies applied for, and were allowed, a writ of error from this court.

Messrs. **Ira A. Place** and **Thomas Emery** argued the cause and filed a brief for plaintiffs in error:

The case here presented is not of the class wherein it is necessary to the jurisdiction of this court that the complainants shall have directly and specifically set up and claimed a right under the Constitution of the United States.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

From the numerous instances of upholding the jurisdiction of this court by a liberality of construction in no wise required by the case at bar, the following may be cited:

Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; *Proprs. of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Armstrong v. Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Fisk v. Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329.

This is a case wherein the court may properly look to the opinion of the court
186 U. S.

for the grounds upon which the case was decided. The opinion is set forth in the case made for appeal in compliance with legal requirements.

People ex rel. Wallkill Valley R. Co. v. Keator, 101 N. Y. 610, 3 N. E. 903.

The rules of courts are made under special statutory authority, and when made have the force and effect of statutes.

Re Moore, 108 N. Y. 280, 15 N. E. 369; *People ex rel. New York v. Nichols*, 18 Hun, 535.

The certificates of the presiding judge of the appellate division and of the court of appeals respectively, authenticating portions of the printed briefs on behalf of petitioners in those courts respectively, constitute competent authentication of the contentions of petitioners in those courts respecting the constitutionality of the law whereon the judgment of the court was founded.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; *McManus v. O'Sullivan*, 91 U. S. 578, 23 L. ed. 390; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.

Mr. **George L. Sterling** argued the cause, and, with Mr. **George L. Rives**, filed a brief for defendant in error:

The Federal question was not raised at the proper time and in the proper manner below.

Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Eastern Bldg. & L. Asso. v. Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *Zadig v. Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; *F. G. Orley Slave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Kipley v. Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550.

The error must appear on the face of the record.

Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34.

This court must determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under § 709 of the Revised Statutes.

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

To render a Federal question available on writ of error from a state court, it must have been raised in the case before judgment; it cannot be claimed for the first time in a petition for rehearing.

Turner v. Richardson, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295.

Mr. Justice **Brown** delivered the opinion of the court:

Petitioners rely in this case upon the fact that the property assessed consists solely of a roadway through Park avenue or Vanderbilt avenue East, depressed from 10 to 18 feet below the grade of the street, the sides of which depression are held in place, and faced by a retaining wall, surmounted by an iron fence, whereby all access to and from the roadway to the street is rendered impossible, except at the intersection of side streets, where bridges are built for the accommodation of traffic. Their claim is that no possible benefit had, would, or could inure to the benefit of the railway companies by the construction of the proposed improvements; and all the oral testimony tended to show that fact. The roadway was in fact nothing more than a tunnel through the avenue, open at the top, and differed only in that particular from an ordinary railway tunnel or subway wholly beneath the surface. The only evidence to the contrary was the order of the board of assessors and the board of revision making the assessment, presumably founded upon the opinion that some benefit must have accrued to the roads.

The only opinion delivered was that of the appellate division, which held that, under the city charter, there was no power in the court in any event to vacate an assessment for local improvements: that while the court was given power to reduce an assessment, it was deprived of the power to vacate it. "It may correct an error, but it cannot entirely wipe out the assessment itself," although it was intimated that the property owner might still "challenge the validity of the assessment, whenever his property is assessed under it, or it is made the foundation of proceedings against him."

[272] *The difficulty with the position of the railway companies in this court is that no Federal question was raised in their petition,—the only pleading filed by them,—and they are forced to rely upon a copy of their printed brief submitted in the court of appeals, and certified by the chief judge of that court as containing certain matters. The only allusion, however, in this brief to a possible Federal question is that contained in the following extracts:

"Legislative enactment is to be interpreted and construed upon the hypothesis that the legislature has, in its enactments, had due regard for these limitations upon its power, and that interpretation to be given to the language promulgated by it which will render it conformable to, rather than violative of, the rule of state and Federal Constitution.

"If, by prohibiting judicial review, the result of § 962 is to enable the assessors to assess property for local improvements without reference to the benefits conferred upon the property by such improvements, that section is unconstitutional. A statute which authorizes assessments for local improvements, other than in accordance with the benefits conferred, is unconstitutional and void. *Norwood v. Baker*, 172 U. S. 269, 1160

43 L. ed. 443, 19 Sup. Ct. Rep. 187. That case holds that the only principle justifying the levying of assessments for local improvements is 'that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvements.'

Manifestly, this is not such a case of setting up and claiming a Federal right as is required by Rev. Stat. § 709, to invest this court with jurisdiction of a writ of error. In the case of *Zadig v. Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639, the contention that there was a Federal question raised below was contained only in an extract from the closing brief of counsel, presented to the supreme court of the state, in which such Federal question was discussed, and an oral assertion in the argument made to the supreme court of California that a claim under the Federal Constitution was presented. "But manifestly," said the court, "the matters referred to form no part of the record, and are not adequate to create a Federal question, when no such question *was necessarily decided below, [273] and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state."

But assuming without intimating an opinion to that effect, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth. *Porter v. Foley*, 24 How. 415, 16 L. ed. 740; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 289, 20 Sup. Ct. Rep. 205; *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

It is hardly necessary to say that the raising of such a question in the assignments of error in this court is insufficient. Not only was there no Federal question raised in the record, but the appellate division made no allusion to such a question, and dismissed the petition upon the ground that the charter of New York did not permit a question of benefit or no benefit to be raised in such a proceeding,—a ground wholly independent of a Federal question.

The writ of error must therefore be dismissed.

J. HENRIETTA HOFFELD, Executrix of
Rudolph Hoffeld, Deceased, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 273-279.)

Public lands—cancellation of entry—repayment of purchase money—purchaser at execution sale not an assign.

1. A purchaser of the original rights of an en-
186 U. S.

tryman at an execution sale against him or his grantee is not an assign within the meaning of the act of June 16, 1880, § 2 (21 Stat. at L. 287, chap. 244), providing that when for any cause an entry of public lands has been erroneously allowed, and cannot be confirmed, repayment shall be made of the consideration to the entryman "or to his heirs or assigns," upon the surrender of the duplicate receipt and the execution of a relinquishment of all claims to the land, since voluntary assigns only are contemplated by this section.

2. One who seeks to take advantage of the act of June 16, 1880, § 2 (21 Stat. at L. 287, chap. 244), providing for the repayment of purchase money where an entry of public lands has been erroneously allowed and cannot be confirmed, must show himself entitled, not only to the land itself, but to everything which the statute has annexed thereto as an incident.

[No. 318.]

Argued April 16, 1902. Decided June 2, 1902.

ON APPEAL from the Court of Claims to review a judgment dismissing a petition for the repayment of purchase money for coal lands, the entry of which has been canceled. *Affirmed.*

See same case below, 36 Ct. Cl. 26.

Statement by Mr. Justice **Brown**:

This was a petition of J. Henrietta Hoffeld, executrix of the estate of Rudolph Hoffeld, deceased, for the repayment to her *by [274] the United States, under the act of June 16, 1880 (21 Stat. at L. 287, chap. 244), of the purchase money for 160 acres of coal lands, the entry of which had been canceled by the Commissioner of the General Land Office on January 27, 1895, over eight years after the purchase was made, and more than seven years after Hoffeld had bought the land.

The purchase from the United States was originally made by other parties for a consideration of \$3,200. These parties had conveyed the lands to the Ohio Creek Anthracite Coal Company, against which company a judgment had been obtained, and a sale made November 10, 1887, to Rudolph Hoffeld, purchaser under the execution. Petitioner was his executrix. Several years after the sale the Commissioner of the General Land Office found that an error had been committed, in the allowance of the original entry upon the affidavit of an attorney, in the absence of the original entrymen. He thereupon exacted an affidavit of these entrymen, but as two out of the four were dead, and the other two could not be found, it was impossible to comply with the requirement of the Commissioner, who canceled the purchase, as above stated.

The court of claims made a finding of facts substantially as above stated, and decided, as a conclusion of law upon such facts, that the claimant had no right to recover, and the petition was therefore dismissed.

Mr. Robert Andrews argued the cause and filed a brief for appellant:

After entry made, the United States parts
186 U. S.

with the complete title to the land included therein, which vests in the entryman.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 361, 33 L. ed. 365, 10 Sup. Ct. Rep. 112; *Carroll v. Safford*, 3 How. 460, 11 L. ed. 680; *Witherspoon v. Duncan*, 4 Wall. 219, 18 L. ed. 343; *Deffeback v. Harke*, 115 U. S. 405, 29 L. ed. 427, 6 Sup. Ct. Rep. 95.

The entryman, having complete title to and ownership of the land included in his entry, has a right to transfer or assign it before the patent is issued.

Myers v. Croft, 13 Wall. 291, 20 L. ed. 562.

His title to and property in the land can be sold under an execution.

Landes v. Brant, 10 How. 371, 13 L. ed. 459.

The word "assigns" in said act means grantees of the land.

Edwards v. Darby, 12 Wheat. 210, 6 L. ed. 604; *United States v. Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; *Robertson v. Downing*, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; *United States v. Healey*, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247. See also *Ely v. State Land-Office Comrs.* 49 Mich. 21, 12 N. W. 893, 13 N. W. 784.

The fact that an entryman has complete title to the land, that he has a right to sell it before patent, and that the purchaser or assign is entitled to repayment, clearly give the right of repayment to a purchaser at a judicial sale. Land included in an entry is the subject of sale under an execution.

Landes v. Brant, 10 How. 371, 13 L. ed. 459.

The land being subject to execution sale, all estate therein was transferred to Hoffeld by operation of law.

Remington v. Linthicum, 14 Pet. 92, 10 L. ed. 368.

Not only the land, but all covenants of title, passed to him by the sheriff's deed.

Rorer, *Judicial Sales*, § 777.

A purchaser at a judicial sale of land before patent has been issued acquires the same title he would acquire by a quitclaim deed from the judgment debtor.

Landes v. Brant, 10 How. 371, 13 L. ed. 459.

The words "transfer or assign" are broad enough in meaning to include an assignment by operation of law, as well as by the act of the party, unless from the purpose of the act a different meaning can be gathered.

Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229.

There is no authority to import into this statute the word "voluntary."

Newhall v. Sanger, 92 U. S. 765, 23 L. ed. 770.

Mr. George Hines Gorman argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellee:

The purchaser at judicial sale takes what the sheriff has a right to sell, and nothing

more. And of this he is charged with full notice, under the doctrine of *caveat emptor*.

Waples v. United States, 110 U. S. 630, 28 L. ed. 272, 4 Sup. Ct. Rep. 225; *Burbank v. Conrad*, 96 U. S. 291, 24 L. ed. 731.

A judgment is not an assignment, because an assignment requires the act of a party, and a judgment is a mere act of law.

Breading v. Boggs, 20 Pa. 33; *Doe ex dem. Goodbehere v. Bevan*, 3 Maule & S. 353.

Language used in a statute, although apparently general and unlimited may, and must be limited in its operation and effect, where it may be gathered, from the object and purpose of the whole statute, that the language used was designed to apply to certain persons or things, or was to operate only under certain conditions, or to be enforced only by certain officers.

McKee v. United States, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92; *Brewer v. Blougher*, 14 Pet. 198, 10 L. ed. 417; *United States v. Saunders*, 22 Wall. 492, 22 L. ed. 736; *Murray v. Gibson*, 15 How. 421, 14 L. ed. 755.

Mr. Justice **Brown** delivered the opinion of the court:

This case depends upon the construction given to § 2 of the act of June 16, 1880 (21 Stat. at L. 287, chap. 244), which reads as follows:

"In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or [275] where, from any *cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

In the case under consideration, the entry had been made May 28, 1886, by Harry Jones, J. L. Cole, Charles L. Weaver, and Samy Perri, through William Hinds, acting in their behalf under a power of attorney, paying therefor to the United States the sum of \$3,200. Section 32 of the coal land regulations requires the entryman to certify in an affidavit that he makes the entry in his own right and for his own benefit, and not for the benefit of any other person. This affidavit was not made by the entrymen themselves, but by Hinds, as their attorney in fact. It was held to be insufficient by the General Land Office, and the local land offices were required to notify the claimants to that effect, and to require a new affidavit. Owing to the death of two of the entrymen and the impossibility of finding the two others, the affidavit could not be procured, and the entry was canceled by the Land Office, January 24, 1895. Pre-

viously thereto, and on May 29, 1886, the entrymen had conveyed the land to the Ohio Creek Anthracite Coal Company, against whom a writ of attachment was issued, a judgment obtained, and an execution issued, levied upon this tract of land, which was sold by the sheriff to Rudolph Hoffeld for the sum of \$75, and on January 10, 1897, Hoffeld made application for repayment of the purchase money under the provisions of the above act.

The act requires that where, from any cause, the entry has been erroneously allowed and cannot be confirmed, repayment shall be made of the consideration to the entryman, or to his heirs or assigns, and the only question for our consideration is, whether the purchaser of the original rights of an entryman at an execution sale against him or his grantee can be said to be an "assign" within the meaning of the act.

*"Assigns," or, as the word is more com-[276] monly spelled, "assignees," are of two classes, depending upon the manner of their creation: first, voluntary assigns, who are created by act of the parties; and, second, assignees created by operation of law. Whether in a given case an assignee belongs to the first or second class depends upon the purpose for which he was created, the object to be attained by his creation, and the language of the statute or other instrument from which he derives his powers. A voluntary assignee is ordinarily invested with all the rights which his assignor possessed, with respect to the property; while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoyment of the things assigned. A voluntary assignee takes the property with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration, may claim all the rights of a bona fide purchaser with respect thereto. Upon the other hand, an assignee by operation of law, as, for instance, a purchaser at a judicial sale, takes only such title as the execution debtor possessed at the time of sale. *The Monte Allegre*, 9 Wheat. 616, 6 L. ed. 174. The doctrine of *caveat emptor* applies in all its rigor, and the buyer cannot set up the rights of a bona fide purchaser, even against an unrecorded deed. Thus, in *Burbank v. Conrad*, 96 U. S. 291, 24 L. ed. 731, it was said of property condemned and sold as enemies' property under the confiscation act, that "the United States acquired by the decree, for the life of the offender, only the estate which at the time of the seizure he actually possessed; not what he may have appeared from the public records to possess, by reasons of the omission of his vendees to record the act of sale to them; and that estate, whatever it was, for that period passed by the marshal's sale and deed; nothing more and nothing less. The registry act was not intended to protect the United States in the exercise of their power of confiscation from the consequences of previous unrecorded sales of the alleged offender." It was held in connection with the same

transaction that the purchaser was not even entitled to a return of his purchase money. *Waples v. United States*, 110 U. S. 630, 28 L. ed. 272, 4 Sup. Ct. Rep. 225.

[277] The case of *The City of Norwich*, 118 U. S. 468, *sub nom. Place v. Norwich & N. Y. Transp. Co.* 30 L. ed. 134, 6 Sup. Ct. Rep. 1150, though *arising under the maritime law, is pertinent in this connection. This was a petition under the limited liability act (Rev. Stat. § 4285), which declares that if the owner of a vessel elect to take the benefit of the act, it shall be a sufficient compliance with the law "if he shall transfer his interest in such vessel and freight, for the benefit of the claimants, to a trustee," who becomes in reality an assignee for the benefit of creditors under the act. It was held that the word "interest" was intended to refer to the extent or amount of ownership which the party had in the vessel and freight, and that whatever the extent or character of his ownership might be, the amount or value of that interest was to be the measure of his liability. It was also held that his transfer of such interest under the law did not operate as an assignment of his insurance upon the vessel, which was a collateral contract, personal to the insured, but not conferring upon him any interest in the property; in other words, the contract of insurance does not attach itself to the thing insured or go with it when it is transferred. See cases cited 118 U. S. 494, 30 L. ed. 144, 6 Sup. Ct. Rep. 1157.

Upon the other hand, an assignee by operation of law may, under certain circumstances, have greater rights than a voluntary assignee. Thus in *Erwin v. United States*, 97 U. S. 392, 24 L. ed. 1065, it was held that the act of February 26, 1853 (Rev. Stat. § 3477), nullifying and avoiding all transfers and assignments of any claim upon the United States, applied only to cases of voluntary assignments of demands against the government, and that it did not embrace cases where there had been a transfer of title by operation of law. "The passing of claims to heirs, devisees, or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the court of claims."

In *Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229, this doctrine was applied to a general assignment for the benefit of creditors.

Referring now to the statute of June 6, 1880 (21 Stat. at L. 287, chap. 244), we find that its requirements are, first, that the entry must have been canceled for conflict, or from some cause must have been erroneously allowed; second, that repayment must be made to the person who made the entry, [278] or to his heirs or assigns; *and, third, that such repayment should only be made upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to the land. The last requirement is strong evidence tending to show that voluntary assigns are only contemplated by the 186 U. S.

act, as they would naturally take the receipt with the deed of the land and be in a condition to relinquish all claims thereto, while an assign by operation of law would have no means of compelling a delivery of the receipt to him. The purchaser at an execution sale would only take the actual title of the owner to the land itself, unaccompanied by any collateral claims or rights incident to the acquisition of the land. In this respect he stands much as an assignee under the limited liability act, who, as above stated, takes the interest of the owner in the vessel and freight, but not his interest in a collateral contract of insurance. The contract evidenced by the statute is really a contract of indemnity, and provides, much like a policy of insurance, that if the owner lose his property he shall recover what he paid for it. We see no reason why the general rule above stated, that a contract of insurance does not accompany a transfer of the thing insured, does not apply to this statute.

It will be readily seen that complicated questions might arise in case the entryman should make a voluntary conveyance of the land accompanied by a surrender of his duplicate receipt, or should assign his receipt to another than the execution purchaser. The requirement that the receipt shall be surrendered is as peremptory as the requirement that the person demanding repayment shall be an heir or assign of the original entryman. The petition in this case contains no averment of petitioner's readiness to surrender the duplicate receipt, or any excuse for a failure to do so, but simply sets forth the title of Rudolph Hoffeld as purchaser under an execution sale upon the judgment against the Ohio Creek Anthracite Coal Company, although the court finds as a fact that it appeared from an affidavit that the duplicate receipt had been destroyed by fire. As bearing upon the equities of the case it is pertinent to remark that Hoffeld bought the property in question for a recited consideration of \$75, but that under the statute he claims the whole *sum [279] of \$3,200 which was paid to the United States at the original entry of the land. He thus by an expenditure of \$75 recovers \$3,200, while neither the original entrymen who paid the \$3,200 nor their assignee, the coal company, recover anything. Inasmuch as, in the absence of a statute, there could be no recovery of the purchase money (*Waples v. United States*, 110 U. S. 630, 28 L. ed. 272, 4 Sup. Ct. Rep. 225), one who seeks to take advantage of it must bring himself clearly within its equity, as well as within its letter, and must show himself entitled, not only to the land itself, but to everything which the statute has annexed thereto as an incident. The right to a return of the purchase money is in no sense an incident to the land, and did not pass to the purchaser upon the sale under the execution.

On the whole we are of opinion that the petitioner has not shown herself an assign of the original entryman or otherwise en-

titled herself to the benefit of the statute, and the judgment of the Court of Claims dismissing her petition is therefore affirmed.

PINE RIVER LOGGING & IMPROVEMENT COMPANY *et al.*, *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 279-297.)

Appeal—objections not raised below—contracts—for removal of timber from Indian reservation—construction—variation in designated quantity by use of “about” or “more or less”—effect of approval of government agent—measure of damages for unlawful removal—evidence—costs—in civil suits brought by United States—fees for transcript used by party in preparing bill of exceptions.

1. An objection that there was no evidence to support a joint action against all the defendants, or that, if there was evidence on this question, it should have been submitted to the jury, is not available in the Supreme Court of the United States on writ of error to a circuit court of appeals, where it was not raised either in that court or in the trial court.
2. Contracts to cut and deliver a certain quantity of dead and down timber do not authorize the cutting of a large excess over the quantity mentioned, because of the use of the words “about” or “more or less” in designating such quantity.
3. Contracts with individual Indians for the cutting and delivery of a designated quantity of dead and down timber on an Indian reservation will not be construed as authorizing the removal of all timber of that character on the reservation because such construction was put upon the contracts by the parties interested, and was approved by the government agent under whose superintendence the work under the contracts was done, since such a construction would be inconsistent with the regulations prescribed by the President under the authority of the act of February 16, 1889 (25 Stat. at L. 673, chap. 172), for the disposal of dead and down timber from Indian reservations, the design of which, as interpreted by such regulations, was to permit every deserving Indian not otherwise employed to engage in the work.
4. The value of the logs when delivered is the measure of damages recoverable by the United States from persons who have knowingly purchased timber which was unlawfully removed from Indian reservations, and not the value to the government of the timber before any labor was expended upon it.
5. That portion of the stipulated compensation for timber to be cut and delivered by individual Indians from the Indian reservation, which was paid by the vendees, as agreed, to the Indian Department for the poor fund of the tribe, will not be deducted from the damages recoverable by the United States from such vendees for the conversion

of so much of the timber as was unlawfully removed from the reservation.

6. The exclusion of a telegram and a letter from officials in the United States Land Office, to the effect that the commissioner had accepted a bond in lieu of logs alleged to have been unlawfully removed from an Indian reservation, and that such logs would be or had been released, is not error where neither the telegram nor the letter adds anything to the inferences to be derived from the face of the bond.
7. Evidence tending to show the amount of dead and down timber on an Indian reservation is not material in an action by the United States against the vendees of such timber under contracts entered into with individual Indians, with the approval of the Commissioner of Indian Affairs, to recover damages for the conversion of so much of the timber as was cut and delivered in excess of the amount designated in such contracts.
8. Unsuccessful defendants in a civil suit brought by the United States are liable for costs.
9. Fees for a transcript of record used by a party in preparing a bill of exceptions for an appeal to the circuit court of appeals are not taxable as costs, either under U. S. Rev. Stat. § 983, authorizing the taxing of “lawful fees for exemplifications and copies of papers necessarily obtained for use,” or by rule 31, subd. 3, of the circuit court of appeals, providing that the cost of the transcript of the record from the court below shall be taxable as costs.

[No. 250.]

Argued May 1, 2, 1902. Decided June 2, 1902.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Minnesota entered upon a directed verdict in favor of the United States in an action to recover damages for a conversion of timber on an Indian reservation. Reduced, and as reduced affirmed.

See same case below, 44 C. C. A. 685, 105 Fed. 1004.

Statement by Mr. Justice **Brown**:

*This was an action in the nature of trover [280] begun in the circuit court for the district of Minnesota by the United States against the Pine River Logging & Improvement Company, a corporation (hereinafter called the logging company), Joel B. Bassett, and William L. Bassett, copartners under the name of J. B. Bassett & Co., and John L. Pillsbury (for whom his administrators have since been substituted) and Charles A. Smith, copartners as C. A. Smith & Co., defendants, to recover damages for an alleged wrongful entry by the defendants upon an Indian reservation, and the cutting and removing of certain pine timber thereon.

The complaint, which contains nine counts, charges, in substance, that nine different parties did, with the consent and at the request of defendants, wrongfully enter upon certain lands of the United States

NOTE.—On the measure of damages for injury to, or destruction of trees—see note to *Bailey v. Chicago, M. & St. P. R. Co.* (S. D.) 19 L. R. A. 653.

known as the Mississippi Indian reservation, and at the special instance and request of the defendants fell and cut into logs certain pine trees, which they *delivered to the [281] defendants, who thereupon caused the logs to be floated down the river to the city of Minneapolis, to be there manufactured into lumber, which they had subsequently sold and appropriated the proceeds thereof to their own use.

The answers filed by the defendants, the logging company, and the Bassetts allege in substance the following facts: That the logs referred to were cut under and by virtue of certain contracts which had been entered into with individual Chippewa Indians for the cutting of dead and down timber found on the reservation; that said contracts had been executed in pursuance of an act of Congress, approved February 16, 1889 (25 Stat. at L. 673, chap. 172), in relation to the cutting of timber on Indian lands; that payment for the logs so cut and removed had been made in full to the United States, and to the proper Indian agent, in accordance with the provisions of said contracts; that said logs were so cut by the Indians and delivered to and accepted by the defendants in good faith, in the honest belief that said logs had been lawfully cut under their contracts from dead and down timber, and that defendants were entitled to the same and became owners thereof upon the delivery of the logs and upon making the aforesaid payments; that after the logs had been delivered to the defendants and before they were floated down the river to Minneapolis the United States, through its proper officer, had seized and taken possession of the logs, claiming that they were cut from green and growing timber, and not from dead or down timber; that thereafter, for the purpose of preserving said logs and realizing their full value for the party who should ultimately be determined to be the owner, a contract was entered into between the United States on the one hand and the logging company and J. B. Bassett on the other, which provided, in substance, that the defendants might drive the logs to Minneapolis without affecting the possession of the United States or the interest of any of the parties in the logs, and that after they had been driven to Minneapolis the defendants executed and delivered to the plaintiff a bond conditioned to pay any judgment that might be rendered against the defendants by the United States on account of the cutting of their logs. One of these bonds was executed [282] by the logging company *as principal, and the other by the firm of J. B. Bassett & Co. It was next set up in the answer of the logging company that the United States had accepted the bond in lieu of the logs, and that, relying upon said acts of the complainant, the logging company had disposed of the logs to others. It was then again specifically set up in the answer, as to the 4th, 5th and 8th counts of the complaint, that the claim of the United States was solely against J. B. Bassett & Co., and not against the logging company; that the claim set up in the

1st, 2d, 3d, 5th, and 6th counts was solely against the logging company, and that there was therefore a misjoinder of causes of action in improperly uniting in one complaint causes affecting solely the logging company and other causes of action affecting solely the firm of J. B. Bassett & Co.

A separate answer was filed by the firm of C. A. Smith & Co., who admitted receiving from the logging company a certain amount of the pine saw logs described in the complaint, and that they manufactured the same into lumber, and disposed of it in the ordinary course of their business; that the amount of the lumber so manufactured was 15,628 feet, and that the value of the same was not greater than the sum of \$132.84; that the defendants in receiving and manufacturing said logs honestly believed that the logging company was the owner and entitled to dispose of them. They also pleaded a misjoinder and nonliability for the acts of the other defendants.

The answer of the logging company admitted, in substance, that, under and by virtue of the three contracts between itself and the Indians, it had received into its possession, converted into lumber, and ultimately sold pine saw logs, cut upon Indian reservations, which had yielded in the aggregate 13,463,400 feet. The defendants, J. B. Bassett & Co., likewise admitted that under two contracts with the Indians they had received saw logs which had yielded in the aggregate 4,136,860 feet of lumber.

The United States demurred to parts of these answers, and replied to other parts, admitting that the logging company and Bassett & Co. had each entered into contracts with certain Indians, but averred that all the logs cut under some of the *con- [283] tracts and a large portion of the logs cut under other contracts were cut from pine trees that were alive and standing, while the contracts authorized only the cutting of dead and down timber.

The case being at issue upon these pleadings, the logging company and Bassett & Co. moved for a judgment against the government upon the pleadings for the sole reason, as stated in the motion, that on the facts admitted the plaintiff was not entitled to maintain an action of trover or conversion against these defendants, or either of them, for the matters and things set out in said cause of action; but that the remedy of the government was upon the bonds given when the logs were surrendered to the defendants. This motion was sustained by the circuit court, and a judgment entered against the United States, which, however, was reversed by the court of appeals, holding that neither of the bonds became available to the United States until a judgment had been obtained in its favor. The case was remanded for a new trial. 24 C. C. A. 101, 49 U. S. App. 24, 78 Fed. 319.

Upon the case being sent back to the circuit court there was a second trial, which also resulted in a judgment in favor of the defendants. The court of appeals reversed this judgment upon exceptions taken by the

United States at the trial. 32 C. C. A. 406, 61 U. S. App. 69, 89 Fed. 907.

A third trial of the ease resulted in a verdict, by direction of the court, in favor of the United States for \$88,269.94. This judgment was affirmed by the circuit court of appeals. Whereupon a writ of error was sued out from this court.

Mr. A. S. Worthington argued the cause and filed a brief for plaintiffs in error:

Where both of the parties to a contract have given it by their subsequent conduct a construction different from that which the law might have given it, the courts will adopt that construction.

Steinbach v. Stewart, 11 Wall. 576, 20 L. ed. 58; *Brooklyn L. Ins. Co. v. Dutcher*, 95 U. S. 273, 24 L. ed. 411; *Topliff v. Topliff*, 122 U. S. 131, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1057; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; *Chicago v. Sheldon*, 9 Wall. 54, 19 L. ed. 596; *District of Columbia v. Gallaher*, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585.

The modern authorities seem to lean to the doctrine that one whose property has been taken by another without fraud, force, or malice is entitled to recover only what he has lost.

Cobbey, Replevin, § 910; *Wells, Replevin*, § 617; *Durant Min. Co. v. Percy Consol. Min. Co.* 35 C. C. A. 252, 93 Fed. 166.

The proper measure of damages where the defendant has taken timber from the land of another, under the mistaken belief that he had the right to do so, is the value of the standing timber to the owner as such.

Whitney v. Huntington, 37 Minn. 197, 33 N. W. 561; *Foote v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151; *Jegon v. Vivian*, L. R. 6 Ch. 742; *King v. Merriman*, 38 Minn. 47, 35 N. W. 570.

In the courts of the United States, costs are governed by the Federal statute, and not by state laws or the practice of state courts.

O'Neil v. Kansas City, S. & M. R. Co. 31 Fed. 663; *United States v. Treadwell*, 15 Fed. 532; *Tesla Electric Co. v. Scott*, 101 Fed. 524.

There are various statutes regulating the taxation of costs, when the United States is a party, in particular classes of cases.

United States v. Harmon, 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327; *Carlisle v. Cooper*, 12 C. C. A. 235, 26 U. S. App. 240, 64 Fed. 472; *United States v. Davis*, 4 C. C. A. 251, 12 U. S. App. 47, 54 Fed. 147; *Marine v. Lyon*, 10 C. C. A. 315, 8 U. S. App. 573, 62 Fed. 153.

But, so far as we are aware, there is not and never has been a statutory provision specifically regulating the taxation of costs between the United States and an adverse litigant in a case similar to that at bar.

It is said that at common law the sovereign shall neither pay nor receive costs.

3 Bl. Com. 400; 1 Chitty, Crim. Law, 825.

In the absence of a permissive statute no costs can be taxed against the sovereign.

United States v. La Vengeance, 3 Dall. 301, 1 L. ed. 611; *United States v. Barker*, 2 Wheat. 395, 4 L. ed. 271; *United States v. Hooe*, 3 Cranch, 73, 2 L. ed. 370; *United States v. Ringgold*, 8 Pet. 150, 8 L. ed. 899; *United States v. McLeomore*, 4 How. 286, 11 L. ed. 977; *United States v. Boyd*, 5 How. 29, 12 L. ed. 36; *The Antelope*, 12 Wheat. 550, 6 L. ed. 725; *People v. Pierce*, 6 Ill. 553; *People use of Trustees of Schools v. Yeazel*, 84 Ill. 539; *People ex rel. Metcalf v. Auditor General*, 38 Mich. 94; *Aplin v. Baker*, 84 Mich. 113, 47 N. W. 515; *State v. Harrington*, 2 Tyler (Vt.) 44; *Swan v. Colfax*, 2 Tyler (Vt.) 258; *State v. Kinne*, 41 N. H. 238; *State v. Stearns*, 31 N. H. 106; *State v. Webster*, 8 Me. 105; *Com. v. Todd*, 9 Bush. 708; *Collier v. Powell*, 23 Ala. 579; *Stephens v. State*, 47 Ala. 696; *State use of Charlotte Hall School v. Greenwell*, 4 Gill & J. 407; *State v. Taylor*, 34 La. Ann. 978; *State ex rel. Leeche v. Waggner*, 42 La. Ann. 54, 8 So. 209; *People v. Cloud*, 50 Ill. 439.

When the state goes into a court of justice as a suitor to obtain a judicial remedy, it is subject to the same rules, and is to the same extent bound to respect the judgment, as parties are in the case of litigation between private persons.

Buchanan v. Knoxville & O. R. Co. 18 C. C. A. 122, 37 U. S. App. 499, 71 Fed. 324; *State ex rel. Lewis v. Dennis*, 39 Kan. 516, 18 Pac. 723; *People v. Brandreth*, 36 N. Y. 196; *United States v. Ingate*, 48 Fed. 251. See also *Brent v. Bank of Washington*, 10 Pet. 615, 9 L. ed. 555; *United States v. Speed*, 8 Wall. 77, 19 L. ed. 449; *United States v. Southern Colorado Coal & Town Co.* 18 Fed. 278.

The court erred in taxing the item of \$356.69 for reporter's fees for preparing the record for the second trial, for appeal.

Monahan v. Gaskin, 100 Fed. 196.

Mr. John E. Stryker, argued the cause, and, with **Mr. Robert A. Howard** and **Solicitor General Richards**, filed a brief for defendant in error:

There was no authority granted to any Indian or Indians to cut, remove, sell, and deliver timber from the reservations mentioned in this suit, except as specified in the contracts set forth in the pleadings.

United States v. Pine River Logging & Improv. Co. 32 C. C. A. 406, 61 U. S. App. 69, 89 Fed. 912; *Northern P. R. Co. v. Lewis*, 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831.

The defendants were not authorized to receive from the Indians, and pay for, any timber in excess of the amounts named in the contracts.

Brawley v. United States, 96 U. S. 168, 24 L. ed. 622; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Cabot v. Winsor*, 1 Allen, 550.

When a condition on which a donation was made has not been complied with, the donation may be revoked, whether the prop-

erty donated be in the possession of the donee or of a transferee of the donee.

Eskridge v. Farrar, 30 La. Ann. 718; *Rountree v. Smith*, 152 Ill. 493, 38 N. E. 680.

A donee must take the gift with its conditions, or not at all.

Berry v. Berry, 31 Iowa, 415.

No special agent can bind his principal beyond the limits of his express authority.

Butler v. Maples, 9 Wall. 766, 19 L. ed. 822.

The government is not bound by the acts or declaration of its agent, unless it manifestly appears that he acted within the scope of his authority, or was employed in his capacity as a public agent, to do the act or make the declaration for it.

Whiteside v. United States, 93 U. S. 247, 23 L. ed. 882.

Any party dealing with such agent must at his peril ascertain the limits of the agent's authority.

The Floyd Acceptances, 7 Wall. 666, *sub nom. Pierce v. United States*, 19 L. ed. 169; *Schimmelpennich v. Bayard*, 1 Pet. 264, 7 L. ed. 138; *Whiteside v. United States*, 93 U. S. 247, 23 L. ed. 882.

No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power of its officers and agents.

Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453; *Minturn v. United States*, 106 U. S. 444, 27 L. ed. 210, 1 Sup. Ct. Rep. 402; *Hart v. United States*, 95 U. S. 316, 24 L. ed. 479; *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; *Chisholm v. Montgomery*, 2 Woods, 594, Fed. Cas. No. 2,686.

This having been a wilful trespass, the measure of damages is the full value of the property at the time and place of demand or of suit brought, with no deduction for labor and expense.

United States v. Williams, 18 Fed. 475; *United States v. Heilner*, 26 Fed. 80; *Cheaney v. Nebraska & C. Stone Co.* 41 Fed. 740; *United States v. Wingate*, 44 Fed. 129; *Kingory v. United States*, 44 Fed. 669; *United States v. Perkins*, 44 Fed. 670; *United States v. Baxter*, 46 Fed. 350.

The good intention and exercise of judgment to effectuate a desired object could not authorize the agent to go beyond his defined powers.

United States v. McDougall, 121 U. S. 89, *sub nom. United States v. Jones*, 30 L. ed. 861, 7 Sup. Ct. Rep. 850.

An objection to want of proof of a fact, which might be met at once, must be taken at the trial, or it will be considered as waived, except as to matters going to the jurisdiction of the court.

O'Reilly v. Campbell, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 421.

An objection to a variance between allegations and proof, not taken at the trial, cannot avail in the higher court if it could have been obviated in the court below.

Roberts v. Graham, 6 Wall. 578, 18 L. ed. 791.

186 U. S.

There being no assignment of error, if the evidence was inconclusive the presumption in favor of the correctness of the decision of the lower court must prevail.

Camden v. Stuart, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 585.

Costs may be awarded to the United States when it is the prevailing party.

United States v. Davis, 4 C. C. A. 251, 12 U. S. App. 47, 54 Fed. 147; *United States v. Sanborn*, 135 U. S. 271, 34 L. ed. 112, 10 Sup. Ct. Rep. 812.

The fees of the reporter for furnishing a transcript used in preparing the record for the appellate court were properly allowed.

Re Pinney, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Linne v. Forrestal*, 51 Minn. 249, 53 N. W. 547, 653.

Mr. Justice **Brown** delivered the opinion of the court:

This case was tried before a jury upon the theory that the defendants went far beyond the terms of their contracts with the Indians, and cut, not only a large excess in quantity, but *selected a quality of timber [284] wholly unauthorized by the contracts, or by the acts of Congress, or the regulations of the President in connection therewith. The questions to be considered arise upon objections to the testimony and the instruction of the court to the jury to return a verdict for the plaintiffs.

It is conceded that the fee to the lands comprised within Indian reservations is in the United States, subject to a right of occupancy on the part of the Indians, and that the unauthorized cutting of timber upon Indian reservations is not only unlawful (*United States v. Cook*, 19 Wall. 591, 22 L. ed. 210; *Northern P. R. Co. v. Lewis*, 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831), but is made a criminal offense by the act of June 4, 1888. 25 Stat. at L. 166, chap. 340. But by an act of Congress passed February 16, 1889 (25 Stat. at L. 673, chap. 172), it is provided: "That the President of the United States may from year to year, in his discretion, under such regulations as he may prescribe, authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell, or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment, for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this act, then in that case such authority shall not be granted."

It will be observed that by this statute no general authority is given to Indians to cut timber upon their reservations. The act contemplates that the authority shall be temporary only, "from year to year," and it is further limited to "dead timber standing or fallen," and that it shall be disposed of solely for the benefit of the Indian or Indians to whom the authority is given.

Pursuant to this act certain regulations

were prepared by the Secretary of the Interior, approved by the President, and extended to the Indians of the Chippewa reservation in the state of Minnesota. These regulations provided that each Indian who engaged in the work should provide his own logging outfit and supplies; that no Indian should be allowed to log who has children of school age, but not attending school, unless in *the opinion of his agent some good reasons existed in special cases which were sufficient to exempt particular persons from this requirement; otherwise, every Indian on the reservation, not well employed, should be permitted and encouraged to engage in the work; that all cutting should be done under the superintendence and direction of a competent white man, who should go into the woods with the Indians, "to the end that no green or growing timber may be cut, and that no live trees are damaged in any manner, so as to cause them to die; . . . and to inspect the sealing of the logs;" that with the exception of a superintendent and of foremen and blacksmiths, all white labor was to be excluded from the reservation; that the logs cut should be sold at public sale to the highest bidder, either by auction or by calling for sealed proposals, at the discretion of the Secretary of the Interior, after at least two weeks' notice by publication in the newspapers, and no sale of the logs should be valid until approved by the Commissioner of Indian Affairs; and that 10 per cent of the gross proceeds derived from such sale of the logs should go to the stumpage or poor fund of the tribe, from which the old, sick, and otherwise helpless might be supported.

The timber in this case was cut under five different contracts made between individual Indians and the defendants, all of which were limited to dead and down timber, to be cut during the season of 1891 and 1892. The first provided for 250,000 feet; the second for 500,000 feet; the third for 500,000 feet; the fourth for 1,000,000 feet, and the fifth for 500,000 feet. The whole amounted to 2,750,000 feet. These contracts were approved by the Commissioner of Indian Affairs, and, although in some of their provisions they differed from the general regulations above stated, which provided for a public sale of logs at auction or under sealed proposals, they must be regarded as superseding those regulations in that particular, and as constituting new regulations approved by the President and Commissioner of Indian Affairs.

The object of the statute, as interpreted by these regulations, was evidently to permit deserving Indians, who had no other sufficient means of support, to cut for a single season a limited *quantity of dead and down timber under the superintendence of a properly qualified white man, and to use the proceeds for their support in exact proportion to the scale of logs banked by each, provided that 10 per cent of the gross proceeds should go to the stumpage or poor fund of the tribe, from which the old, sick, and otherwise helpless might be supported. The rights of the

government to the unimpaired value of the land and to the standing timber were carefully guarded by the proviso that no green or growing timber should be cut, and no live trees damaged, so as to cause them to die, that they might be marketed under the provisions of the act. Nothing can be plainer than that there was no intention on the part of Congress or the President to authorize promiscuous logging operations, or the felling of live standing timber, or that a few Indians should be permitted to monopolize the proceeds, but that they should be divided among the individuals of the tribe in proportion to the scale of the logs banked by each.

1. The first assignment of error takes exception to the action of the circuit court in instructing the jury to return a verdict for the United States, because it required the logging company to become responsible for, any pay the obligations of, Bassett & Co., and required that firm to pay the obligations of the logging company, and also required the firm of C. A. Smith & Co. to pay the obligations both of the logging company and Bassett & Co., when there was no evidence in the case to justify the court in holding any of the parties liable for the obligations of the others; or if such evidence existed at all, it was a question of fact for the jury.

The difficulty with this assignment is that no such point appears to have been taken upon the trial of the case in the circuit court. The bill of exceptions shows that when the plaintiff rested, defendants moved the court that the plaintiff "elect as to the time and place of the conversation (conversion) upon which it relies," and that plaintiff thereupon elected to take the value of the logs in the spring of 1892 as they were at the time of the seizure. Upon the conclusion of the entire testimony plaintiff moved the court to strike out all the evidence offered by the defendants with reference to their good faith in the transactions, *which the court denied, and plaintiff ex-[287] cepted; and thereupon the court instructed the jury to return its verdict in favor of the plaintiff, to which an exception was also taken. No such objection upon the ground of misjoinder was taken in the assignment of errors filed in the circuit court of appeals to review that judgment, or in the original assignment of errors filed in this court and incorporated in the record. It would appear that the objection was made on behalf of the defendants in the first trial of the case, inasmuch as it is mentioned in the first opinion of the circuit court of appeals. 24 C. C. A. 101, 49 U. S. App. 24, 78 Fed. 320. It will be remembered that upon this first trial the case was submitted upon the pleadings alone, defendants taking an objection in the nature of a demurrer that, upon the facts admitted by the pleadings, the government could not recover, but was relegated to an action upon the bonds given when the logs were surrendered to the defendants. The circuit court of appeals held that the complaint did not disclose a misjoinder of causes of action, and also that the judgment ren-

dered by the circuit court was in such form that, if sustained, it would bar a subsequent suit against either of the defendants for a wrongful conversion of the property. The point was therefore held not to be well taken, and from that time seems to have been waived or abandoned, as it does not appear to have been raised upon the second or third trials.

This clearly precludes the defendants from raising the question at this stage of the case. It is well settled in this court that an objection that the evidence does not support a joint action against all of the defendants,—in other words, a variance between the pleadings and proofs,—is one which should be taken at the trial and cannot be raised for the first time in the appellate court. In *Roberts v. Graham*, 6 Wall. 578, 18 L. ed. 791, it was said that an objection of variance between the allegations and proofs must be taken when the evidence is offered, and will not even be available upon motion for new trial. See also *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 421; *Patrick v. Graham*, 132 U. S. 627, 33 L. ed. 460, 10 Sup. Ct. Rep. 194; *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830.

But, in addition to this, the record is by no means barren of evidence of a joint responsibility. While the contracts with the [288] Indians were separately made by each defendant, and their accounts of logs cut and money paid were kept distinct from each other, and each averred that it had nothing to do with the contracts of the other, two of the defendants testified that the logs cut under the five contracts were equally divided between C. A. Smith & Co. and J. B. Bassett & Co., and not according to the amounts named in the contracts; that the logging company was practically controlled by C. A. Smith & Co., and that the logging operations were conducted under the supervision of three men who were acting as agents of these firms. We do not undertake to say that there was not evidence upon this point which, if the attention of the court had been called to it, should not have been submitted to the jury; but as the question was not made in the circuit court or in the court of appeals it is too late to raise it upon a writ of error from this court.

2. By the second assignment it is insisted that the court should either have instructed the jury, or left to them to determine, that under the contracts between the logging company and Bassett & Co. respectively on the one hand, and the Indians on the other, as those contracts had been construed and acted upon by all parties in interest, including the United States, these companies respectively had a good title to all the dead and down timber delivered to them by the Indians under the contracts, without regard to the specific quantity of timber mentioned therein.

In two of the contracts the designation of the quantity of timber to be cut is preceded by the word "about," and in the other three is followed by the words "more or
186 U. S.

less." It is contended that by the use of these words the contracts were susceptible of a wide latitude of construction, and if the parties themselves disregarded the limitations, the court, in interpreting those contracts, will adopt the construction given them by the parties interested.

There is no doubt whatever of the general proposition that where the words "about" or "more or less" are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of "wood or coal," [289] or the cargo of a particular ship, or a certain parcel of land, the words "more or less," used in connection with the estimated quantity, are susceptible of a broad construction, and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified. This doctrine is well illustrated in the case of *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622, where the contract was to deliver to a military post 880 cords of wood, "more or less, as shall be determined to be necessary by the post commander, for the regular supply, in accordance with army regulations of the troops and employees of the garrison of said post." It was held that the latter were the determinative words of the contract, and the quantity, designated at 880 cords, was to be regarded merely as an estimate of what the officer making the contract at the time might suppose would be required; and that the government was not liable for more than 40 cords of wood which was accepted by the officers. So in *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91, it was held that where a ship was described in a charter party as of the burden of 1,100 tons, "or thereabouts," registered measurement, the charterer was bound to accept her, although her registered measurement, unknown to both parties, was 1,203 tons.

But, upon the other hand, if the agreement be to manufacture, furnish, or deliver certain property not then in existence, or to be taken from a larger quantity, the addition of the words "more or less" will be given a narrow construction, and held to apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction. *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12.

The contracts in this case unquestionably belong to the latter class. They were contracts to cut and deliver a certain quantity of dead and down timber, and if construed, as is claimed, to authorize the cutting of six times that amount, the quantity might as well have been omitted altogether. The argument of the defendants in that connection is virtually an insistence that the specification of the quantity to be cut should be discarded, and as the payment was stipulated at a certain price per thousand feet, the contract should be interpreted as "authorizing" [290] the cutting of an unlimited quantity, so long as the price paid was that stipulated in the contract.

Defendants' main reliance, however, is upon the construction of these contracts by the parties themselves, including the United States, and in support of their position they invoke the general rule that where both parties to a contract have by their subsequent conduct given it a construction different from what the law might have given it, the courts will adopt that construction; and that the statutes under which the cutting was done, the correspondence between the Secretary of the Interior and the President upon the subject, the regulations which the latter adopted for carrying the act into effect, and the conduct of the parties to the contracts, tend to show that they were intended to authorize the removal of all the dead and down timber on the public land described in them. Undoubtedly there is some support for the proposition in the disregard by the parties to the contract of the limitations of quantity to be cut; but upon the statute and regulations we put, as before stated, an entirely different interpretation. The argument overlooks the fact that the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use, or to improve their land (*United States v. Cook*, 19 Wall. 591, 22 L. ed. 210), except so far as Congress chose to extend such right; that they had no right even to contract for the cutting of dead and down timber, unless such contracts were approved by the Commissioner of Indian Affairs; that the Indians in fact were not treated as *sui juris*, but every movement made by them, either in the execution or the performance of the contract, was subject to government supervision for the express purpose of securing the latter against the abuse of the right given by the statute. It is true that, as a matter of fact, the work was done under these contracts under the superintendence of a government agent, who personally directed what timber should be cut, and when the timber had been cut and a final settlement was made with the Indians, the amounts found to be due them were paid to the Indian agent, who, with the contracts before him, must have known when he received his payments the quantity of timber which had been cut under the different contracts.

[291] *It is unnecessary to inquire what excuses may be made by these officers for thus indirectly approving the construction put upon the contracts by the parties interested, since they could not bind the government in this particular. With the contracts before them they had but one duty, and that was to see that they were honestly and faithfully carried out according to their spirit and letter. No authority had been given them to extend the contracts either as to the quantity or quality of timber to be cut. In fact, they were placed in charge of the operations for the express purpose of seeing that there should be no violation of the contracts in these particulars. They, as well as the parties thereto, were equally bound by its provisions. No discretion had been given

them to waive or alter the contracts in any particular. No conduct of theirs can estop the government from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract. *Lee v. Munroe*, 7 Cranch, 366, 3 L. ed. 373; *The Floyd Acceptances*, 7 Wall. 666; *sub nom. Pierce v. United States*, 19 L. ed. 169; *White-side v. United States*, 93 U. S. 247, 23 L. ed. 882. We are therefore of opinion that the defendants cannot take refuge under the consent or acquiescence of the government agent in the disregard of these contracts.

To give to them the construction claimed by defendants is not only inconsistent with their language, but with the regulations of the President, the design of which was to permit every Indian on the reservation to engage in the work of cutting dead and down timber, and that no one should obtain more than his fair share of such privilege. The timber in question, if allowed to lie upon the land, would simply rot and go to waste, and its removal and sale were no detriment to the land or the government; and this right, if judiciously exercised, would give support to a good many Indians who had no other means of earning a living. The regulations, however, properly limited the right to Indians "not well employed," and provided that no favoritism should be shown by the agent in the management of the business, and that no Indian should be permitted to monopolize the business for his own profit. In short, the object of these regulations was to prevent exactly what was done in this case, that is, the appropriation to a few Indians of the benefits of the act to the [292] exclusion of the many. It will be observed that while the defendants were interested in all these contracts, care was taken that one contract should not be made for the delivering of the gross amount of logs, but that five different contracts should be entered into with different Indians, undoubtedly for the very purpose of preventing a monopoly by a single person, the largest of these contracts being only for a million feet.

3. The third assignment of error is directed to the proper measure of damages, which were assessed at the value of the logs as they were banked upon the streams and lakes in the neighborhood of where they were cut. It is insisted that the proper measure was the value to the government of the timber before the Indians or the contractors had, by their labors, added to that value.

To determine the proper measure of damages, it is necessary to consider the exact relation of the defendants to this timber. They were certainly not innocent purchasers for value of the logs that were cut. All the logs were cut under contracts with individual Indians, by which the latter had agreed to cut, haul, and deliver to the defendant, upon the Mississippi river, or waters tributary thereto, an aggregate of 2,750,000 feet of dead and down timber, defendants agreeing to pay to the Indian Department 10 per cent of the purchase price as stumpage for such timber, which should

be deducted from the price of \$4 per thousand and agreed to be paid. As a matter of fact, there were delivered on these contracts over 17,000,000 instead of 2,750,000 feet contracted for, a large proportion of which seems to have been cut from green and growing timber, though the quality of the timber is not in issue here. Defendants could not have failed to know that they were paying for a very much larger amount than they had agreed to buy, or than the Indians had any power to sell. They knew that their contracts had been approved by the Commissioner of Indian Affairs upon the basis of a certain quantity of dead and down timber, and that if the agent of the Indian Department had acquiesced in the amount and quality of timber actually cut, he had exceeded his authority, and his acts were not

[293] binding upon the government. *Granting that the question that what constituted "dead and down" timber might be the subject of a bona fide dispute, there was no question but that the amount of timber received grossly exceeded the amount contracted for, and that an agreement to cut 2,750,000 feet could not be glossed over by the words "about" or "more or less" in any such way as to cover 17,000,000 feet.

The case of *E. B. Bolles Woodenware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398, is decisive of the law in this connection. That was also an action of trover brought by the United States for the value of 242 cords of ash timber cut from the Oneida reservation in the state of Wisconsin. The timber was knowingly and wrongfully taken from the reservation by Indians, and carried to a distant town, where it was sold to the woodenware company, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase. The timber on the ground, after it was felled, was worth 25 cents per cord, and at the town where the defendant bought it, \$3.50 per cord. The question was whether the liability of the defendant should be measured by the value of the timber on the ground where it was cut, or at the town where it was delivered. It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized; and if the defendant purchase it in its then condition, with no notice that it belonged to the United States, and with no intention to do wrong, he must respond by the same rule of damages as his vendor would, if he had been sued. "This right" (of the recovery of the property), said the court, "at the moment preceding the purchase by defendant at Depere, was perfect, with no right in anyone to set up a claim for work and labor bestowed on it by

186 U. S.

the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the *property [294] than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff."

The cases involving this distinction and in line with the *Woodenware Case* are abundant, both in the Federal and state courts, and are too numerous even for citation. We do not see that the defendants are in any better position by the fact that the contracts were approved by the Commissioner of Indian Affairs, since it was not what was done in pursuance of these contracts, but what was done in disregard of them, which lies at the basis of plaintiff's action. Had the contracts been adhered to, clearly there could have been no recovery. We are not called upon to explain the conduct of the government agent who superintended the cutting of this timber. It is sufficient to say, as already stated, that his acts in excess of his authority, which must have been well known to the defendants, afford them no protection. To say that all parties, including the Indians, the government agent, and the defendants, may have honestly supposed that their right extended to all dead and down timber upon the lands described in the contracts, is to impute to them an ignorance of the English language. This might be ascribed to the Indians, but not to the other parties. It is unnecessary to say that the defendants do not stand in a position of innocent purchasers in good faith.

It may admit of some question whether their advances of money and supplies to the Indians to carry on the logging operations was not a violation of the regulation that "each Indian shall provide his own logging outfit and supplies," but however this may be, it gives no color to the assertion that the defendants acted in good faith, since they could hardly have failed to know that their advances must have been greatly in excess of what was needed for preparing for market less than 3,000,000 feet of logs.

We regard the rule laid down in the *Woodenware Case*, that an intentional trespasser, or a purchaser from him, shall have no *credit for the labor he may have expended upon the property at the time of its conversion, as an eminently proper and wholesome one. It is, and has for many years been, notorious that under the various guises of Indian contracts, purchases of timber entries, or cutting timber for railway, mining, or agricultural purposes, the timber lands of the United States are being denuded of all their substantial value by logging concerns gradually gathering to themselves all the valuable timber of the country, which Congress intended to reserve for the benefit of homestead entrymen, or the purchasers of land in small parcels. If trespassers under these circumstances were per-

[295]

mitted to escape by the payment of the mere stumpage value of the standing timber, there would be a strong inducement upon the part of these operators to avail themselves of every opportunity of seizing this timber, since they would incur no greater liability than the payment of a nominal sum. It is only by denying them a credit for their labor expended upon it that the government can obtain an adequate reparation for this constantly growing evil, and trespassers be made to suffer some punishment for their depredations.

4. The fourth assignment is based upon the proposition that the contractors should have been allowed credit for the amount paid to the United States for stumpage on account of the 14,850,260 feet included in the verdict. The stumpage representing this quantity of timber would be \$6,400.

This payment was not made to the United States in reimbursement of their claim for timber, but under regulations of the President, and under their contracts with the Indians that they would pay 10 per cent of the stipulated compensation of \$4 per thousand feet to the Indian Department as stumpage, which should be deducted from the price of \$4 per thousand feet, and under the condition that such stumpage should go to the poor fund of the tribe, from which its helpless members might be supported. This payment was not made to the government as vendor, but to be held by the Indian Department as trustee for the benefit of helpless Indians, and was as much a part of the stipulated price to be paid for the timber as the other 90 per cent of the \$4 per thousand feet.

[296] *5. The fifth objection assigns as error the exclusion by the trial court of a telegram of March 16, 1898, from the Acting Commissioner of the Land Office to the logging company, stating simply that the commissioner had accepted the bond of the defendants in lieu of the logs, and that the government agent had been directed to release the logs. A like exception was taken to a letter from the special agent of the Land Office to the logging company, repeating the telegrams, and stating that the logs had been released. We do not see the materiality of these papers. There is no doubt that the bonds were accepted in lieu of the logs themselves, and as security for any judgment that might be obtained. Neither the telegram nor the letter adds anything to the inferences to be derived from the face of the instruments.

6. The same remark may be made as to the exclusion of certain conversations of Charles A. Smith with Indians in the fall of 1891, wherein the Indians informed him that there was a large amount of dead and down timber on the reservation which could be cut. Of course there was, or the contract would not have been made. We fail to see that these conversations have any bearing upon the question of the good faith of the defendants. The seventh, eighth, and ninth assignments of error need no comment.

7. In the tenth assignment it is insisted

that the court erred in taxing costs against the defendants. While the rule is well settled that costs cannot be taxed against the United States, the rule is believed to be universal, in civil cases at least, that the United States recover the same costs as if they were a private individual. We know of no case in this court directly adjudicating the liability of unsuccessful defendants for costs in actions brought by the United States, although it was assumed in *United States v. Sanborn*, 135 U. S. 271, 281, 34 L. ed. 112, 115, 10 Sup. Ct. Rep. 812, where the question arose as to particular fees included in a general bill. Throughout the elaborate opinion of Mr. Justice Harlan the liability of the defendant for costs was assumed, and such has been the ruling generally in the lower courts, although the reported cases upon the subject are rare. *United States v. Davis*, 4 C. C. A. 251, 12 U. S. App. 47, 54 Fed. 147. It has been assumed rather than decided.

*8. The item of \$353.69, reporter's fees for [297] a transcript of the record used by the plaintiff in preparing its bill of exceptions on the former appeal, was improperly allowed.

By Rev. Stat. § 983, "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court;" and by rule 31, subdivision 3, of the circuit court of appeals, "the cost of the transcript of the record from the court below shall be taxable in that court as costs in the case." It has been held in a number of cases that § 983 did not include a transcript of the evidence for the personal use of counsel in preparing a case for an appellate court. *Wooster v. Handy*, 23 Blatchf. 113, 23 Fed. 49, 60, by Judge Blatchford, who says the language implies that the copies must have been actually used on or in the trial or final hearing, or at least obtained for such use. In *The William Branfoot*, 3 C. C. A. 155, 8 U. S. App. 129, 52 Fed. 390, 395, it was held by Mr. Chief Justice Fuller that a copy of the official stenographer's notes, obtained for libellant by his counsel, was simply for convenience, and not a copy necessarily used on the trial, and the charge therefor was properly rejected. To the same effect are *Gunther v. Liverpool, L. & G. Ins. Co.* 20 Blatchf. 362, 390, 10 Fed. 830; *Kelly v. Springfield R. Co.* 83 Fed. 183, and *Monaahan v. Godkin*, 100 Fed. 196. This error, however, does not render it necessary to reverse the judgment of the court below. The amount of the reporter's fees, \$353.69, may be deducted from the judgment.

In conclusion, we are of opinion that there was no error committed upon the last trial. The case was an aggravated one, the conduct of the companies wholly indefensible, and the right of the government to recover is entirely clear.

The judgment of the Court of Appeals, subject to the above deduction, is right, and it is therefore affirmed.

[298]

*UNITED STATES, *Appl.*,

v.

AUSTIN NICHOLLS & COMPANY.

(See S. C. Reporter's ed. 298-303.)

Statutes—tariff act—repeal by customs administrative act — duty on glass bottles filled with ad valorem goods.

1. The duties on filled glass bottles, prescribed by the tariff act of 1883, were not repealed by the provision of the customs administrative act of 1890, § 19 (26 Stat. at L. 131, 139, chap. 407), that the duty on ad valorem goods shall be assessed upon their actual market value, including the value of "all cartons, cases, crates, boxes, sacks, and coverings of any kind."
2. Glass bottles filled with merchandise liable to ad valorem duties cannot be regarded as "coverings" within the meaning of the provision of the customs administrative act of 1890, § 19 (26 Stat. at L. 131, 139, chap. 407), that the duty upon ad valorem goods shall be assessed upon the actual market value, including the value of "all cartons, cases, crates, boxes, sacks, and coverings of any kind," in view of the elaborate provisions made by the tariff act of 1894 (28 Stat. at L. 508, chap. 348) for a specific tax on glass bottles, filled or unfilled, whether their contents are subject to ad valorem or specific duties.

[No. 249.]

Submitted May 2, 1902. Decided June 2, 1902.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question whether the duty on glass bottles filled with goods dutiable at ad valorem rates is fixed by the customs administrative act of 1890. *Answered in the negative.*

Statement by Mr. Justice **Brown**:

This case came before the court of appeals upon appeal from a decision of the circuit court for the southern district of New York, reversing a decision of the board of general appraisers, which affirmed the action of the collector of the port of New York regarding the assessment of duty upon certain imported merchandise. The circuit court of appeals, being in doubt with regard to a certain question of law arising therein, desired the instruction of the supreme court for its proper decision.

The importation was made under the tariff act of 1894, and consisted of glass bottles, holding not more than one pint, and filled with goods dutiable at ad valorem rates. Upon these facts the question of law concerning which the instruction of this court was desired was this:

"Should the value of the bottles filled

with ad valorem goods be added to the dutiable value of their contents, under § 19 of the customs administrative act of 1890, to make up the dutiable value of the imported merchandise?"

Assistant Attorney General **Hoyt** submitted the cause for appellant.

Mr. **Albert Comstock** submitted the cause for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

"This case involves the dutiable classification of certain glass bottles either under the customs administrative act of 1890 or the tariff act of 1894. The statement of facts shows that the bottles in question held not more than one pint, and were imported filled with merchandise, which was liable to ad valorem duties, and that they were assessed for duty at the respective ad valorem rates applicable to their contents as a part of their value. The protest (referred to by counsel, though no part of the record) claimed that the articles were free from duty, or, failing that, were dutiable at 40 per cent ad valorem under §§ 88, 89, or 90 of the tariff act of 1894.

Section 19 of the customs administrative act (26 Stat. at L. 131, 139, chap. 407) provides that "whenever imported merchandise is subject to an ad valorem rate of duty . . . the duty shall be assessed upon the actual market value or wholesale price of such merchandise, . . . including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges, and expenses," etc.

At the time this act was passed the following provisions of the tariff act of 1883 were in force (22 Stat. at L. 488, 495, chap. 121):

"Green and colored glass bottles . . . not specially enumerated or provided for in this act, one cent per pound; if filled, and not otherwise in this act provided for, said articles shall pay thirty per centum ad valorem in addition to the duty on the contents."

By the same act "flint and lime glass bottles and vials, . . . not specially enumerated or provided for in this act," were taxed at 40 per centum ad valorem. "If filled, and not otherwise in this act provided for, . . . 40 per centum ad valorem in addition to the duty on the contents."

Though the tariff act of 1883 is not directly in issue in this case, it is pertinent to inquire whether the sections above cited respecting duties upon glass bottles were repealed by § 19 of the customs administrative act. We are of opinion that they were not. The customs administrative act was not a tariff act, but, as its title indicates, was intended "to simplify the laws in connection with the collection of the revenues," and to provide certain rules and regulations with respect to the assessment and collection [300]

1173

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey* (N. C.) 4 L. R. A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136; and *United States v. 356 Caddies of Tobacco*, 20 L. ed. U. S. 235.

of duties, and the remedies of importers, and not to interfere with any duties theretofore specifically imposed or thereafter to be imposed, upon merchandise imported. Section 19 was intended to provide a general method for the assessment of ad valorem duties, and to require the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind to be included in such valuation. We think the rule *cjusdem generis* applies to the words "coverings of any kind," and that glass bottles, which are never in ordinary parlance spoken of as coverings for the liquor contained in them, is such a clear departure from the preceding words as to exempt them from the operation of the section, provided, at least, they are taxed under a different designation. It is very singular that if Congress intended to include under the words "coverings of any kind" vessels used for containing liquors, it should not have made use of the words casks, barrels, hogsheds, bottles, demijohns, carboys, or words of similar signification. The inference is irresistible that by the word "coverings" it only intended to include those previously enumerated and others of similar character used for the carriage of solids, and not of liquids. Webster defines a covering as "anything which covers or conceals, as a roof, a screen, a wrapper, clothing," etc.; but to speak of a liquid as being covered by the bottle which contains it, is such an extraordinary use of the English language that nothing but the most explicit words of a statute could justify that construction.

So, too, by cartons, cases, crates, boxes, and sacks, we understand those encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents. Indeed, it is quite possible that they were made taxable in a general way by the customs administrative act, in order that, if they were so made as to be of further use after their contents were removed, they might not escape taxation. The ordinary cartons, cases, crates, boxes, and sacks are of no value after their contents are removed, but in order that they should not escape taxation altogether, if they were of permanent value, they were included in the general terms of the customs administrative act.

[301] *The subsequent legislation upon the same subject tends to show that Congress intended to preserve the distinction between bottles and ordinary coverings, and to make a special provision for them. Thus, by the tariff act of October 1, 1890 (26 Stat. at L. 567, chap. 1244, § 103), "green and colored, molded or pressed, and flint and lime glass bottles, holding more than one pint, . . . and other molded or pressed green and colored and flint or lime bottle glassware not specially provided for in this act, one cent per pound," while those not holding more than one pint were taxed at 50 cents per gross, and by § 104, "if filled, and not other-

wise provided for in this act, and the contents are subject to an ad valorem rate of duty, or to a rate of duty based upon the value, the value of 'such bottles . . . shall be added to the value of the contents for the ascertainment of the dutiable value of the latter; but if filled . . . and the contents are not subject to an ad valorem rate of duty . . . they shall pay, in addition to the duty, if any, on their contents, the rates of duty prescribed in the preceding paragraph." It will be noticed that by this act there was a division, theretofore unrecognized, between bottles holding more than 1 pint and those holding less than 1 pint, but both classes were specifically taxed, whether filled or unfilled; consequently the question arising in this case as to the rate of duty payable, if the administrative act were not applied, would not arise under the act of October 1, 1890.

In 1894, the tariff was again revised (28 Stat. at L. 508, chap. 348), and by § 88 "green and colored, molded and pressed, and flint and lime glass bottles holding more than one pint, . . . whether filled or unfilled, and whether their contents be dutiable or free," "were taxed at three fourths of one cent per pound, and vials holding not more than 1 pint and not less than one quarter of a pint, 40 cents per gross; all other plain, green and colored, molded or pressed, and flint and lime glassware, 40 per centum ad valorem." By § 248 of the same act ginger ale or ginger beer was taxed at 20 per centum ad valorem, but no separate or additional duty were assessed on the bottles. By § 244, imposing duties upon still wines, there was a proviso that "no separate or additional duty shall be assessed on the bottles;" and by § 245 "a like provi-[302] sion was made with regard to ale, porter, and beer in bottles.

It will be observed that by § 88 a duty was imposed upon bottles holding more than 1 pint, whether filled or unfilled, but upon vials holding less than 1 pint there was, probably, by mistake, no provision that they should pay duty if filled; hence arises the contention of the defendants in this case, that if filled, they are either free of duty, or fall under the last clause of § 88, and are dutiable at only 40 per centum ad valorem.

The construction of these paragraphs in connection with the administrative act of 1890 has been considered in several of the lower courts, and a conclusion generally reached that where a special provision was made for a particular kind of covering the administrative act did not apply. Thus, in *United States v. Dickson*, 19 C. C. A. 428, 38 U. S. App. 476, 73 Fed. 195, it was held that in assessing duty on ginger ale in bottles under § 249 above cited, the provision that no additional duty shall be assessed on the bottles prevented the collector from adding the value of the bottles to the value of the ale, upon the ground that they were coverings. The case was put upon the ground that Congress had legislated for bottles, co

nomine, as a separate subject of duty. The decision was by the court of appeals of the second circuit, and affirmed the decision of Judge Townsend (68 Fed. 534), and also a decision by Judge McKennan in *Lelar v. Hartranft*, 33 Fed. 242, which, however, was decided before the customs administrative act. As bearing upon the same subject, see *United States v. Leggett*, 13 C. C. A. 448, 26 U. S. App. 531, 66 Fed. 300. In *United States v. Ross*, 33 C. C. A. 361, 62 U. S. App. 320, 91 Fed. 108, it was held that glass soda bottles holding less than 1 pint, and which constitute the usual and necessary coverings of soda water imported therein, are not dutiable under the act of 1894. In *Merck v. United States*, 99 Fed. 432, it was held that bottles holding not more than 1 pint of free goods, and those subject to a specified duty were free; and that bottles holding (not?) more than 1 pint of merchandise subject to an ad valorem duty are not themselves subject to duty. The customs administrative act seems to have been regarded by Judge Townsend as having nothing really to do with the question.

[303] The question certified does not require us to determine whether the bottles in question are subject to a duty under § 88 of the tariff act of 1894, or any other section, but merely whether the value of the bottles, filled with ad valorem goods, should be added to the dutiable value of the contents under § 19 of the customs administrative act. The large number of cases which have arisen under the tariff acts with respect to the proper classification of glass bottles show that in the mass of legislation upon that subject it is difficult to evolve a construction applicable to all such cases, or to determine what particular provision of the glassware sections shall be applied; but it is sufficient to say that where such elaborate provisions are made for a specific tax on glass bottles, whether filled or unfilled, and whether their contents be subject to ad valorem or specific duties, it was not intended that the general word "coverings," used in the customs administrative act, which, as before observed, is not a tariff act at all, was intended to supply any deficiency that might exist in the tariff act with respect to those articles.

We have no doubt that the customs administrative act applies to coverings generally, but we think that in view of the several sections of the act of 1894 upon the subject of glass bottles Congress must have intended the words "coverings of any kind" should not apply to them, but that the other sections must be looked to exclusively to determine their rates of duty. As we are not called upon to determine that rate in this case, but only to instruct the court whether the administrative act applies to this case, we answer the question certified in the negative.

186 U. S.

*THOMAS P. KENNARD, *Plff. in Err.*, [304]
v.

STATE OF NEBRASKA.

(See S. C. Reporter's ed. 304-308.)

Appeal—error to state court—Federal question.

A decision by the highest court of the state of Nebraska, that the Pawnee reservation lands in that state are public lands within the meaning of the enabling act of April 19, 1864, § 12 (13 Stat. at L. 47, chap. 59), does not bring into question the validity of that section, so as to give the Supreme Court of the United States the right, under U. S. Rev. Stat. § 709, to review the judgment of the state court.

[No. 261.]

Submitted May 2, 1902. Decided June 2, 1902.

IN ERROR to the Supreme Court of Nebraska to review a judgment which reversed a judgment of the District Court of Lancaster County in that state in favor of plaintiff in an action against the state. *Dismissed.*

See same case below, in state court, 56 Neb. 254, 76 N. W. 545, 57 Neb. 711, 78 N. W. 282.

The facts are stated in the opinion.

Mr. A. S. Tibbets submitted the cause for plaintiff in error. Mr. T. S. Allen was with him on the brief.

Mr. F. N. Prout submitted the cause for defendant in error. Mr. Norris Brown was with him on the brief.

Mr. Justice Shiras delivered the opinion of the court:

In May, 1897, in the district court of Lancaster county, state of Nebraska, Thomas P. Kennard brought an action against the state of Nebraska, seeking to recover the sum of \$13,521.99,—being 50 per cent of a certain sum paid by the United States to the state of Nebraska, and which plaintiff alleged had been so paid by reason of his services, as a duly appointed agent of the state, in procuring the allowance of the claim of the state. The petition further stated that, in pursuance of an act of the legislature of the state, the governor had contracted with the plaintiff to promote the claim of the state, and had agreed that plaintiff was to receive 50 per cent of the amount recovered. It also alleged that by a resolution of the legislature he was authorized to prosecute his claim in the courts of the state of Nebraska.

*The cause was put at issue, and came to trial, a jury being waived, and on March 11, 1898, upon the pleading and evidence, the court found for the plaintiff the sum of \$13,521.99. [305]

NOTE.—On Federal jurisdiction over state courts; necessity of Federal question—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267, and *Kipley v. Illinois ex rel. Akin*, 42 L. ed. U. S. 998.

As to what is a Federal question; when considered—see note to *Re Buchanan*, 39 L. ed. U. S. 884.

521.99, and entered judgment accordingly. The cause was taken to the supreme court of Nebraska, where, on October 5, 1898, the judgment of the trial court was reversed (*State v. Kennard*, 56 Neb. 254, 76 N. W. 545); and again, on February 9, 1899, upon a rehearing, the same conclusion was reached. A writ of error was allowed, January 17, 1901, and the cause brought to this court.

The facts of this case appear, sufficiently for our purposes, in the following extract from the opinion of the supreme court of Nebraska, filed upon a rehearing of the case in that court:

"This is a rehearing of *State v. Kennard*, 56 Neb. 254, 76 N. W. 545. By § 12 of the enabling act passed by Congress, April 19, 1864 (13 Stat. at L. 47, chap. 59), the United States donated to the state of Nebraska 5 per centum of the proceeds of sales of all public lands lying within the state of Nebraska which had prior to that time been sold, or which should subsequently be sold, by the United States, after deducting expenses incident to such sale. At the time the state was admitted into the Union a tribe of Indians, known as the 'Pawnees,' occupied in common a tract of lands in this state known as the 'Pawnee Indian reservation.' After the state was admitted into the Union the United States took such steps as resulted in the extinguishment of the rights of these Indians to the lands in this reservation, sold the lands, and, it seems, used the proceeds of the sale to defray the expenses incident thereto in procuring other lands for the Indians elsewhere, and placed the remaining proceeds of the sale of these lands in the United States Treasury to the credit of the Indians. By an act passed by the legislature of the state of Nebraska in February, 1873 (see Gen. Stat. 1873, chap. 59), it seems that the legislature was of opinion that by reason of § 12 of the enabling act the United States was indebted to it for 5 per cent of the value of the lands lying within the state used as Indian reservations, and 5 per cent of the value of all lands on which private parties had located military land warrants and land scrip issued for military service in the wars of the United States, and 5 per cent of the value of all such as had been donated by the United States to railroads.

"It is also recited in said act that the United States had donated to other states swamp and overflowed lands lying within their borders, but that no such donation or allowance of swamp and overflowed lands had been made to this state, and it seems to have been the opinion of the legislature that all the swamp and overflowed lands lying within the state belonging to the United States should by it be donated to the state. The act under consideration authorized the governor to employ an agent in behalf of the state, to prosecute to final decision before Congress or in the courts, the claim of the state of Nebraska against the United States for the 5 per cent of the value of the

lands disposed of by the United States for any of the purposes already mentioned and for the purpose of procuring from the United States a donation of the swamp and overflowed lands within its borders. The act left the compensation of the agent to be agreed upon by the governor and the agent, but provided, in effect, that the agent should not be entitled to any compensation for collecting from the United States any part of the 5 per cent cash school fund which had been donated to the state by the United States by § 12 of the enabling act aforesaid. The governor of the state entered into a contract with Kennard in pursuance of the act of the legislature just mentioned, in and by which he authorized Kennard to prosecute and collect the claims of the state against the nation in conformity with the act of the legislature, and that the state should pay him one half of all moneys, except such cash school fund, he should collect for the state as such agent. Mr. Kennard entered upon the performance of his contract with the governor, and by his efforts induced the Secretary of the Interior to acknowledge that the United States were indebted to the state of Nebraska in the sum of 5 per centum of the proceeds of the sale of the 'Pawnee Indian reservation' lands made by the United States subsequent to the admission of the state into the Union; and, in pursuance of this decision of the Secretary of the Interior, the United States paid into the treasury of this state \$27,000. Mr. Kennard, by permission* of the legislature, then brought this [307] suit to recover one half of that sum. He had judgment in the district court for Lancaster county, and the state brought the same here for review, and the judgment of the district court was reversed. We based our judgment of reversal of this judgment upon the proposition that the lands of the 'Pawnee Indian reservation' were public lands within the meaning of § 12 of the enabling act, and that the only money collected by Mr. Kennard was the 5 per cent of the proceeds of the sale made of these lands by the United States, and, by the terms of his contract, he was not to have any compensation for collecting these moneys."

Upon this statement of the facts, does this court have jurisdiction to review the judgment of the supreme court of the state of Nebraska?

There was no dispute as to the facts out of which the controversy arose. The right of the plaintiff to recover under his contract with the state is not for us to determine, unless the record discloses that he has been deprived of some title, right, privilege, or immunity secured to him by the Constitution of the United States, and unless it appears that such title, right, privilege, or immunity was specially set up or claimed in the state court. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Columbia Water Power Co. v. Columbia Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

Looking into the record, we do not find in

the pleadings, or in the petition for a hearing, any specific statement or claim by the plaintiff in error of any right, title, privilege, or immunity secured to him by any provision of the Constitution of the United States. This, indeed, is admitted in the brief of the plaintiff in error, but it was claimed in the petition for allowance of a writ of error from this court, "that in the rendition of the judgment by the supreme court of the state there was drawn in question the construction of the statutes of the United States with reference to the lands of the Pawnee Indian reservation located in the state of Nebraska, and the act of Congress authorizing the admission of the state of Nebraska into the Union, passed April, 1864 (13 Stat. at L. 47, chap. 59), and that the decision of said supreme court was against the plaintiff in error in such construction," and that "said decision was necessary to the judgment *given by the said supreme court, and without such decision and construction the said judgment could not have been given." And it is now contended that the plaintiff's right to recover was defeated solely by the construction the state court placed upon the congressional acts, and that thus a Federal question appears in the record, giving this court power to review the decision of the state court.

[308] But the validity of the acts of Congress referred to was not drawn in question by the facts of this controversy. Our jurisdiction to review the judgment of the state court rests upon § 709 of the Revised Statutes. It has often been held that the validity of a statute or treaty of the United States is not "drawn in question," within the meaning of § 709, every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed. *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 653, 34 L. ed. 1110, 1116, 11 Sup. Ct. Rep. 435; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 328, 44 L. ed. 486, 490, 20 Sup. Ct. Rep. 399; *Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co.* 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247.

The decision by the supreme court of the state, that the Pawnee reservation lands in Nebraska were public lands within the meaning of the 12th section of the enabling act, did not bring into question the validity of that section—much less was it a decision against its validity. As, then, the plaintiff in error specially set up or claimed no Federal right, and as the judgment of the supreme court of Nebraska did not impugn the validity of any statute of the United States, we find nothing on which to rest a right to review that judgment, and the writ of error is accordingly dismissed.

186 U. S.

*UNITED STATES, *Plff. in Err.*, [309]
v.

EDWARD J. FREEL, as Executor of the Last Will and Testament of Edward Freel, Deceased.

(See S. C. Reporter's ed. 309-319.)

Principal and surety—release of surety—change in principal's obligation—appeal—when objection too late.

1. The surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by a change made by the contracting parties, without his consent, in the location of the dry dock, which required the contractor to make additional excavations and connections with the water at an increased expense, and gave an increased time of performance, as such a change was not contemplated by the provisions of the contract for such changes in the plans and specifications as might be found advantageous or necessary.
2. The objection that a surety should have set up as an affirmative defense by plea or answer, and not by demurrer, the fact that such changes were made in his principal's contract as would release the surety if made without his consent, cannot be urged on appeal, where the declaration set out the original and supplemental contracts, and contained no averments that the surety had knowledge of or consented to the changes made by the supplemental contract, and no leave to amend was asked when the demurrer was sustained.

[No. 224.]

Argued April 17, 1902. Decided June 2, 1902.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of New York sustaining a demurrer to a complaint in a suit to recover on a contract of suretyship. *Affirmed.*

See same case below, 39 C. C. A. 491, 99 Fed. 237.

The facts are stated in the opinion.

Mr. George Hines Gorman argued the cause, and, with Assistant Attorney General Pradt, filed a brief for plaintiff in error.

The supplemental contract was not, as a matter of fact, a change in the original contract for the construction of this dry dock, either in location of the site or in character of construction.

Simpson v. United States, 31 Ct. Cl. 217.

The contract guaranteed is by reference made a part of the bond; and therefore, in order to determine the scope of the defendant's undertaking, the two instruments must be read together.

Smith v. Molieson, 148 N. Y. 241, 42 N. E. 669.

The obligation of the surety upon this contract is precisely the same as the obligation of the principal.

Benjamin v. Hillard, 23 How. 164, 16 L.

NOTE.—On the release of surety by change in principal's contract—see note to *Miller v. Stewart*, 6 L. ed. U. S. 189.

ed. 520; *Gamble v. Cuneo*, 21 App. Div. 413, 47 N. Y. Supp. 548.

Parties may by their contract enlarge their liabilities beyond that which the law would otherwise impose, either expressly or by fair implication; and if they do so enlarge their liabilities by their own contract, the courts will not undertake to relieve them by any process of construction or interpretation, but will enforce the contract as the parties made it.

Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, ante, 366, 22 Sup. Ct. Rep. 240.

Where a contract makes provision for changes of location or character of construction, the surety is as much bound for the due performance of such changes as he was for the original undertaking.

Wehr v. German Evangelical Lutheran St. Matthew's Cong. 47 Md. 177; *Western Bldg. & L. Asso. v. Fitzmaurice*, 7 Mo. App. 283; *Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397; *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402; *Northern Light Lodge No. 1, I. O. O. F. v. Kennedy*, 7 N. D. 146, 73 N. W. 524; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Risse v. Hopkins Planing Mill Co.* 55 Kan. 518, 40 Pac. 904; *McLennan v. Wellington*, 48 Kan. 756, 30 Pac. 183; *Hayden v. Cook*, 34 Neb. 670, 52 N. W. 165; *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669.

The words "place on the water line" mean that the dock is to be located at, or near, or adjacent to the water, as shall best conduce to the purposes for which the structure was erected, and taking into consideration the physical exigencies, limitations, and necessities of the surroundings of the site.

Simpson v. United States, 31 Ct. Cl. 241.

Any substantial change made in a contract without the knowledge and consent of the surety will release him from his obligation; but want of knowledge and assent is an affirmative defense to be set up by the defendant, and is not required to be traversed by the plaintiff in his declaration, in anticipation.

Shepherd v. May, 115 U. S. 511, 29 L. ed. 457, 6 Sup. Ct. Rep. 119; *Truesdell v. Hunter*, 28 Ill. App. 292; *Crosby v. Wyatt*, 10 N. H. 318; *Strafford Bank v. Crosby*, 8 Me. 191.

Mr. **James Russell Soley** argued the cause and filed a brief for defendant in error:

The liability of a surety cannot be extended by implication, and the courts will carefully guard his rights and protect him against a liability not strictly within the expressed terms of his contract.

Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189; *Page v. Krekey*, 137 N. Y. 307, 21 L. R. A. 409, 33 N. E. 311; *Smith v. United States*, 2 Wall. 234, 17 L. ed. 791; *National Mechanics' Bkg. Asso. v. Conkling*, 90 N. Y. 116, 43 Am. Rep. 146; *Livingston v. Moore*, 15 App. Div. 19, 44 N. Y. Supp. 125; *Ducker v. Rapp*, 67 N. Y. 464; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *McMicken v. Webb*, 6 How. 292, 12 L. ed. 1178

443; *United States v. Case*, 25 Int. Rev. Rec. 56; *United States v. Corwine*, 1 Bond, 339, Fed. Cas. No. 14,871; *Paine v. Jones*, 76 N. Y. 274.

Where the original contract requires the contractor to make any and all changes, and that the change shall be set forth in writing, alterations made pursuant to verbal agreements or directions release the surety.

Eldridge v. Fuhr, 59 Mo. App. 44; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Killoren v. Meehan*, 55 Mo. App. 427.

The burden of proof to show the surety's want of knowledge of or assent to alleged changes in the contract is not upon the surety.

Mundy v. Stevens, 9 C. C. A. 366, 17 U. S. App. 442, 463, 61 Fed. 85; *United States v. Schumacker v. McIntyre*, 111 Fed. 597; *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683; *Stowell v. Goodenow*, 31 Me. 540; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 30.

Mr. Justice **Shiras** delivered the opinion of the court:

In September, 1898, the United States of America brought an action in the circuit court of the United States for the eastern district of New York against John Gillies, Henry Hamilton, and Hugh McRoberts, Catharine Freely, Edward J. Freely, and Frank J. Freely, as executors of Edward Freely, deceased.

The complaint alleged that theretofore, and on the 17th November, 1892, the defendant John Gillies entered into a contract in writing with the plaintiff to construct a timber dry dock, to be located at the United States Navy Yard, Brooklyn, New York, according to certain plans and specifications attached to and made part of said contract; that on said 17th November, 1892, the said John Gillies, as principal, and Henry *Ham- [310] iltan and Hugh McRoberts, and Edward Freely, as sureties, executed their joint and several bond to the United States in the penal sum of \$120,600, conditioned for the faithful performance by the said Gillies of his contract to construct said dry dock; that Gillies entered upon the performance of said contract; that subsequently, on June 16, 1893, Gillies and the United States agreed in writing to change and modify the plans and specifications so as to increase the length of said dry dock from 600 to 670 feet; that on August 17, 1893, Gillies and the United States further agreed in writing to change and modify the contract in certain particulars; that Gillies proceeded with the work under said original and supplemental contracts so slowly, negligently, and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the said contract forfeited on the part of said Gillies; that thereupon, by a board duly appointed, the market value of the work done and of the materials on hand was appraised at the sum of \$170,175.40; that thereafter, under the provisions of said contract, the Secretary of the Navy proceeded to complete said

dry dock and appurtenances in accordance with the said contracts, plans, and specifications, at a cost to the United States of the sum of \$370,000; that the sum of \$72,414.16 represented the damages sustained by the plaintiff by reason of said Gillies' breach of contract; that Edward Freel died on the 24th day of December, 1896, leaving a last will appointing Catharine Freel, Edward J. Freel, and Frank J. Freel executors thereof; that the said defendant John Gillies neglected and refused to perform the terms and conditions of said contract on his part, and that the plaintiff has performed, fully and completely, all the terms and conditions of said contract on its part. Wherefore the plaintiff demanded judgment against the said defendants in the said sum of \$72,414.16, with interest from April 1, 1897.

[311] On November 26, 1898, Edward J. Freel, as executor of Edward Freel, deceased, appeared and demurred to the complaint upon the ground that it appeared upon the face thereof that said complaint did not state facts sufficient to constitute a cause of action. On May 24, 1899, after hearing the counsel of the respective parties, the circuit court sustained the demurrer, and dismissed the complaint as to said Edward J. Freel as executor. 92 Fed. 299. The case was taken to the circuit court of appeals for the second circuit, and on January 5, 1900, that court affirmed the judgment of the circuit court. 39 C. C. A. 491, 99 Fed. 237. On December 22, 1900, a writ of error was allowed, and the cause was brought to this court.

The question in this case is whether a surety on a contractor's bond, conditioned for performance of a contract to construct a dry dock, was released by subsequent changes in the work made by the principals without his consent.

As the question is presented to us on a general demurrer to the complaint, it is necessary to set forth, with some particularity, portions of the original and of the supplemental contracts, which form parts of the complaint.

The original contract, dated November 17, 1892, contained, after alleging that proposals had been made and accepted for the construction by contract of a timber dry dock, to be located at the United States Navy Yard, Brooklyn, New York, the following provisions:

"First. The contractor will, within twenty days after he shall have been tendered the possession and occupancy of the site by the party of the second part, which possession and occupancy of the said site during the period of construction and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractor by the party of the second part, commence, and within twenty-seven calendar months from such date, construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy yard, Brooklyn, N.

Y., as shall be designated by the party of the second part."

"Seventh. The construction of said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed and shall be deemed and taken as forming a part of this contract *with the like operation and effect [312] as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition that the said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any; *Provided*, That whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars (\$500) the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose; and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: *Provided further*, That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: *And provided also*, That no further payment shall be made unless such supplemental or modified *agreement shall [313] have been signed before the obligation arising from such change or modification was incurred and until after its approval by the party of the second part: *And further provided*, That no change herein provided for

shall in any manner affect the validity of this contract."

The supplemental contract of June 16, 1893, contained, among other things, the following:

"This agreement, entered into this 16th day of June, 1893, between John Gillies, contractor, for the construction of a dry dock at the U. S. Navy Yard, Brooklyn, New York, party of the first part, and Norman H. Farquhar, Chief of the Bureau of Yards and Docks of the Navy Department, for and in behalf of the United States, party of the second part,

"Witnesseth: That, whereas, the Navy Department has decided to lengthen the said dry dock from six hundred (600) feet, as called for in the specifications forming a part of the contract for the construction of a dry dock at the above-mentioned location, entered into by the above-mentioned parties of the first and second parts on the 17th of November, 1892, to six hundred and seventy (670) feet from the outer gate sill to the coping at the head of the dock.

"And, whereas, a board of naval officers, consisting of Captain J. N. Miller, U. S. N., Civil Engineer P. C. Asserson, U. S. N., and Civil Engineer, F. C. Prindle, U. S. N., was ordered by, and did convene, by order of the Secretary of the Navy, in compliance with the requirements of paragraph 7, page 2, of the contract, to fix this additional compensation to be allowed to said party of the first part for the additional labor and material required for said extension.

"And, whereas, said board of naval officers, after careful and mature deliberation, did fix the additional compensation to be paid said party of the first part for the said extension of the said dry dock at forty-five thousand five hundred and fifty-six (\$45,556) dollars, and did allow an extension of three (3) months' time on account of said extension of said dry dock:

[314] "Now, therefore, the party of the first part does hereby agree to extend the said dry dock to a length of six hundred and seventy (670) feet, measuring from the outer gate sill to *the coping at the head of the dock, in the same manner and under the same conditions as though said extension had been included in the original contract.

"And it is further agreed by the party of the first part to accept from the United States, as a just compensation for said work of extension, the sum of forty-five thousand five hundred and fifty-six (\$45,556) dollars, in full therefor, payment to be made under the same conditions and requirements as exacted by the original contract.

"And it is further agreed by the party of the second part that, in full and just compensation to the party of the first part, the sum of forty-five thousand five hundred and fifty-six (\$45,556) dollars shall be paid for the additional labor and material necessary to extend the said dry dock, as heretofore agreed to, payments to be made under the same conditions and requirements as exacted in the original contract.

1180

"And it is therefore agreed that the time fixed in the original contract for the completion of the said dry dock shall be extended three (3) months, on account of the extra labor necessary to carry out the extension of the said dry dock as called for by this agreement."

The supplemental contract of August 17, 1893, contained the following:

"This agreement, made and concluded this seventeenth day of August, A. D. 1893, by and between John Gillies, of the city of Brooklyn, in the State of New York, party of the first part, and the United States, represented by N. H. Farquhar, U. S. Navy, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part,

"Witnesseth: That whereas it has been deemed desirable to change the location of the dry dock now being constructed at the U. S. Navy Yard at Brooklyn, New York, under contract with the said John Gillies, party of the first part, dated November 17th, A. D. 1892:

"Now, therefore, this agreement witnesseth that in consideration of the premises and for and in consideration of the payment to be made as hereinafter provided for, the party of the *first part, for himself, his heirs[315] and assigns, and his legal and personal representatives, agrees to and with the United States that he will, in the construction of the said dry dock, change its location to one sixty-four (64) feet further inland than that laid down and staked out when the said contract was entered into, and that he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump house, including the piping, round piles, sheet piles, timber, iron work, excavation and back filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor.

"And this agreement further witnesseth that the United States, party of the second part, in consideration of the stipulations, agrees that for the faithful performance of this agreement by the party of the first part there shall be paid to the said party of the first part the sum of five thousand and sixty-three dollars and eighteen cents (\$5,063.18), United States currency, as full compensation. Said payment to be made in accordance with all the terms and conditions of payments as provided in the said contract and specifications.

"And the United States further agrees that the time limited by the said contract for the completion of the dry dock shall be extended for a period of eight (8) weeks on account of the said change in the position of the dry dock.

"It is also agreed that the provisions and conditions contained in the said contract and the specifications thereto attached, in regard to the character and quality of the

186 U. S.

materials and workmanship, shall apply to the work as herein modified.

"This agreement is made under the provisions of and in accordance with article 'seventh' of the said contract."

Before addressing ourselves directly to the question before us, it may be well to briefly examine some of the decisions of this court on the subject of the alteration of contracts without the assent of the surety.

[316] *Miller v. Stewart*, 9 Wheat. 680, 6 L. ed. 189, was an action on a bond conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships in the fifth collection district of New Jersey, and it appeared that the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties. It was held that the surety was discharged from his responsibility for moneys subsequently collected by his principal, the court saying, per Mr. Justice Story: That the liability of a surety is not to be extended by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms; and that the whole series of authorities proceeded upon this ground. *Miller v. Stewart* was followed and approved in *Leggett v. Humphrey*, 21 How. 76, 16 L. ed. 54; *Smith v. United States*, 2 Wall. 219, 17 L. ed. 788.

In *United States v. Boecker*, 21 Wall. 652, 22 L. ed. 472, in the case of a distiller's bond, which recited that the person is about to be the distiller at one place, to wit, at the corner of Hudson street and East avenue, situated in the town of Canton, it was held that his sureties were not liable for taxes in respect of business carried on by him at another place, to wit, at the corner of Hudson and Third streets in the same town, even though he had no distillery whatever at the first-named place.

However, the proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and Federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. 92 Fed. 299.

[317] At the trial in the circuit court, it was contended, on behalf of the surety, that this proposition was applicable, and exonerated him by reason of the changes made in the original contract by the supplemental contracts of June 16 and August 17, 1893. It was claimed on behalf of the United States that the changes made in the original contract by the supplemental agreements were within contemplation of that contract, and must be deemed to have been assented to in advance by the surety.

186 U. S. U. S., Book 46.

It was held by the learned trial judge that the government's position was well taken in respect to the supplemental agreement of June 16, 1893, which he regarded as fairly within the meaning of the provisions in the 7th section of the contract, which refers to and provides for changes, alterations, or modifications in the plans and specifications, and, therefore, within the undertaking of the surety. But his view was otherwise in respect to the alterations made by the supplemental contract of August 17, which, as respects the change of the site of the dock and the extension of the time of completion of the contract, he held to be changes not within the scope of the 7th section, but to be such as to exonerate the surety from liability for the subsequent dereliction of his principal.

We agree with the circuit court of appeals in thinking that if the learned judge's opinion was sound in respect to the agreement of August 17, 1893, it is not necessary to determine whether the 7th section warranted so wide a departure from the plans and specifications of the original contract as was made by the agreement of June 16, 1893.

Coming, then, to the question of the effect on the responsibility of the surety of the supplemental agreement of August 17, we agree with the circuit court and the circuit court of appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability. The 7th section had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense, and gave an increased time of performance.

A few cases, illustrating the principles involved, may be properly cited, and reference is made to the opinion of the circuit court, in which many more are cited.

In *Mundy v. Stevens*, 9 C. C. A. 366, 17 U. S. App. 442, 463, 61 Fed. 77, it was held by the circuit court of appeals of the third [318] circuit that sureties for the payment by a contractor to a subcontractor of all moneys received for work under a government contract as provided in the contract were released by an alteration of such agreement whereby the right secured to the original contractors to deduct from the monthly payments 3 cents per yard for material dredged, subsequently was modified so that payments of 2½ cents per cubic yard should be made monthly; and it was also held that, as the plaintiff had set forth the supplementary agreement in his statement of claim, he thereby made it part of his case, and the burden of proof that the change was consented to by the sureties was upon the plaintiff.

Rowan v. Sharps' Rifle Mfg. Co. 33 Conn. 1, is an important case. There it was held

by the supreme court of Connecticut that where a contract provided that the guns contracted for should be made "with all possible despatch," and a supplemental contract, made before performance, provided that 300 guns per week should be delivered for a certain period, and 600 per week afterwards, the surety was discharged, the court saying: "But it appears to us very clear that a contract to manufacture and deliver a large quantity of any description of goods in a reasonable time, and a contract to manufacture and deliver the same quantity either at a specified time for the whole or a specific quantity from time to time, monthly or weekly, as the case may be, are materially variant."

The supreme court of Indiana, in *Zimmerman v. Judah*, 13 Ind. 286, held that a supplementary agreement to put an additional story on a house released the surety for the contractor in the original contract.

Whitcher v. Hall, 5 Barn. & C. 269, is cited in the opinion of the circuit court. There it was held by the court of King's bench that a surety engaged for another to the plaintiff for the milking of 30 cows, at a given price each per annum, was released by a subsequent agreement without his consent, whereby the hirer was to have 28 cows for one half the year and 32 for the remainder.

[319] *A further contention is made in the government's brief that, even if such substantial changes were made in the contract as would release the surety if made without his assent, the fact of such changes should have been set up by the defendant as an affirmative defense by answer or plea, and not by demurrer.

The declaration set out, by attaching them as exhibits, the original and the two supplemental contracts, and it alleged that the changes effected by the latter were made "pursuant to, and in conformity with, paragraph 'seventh' of the first contract." If, upon the face of the agreement of August 17, 1893, it appeared that substantial changes were made in the location of the proposed structure, requiring additional excavations and connections at an increased expense, and extending the time limited by the contract for the completion of the dry dock for a period of eight weeks, on account of the change in the position of the dry dock, and if, as is conceded by this objection, such substantial changes in the location, cost, and time necessary for the completion of the work operated to release the surety if made without his knowledge and consent, then the declaration put the plaintiff out of court, so far as the defendant surety was concerned, unless it was averred that the latter had knowledge of the changes and consented thereto. If the government's pleader had evidence of facts showing such knowledge and consent, and was surprised by the action of the trial judge in sustaining the demurrer, it was open to him to ask leave to amend the declaration by adding the necessary averment. This was not done,

1182

and we think it is too late to urge this objection in this court.

The judgment of the Circuit Court of Appeals is affirmed.

Mr. Justice **Gray** took no part in the disposition of this case.

*INTERSTATE COMMERCE COMMISSION, *Appt.*,
v.

CHICAGO, BURLINGTON, & QUINCY
RAILROAD COMPANY *et al.*

(See S. C. Reporter's ed. 320-342.)

Carriers—division of rates—separate charge for terminal services—reasonableness of terminal charge—-independent investigation of facts on appeal.

1. Railroad companies may make a distinct charge for carriage from the point of shipment of live stock to Chicago, and a separate terminal charge for delivery to the Union Stock Yards, a point beyond the lines of the respective carriers,—especially in view of the 6th section of the Act to Regulate Commerce, providing that schedules of rates to be filed by carriers shall "state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of said aforesaid rates and fares and charges."
2. Carriers who had long delivered live stock to the Union Stock Yards in Chicago without making any distinct terminal charge did not, by giving notice to the public that after June 1, 1894, a terminal charge of \$2 per car would be made for delivery at the stock yards, in addition to the entire previous through rate to Chicago, and by filing a memorandum to that effect with their rate sheets with the Interstate Commerce Commission, separate in their schedules the entire terminal charge from the through rate, as required by the 6th section of the Act to Regulate Commerce, but simply added this additional charge to the sum of the terminal charge embraced in the prior through rate.
3. The imposition by railroad companies, in addition to the terminal charge embraced in the through rates to Chicago, of a terminal charge of \$2 per car for delivering live stock to the Union Stock Yards in Chicago, although not justified by an additional average charge of \$1 per car for trackage by the Union Stock Yards Company, cannot be said to be unjust and unreasonable, where the through rates to Chicago have since been reduced from \$10 to \$15 per car, both the terminal charges and the through rates as reduced being in themselves just and reasonable when separately considered as distinct charges.
4. An independent investigation of the facts cannot be entered upon by the Supreme Court of the United States on appeal from a decree refusing to demand compliance with an order of the Interstate Commerce Commission.

NOTE.—On railroads as carriers; rates of freight; long and short hauls; interstate commerce regulations—see note to *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 12 L. R. A. 436. On legislative power to regulate rates, tolls, and prices—see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177.

186 U. S.

in order to evolve new and substantive findings of fact upon which the order of the Commission may be sustained, even if the record is in such condition as to permit such a course.

[No. 154.]

Argued November 7, 8, 1901. Decided June 2, 1902.

A PPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree affirming a decree of the Circuit Court for the Northern District of Illinois dismissing a petition to compel compliance with an order of the Interstate Commerce Commission. *Affirmed.*

See same case below, 43 C. C. A. 209, 103 Fed. 249.

The facts are stated in the opinion.

Messrs. William A. Day, S. H. Cowan, and David Willcox argued the cause, and, with *Assistant Attorney General Beck*, filed a brief for appellant:

The question whether there is an unjust and unreasonable charge, or an undue and unreasonable preference, is a question of fact to be determined by the Commission in view of the circumstances of each case.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; *Matthews v. North Carolina Corp. Comrs.* 106 Fed. 7.

There is nothing in the suggestion that the orders were unlawful as establishing a rate.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45.

The Commission is expressly authorized to prohibit the exaction of unreasonable rates; and the exercise of such a power does not constitute making a rate.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. Rep. 888.

Common carriers engaged in the business of transporting live stock are bound to furnish facilities for unloading the same at the point of destination; they cannot charge the shipper what it may cost them to procure the performance of that service, even by an independent agent.

Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; *Walker v. Kewan*, 19 C. C. A. 668, 34 U. S. App. 691, 73 Fed. 755.

In any case this additional terminal charge was unlawful, because it was im-

posed by concerted agreement among the defendants, in violation of the anti-trust law.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; *United States v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487.

The agreement was in itself illegal.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

None shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain.

Russell v. De Grand, 15 Mass. 35.

It is idle to claim that a court of equity must carry an unlawful combination into effect.

Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 39 C. C. A. 413, 99 Fed. 52.

The finding of the Commission is *prima facie* binding upon the circuit court.

Kelly v. Jackson ex dem. Morris, 6 Pet. 622, 8 L. ed. 523; *Pillow v. Roberts*, 13 How. 472, 14 L. ed. 228; *Allen v. Hawks*, 11 Pick. 359; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; *Interstate Commerce Commission v. Louisville & N. R. Co.* 102 Fed. 709.

The appellees' contention that the so-called terminal charge must be deemed reasonable because it was imposed is obviously without merit, in view of the express finding of the Commission that under the circumstances it was unreasonable.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45.

This case must be decided upon the facts proved, rather than upon the authority of a judicial decision in a case where these facts perhaps might have been proved, but evidently were not considered.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

Mr. Lloyd W. Bowers argued the cause, and, with *Messrs. Frank B. Kellogg and Robert Dunlap*, filed a brief for appellees:

The Commission has no power to prescribe railroad rates — whether maximum, minimum, or absolute — for the future.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414,

18 Sup. Ct. Rep. 45; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

This is true whether the Commission proceeds upon its own initiative, or attempts the prescription of rates in an order made upon complaint to it.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 161, 42 L. ed. 421, 18 Sup. Ct. Rep. 45.

A railway carrier in the absence of statutory prohibition is entitled to make a separate charge for a distinct special service, instead of making a single aggregated charge for the total of all its services. The limitation upon this privilege, doubtless, is that the subdivision of charges shall not go to the length of unreasonableness. The Interstate Commerce Act recognizes and confirms this right of apportioning separate charges to different services.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

In England the system of separate items of charge for different parts of a railway company's services is carried to great length, and has always been deemed of the utmost public advantage.

Hall v. London, B. & S. C. R. Co. 5 Browne & McN. R. & Canal Traffic Cas. 28; 1 Hodges, Railways, 7th ed. 456, 459; 2 Hodges, Railways, 438-451; regulation of railways act 1868 (31 & 32 Vict. chap. 119), § 16.

The policy of England is most emphatically apparent in the statutory provisions which have existed now for perhaps forty years, entitling any shipper, in case the railway company does not itself voluntarily itemize its different charges, to require such itemization.

Regulations of railways act 1868 (31 & 32 Vict. chap. 119), § 17; regulation of railways act 1873 (36 & 37 Vict. chap. 48), § 14; railway & canal traffic act 1888 (51 & 52 Vict. chap. 25), § 33, cl. 3.

The Interstate Commerce Act in no way lessens the common-law liberty of carriers in respect of dividing their charges, but, on the contrary, recognizes and confirms it.

1 U. S. Rev. Stat. Supp. pp. 684, 685, § 6, p. 529, § 1, p. 530, § 4.

There is nothing in the *Corington Stock-Yards Case* in denial of the right to make a distinct charge for a special service performed by a railway for a shipper.

Corington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461.

This \$2 charge is quite within the field of extra charge, under the English statutes.

Hall v. London, B. & S. C. R. Co. 5 Browne & McN. R. & Canal Traffic Cas. 28; *Manchester, S. & L. Co. v. Pidcock & Co.* 10 Browne & McN. R. & Canal Traffic Cas. 150; *Sowerby & Co. v. Great Northern R. Co.* 7 Browne & McN. R. & Canal Traffic Cas. 156.

While the charges made under circumstances of voluntary service may well be

subject to the requirement that they shall be reasonable in amount, there can hardly be a fair question that the entirely voluntary character of the service justifies a separate charge of a reasonable amount.

Watson v. Midland R. Co. 9 Browne & McN. R. & Canal Traffic Cas. 90.

This \$2 is to be fairly considered, under modern railway and statutory usage, as a terminal charge.

Regulation of railways act 1873 (36 & 37 Vict. chap. 48), § 15; railway and canal traffic act 1888 (51 & 52 Vict. chap. 25), § 55. See MacNamara, Law of Carriers, pp. 226, 227; *Stone v. Detroit, G. H. & M. R. Co.* 3 Inters. Com. Rep. 60, 66; *National Tube-Works Co. v. Baltimore & O. R. Co.* (Pa.) 8 Atl. 6; *Owen v. St. Louis & S. F. R. Co.* 83 Mo. 454; 4 Elliott, Railroads, § 1566; *Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986.

The court is to try and determine the proceeding *de novo* as a chancellor, and must determine for itself, on all the evidence, whether the Commission's conclusions, even on questions of fact, were right.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 174, 42 L. ed. 425, 18 Sup. Ct. Rep. 45.

The appellate courts are not to assume the initiative as to the facts, though they will and must revise the Commission's conclusions of fact when once the Commission has made them.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The distinction between the impropriety of the court of appeals considering, originally, new questions of fact not considered by the Commission, and its reviewing, on the other hand, the questions of fact which were actually investigated by the Commission, is clearly set forth in—

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209. See also *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The law forbids the idea that a charge which does not exceed the actual cost of the service for which it is laid is unreasonably large. Indeed, the law allows a reasonable profit above the cost. Whether a charge is reasonable which does not exceed the cost is not a question of fact, but of law; and only an affirmative answer is permissible under the law.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The Commission's order forbids the ter-

minal charge absolutely, and therefore is not such an order as it ought to be if based upon a finding of discrimination.

Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

The Commission itself has lately decided that it is not empowered to administer the anti-trust act.

Sprigg v. Baltimore & O. R. Co. 8 Inters. Com. Rep. 443.

Neither the circuit court nor this court has jurisdiction, in a proceeding like the present, to modify the orders of the Commission sought to be enforced. The only question which such a proceeding brings before the courts is whether the orders of the Commission should be enforced as made by it.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 64 Fed. 723, 5 Inters. Com. Rep. 146; *Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 83 Fed. 249.

Mr. Justice **White** delivered the opinion of the court:

This record requires us to determine whether the court below rightly refused to enforce an order of the Interstate Commerce Commission, by which it was found that an alleged terminal charge, made by the defendants in error, for the delivery of live stock to the stock yards in Chicago, was unjust [321] and unreasonable, *and hence violative of the Act to Regulate Commerce. To avoid the confusion which must be engendered by considering a number of irrelevant issues, and to reach the single question to which the controversy is reducible, it is essential to state the facts, which are uncontroverted, concerning the making of the charge in question, and to bear in mind the results of a controversy relating to such exaction, which arose when it was first imposed by the railroad companies.

Prior to 1865 there were four different places in the city of Chicago at which live stock shipped to that city was delivered and marketed. The railroads by which such live stock was brought into Chicago were accustomed to deliver at any one of these four points as directed by the shipper, and no distinct terminal charge was made, the charge, if any, for the terminal services being embraced in the through rate exacted for carriage from the point of shipment to the place of delivery. In 1865 a corporation was formed, called the Union Stock Yards & Transit Company, which will be hereafter referred to as the stock yards company. Under its charter this corporation was given the right to construct the necessary buildings and conveniences for the receipt, keeping, and marketing of live stock. The corporation was given power to construct tracks connecting its facilities with the different [322]

lines of railway entering Chicago, and it was provided that when such tracks were constructed the stock yards company might engage in the business of transporting stock and other freight over these tracks on its own account, or it might lease the privilege to do so upon such terms as might be deemed best. The facilities and the tracks were constructed, and it consequently came to pass that the general market for live stock in Chicago was transferred from the places at which such business had been previously carried on to the establishment of the stock yards company. Leaving aside all question of charges on freight, other than live stock, from the incipency of the opening of the stock yards in 1865 down to June, 1894, the railroads bringing in live stock to Chicago were accustomed to use the tracks of the stock yards company for the purpose of delivering carloads of cattle, and for the use of these tracks by the various companies, for the *purpose above stated, no charge for [322] trackage or otherwise was made against the railroads by the stock yards company, except a small sum for the unloading of the cattle. During these thirty years the railroads did not divide their rates by separately charging for carriage from the point of shipment to Chicago and for terminal services rendered at Chicago, but asked one rate from the place of shipment to delivery at the stock yards.

In June, 1894, the stock yards company imposed a trackage charge for carrying in carloads of cattle to the stock yards and in bringing the empty cars out. The railroads, therefore, became subject to an additional burden, the amount of which depended upon the distance which each road was obliged to carry its carloads of stock in going in and coming out over the tracks belonging to the stock yards company. The situation of the various roads was such that no one of them in consequence of this new exaction paid less than 80 cents per car, that is, 40 cents each way, and none paid more than \$1.50, that is, 75 cents each way. The railroad officials thereupon entered into an agreement that each road would impose a terminal charge of \$2 upon each car of cattle taken into the stock yards. A joint circular was issued on behalf of the railroads, informing shippers on the subject, the circular being as follows:

"On and after June the 1st, 1894, a terminal charge of \$2 per car will be made in addition to the Chicago rates as shown in the tariffs of the Western Freight Association on live stock and other freight received from or delivered to the stock yards or industries located on the tracks of the Union Stock Yards Railway, the Indiana Line Railway, and the Northern Indiana Railroad."

The provisions of this circular were, besides, separately reiterated by the various railroads concerned in the agreement, and in their posted tariffs, as in those filed with the Interstate Commerce Commission, a memorandum was made showing the additional charge substantially in the form above stated. In other words, because the

stock yards company imposed on the railroads a charge for the use of its tracks, varying between a minimum of 80 cents per car of cattle to a maximum of \$1.50 per car, the railroads immediately exacted a terminal charge on each car of \$2.

One of the roads which imposed this terminal charge was the Atchison, Topeka, & Santa Fé. It was in the hands of a receiver appointed by the circuit court of the United States for the northern district of Illinois. Keenan, a shipper, who carried on his business at the stock yards, refused to pay the added charge, and the receiver consequently declined to deliver to him a consignment of cattle. Keenan thereupon petitioned the court to instruct its receiver to make delivery of the cattle without the payment of the charge in question. Several persons interested in the receipt of cattle at the stock yards intervened, and prayed the court to make an order forbidding the receiver from exacting the additional \$2. The circuit court granted the relief prayed for. It held that it had been settled in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461, that a carrier could not lawfully divide his charge so as to separate the sum to be paid for terminal services from that exacted for the through carriage, unless the terminal services embraced some character of service not by operation of law included in the contract of carriage. 64 Fed. 992.

The case was taken to the circuit court of appeals, where the decree of the circuit court was reversed. That court thought that the circuit court had misapplied the case of *Covington Stock-Yards Co. v. Keith*, and, interpreting that case, held that it was not authority for the proposition that a carrier in a case like the one before the court could not divide its rate so as to separate the terminal charge from that for carriage from the point of shipment to the place of delivery. The court held that it was disclosed by the record that Keenan was engaged in business at the stock yards, that the cattle shipped to him were intended for delivery there, and hence the contract contemplated such delivery beyond the rails of the final carrier; that it was therefore immaterial whether such carrier had facilities of its own for delivering cattle at any other place than the stock yards, because even if such other facilities had existed they would not have been used under the contract, since it contemplated that the *cattle were to be delivered at the stock yards and at no other place.

The court concluded its opinion as follows:

"It is not suggested, assuming any such charge as is here in question to be legal at all, that the amount is unreasonable. The contention that the carriers must move cattle from their lines of road over the track of the stock yards company to the stock yards, without compensation other than as contained in their charges for hauling to points on their respective lines in Chicago (and this is what the claim of these ap-

pellees amounts to), is invalid." [19 C. C. A. 668, 34 U. S. App. 691, 73 Fed. 755.]

Some months after the decision of the circuit court of appeals the Cattle Raisers' Association of Texas, an organization composed of owners and raisers of cattle in Kansas, Montana, North and South Dakota, Texas, and the Indian territory, filed a petition before the Interstate Commerce Commission against the Fort Worth & Denver City Railway Company and its receiver, and various other railroad companies, and against the stock yards company. The petition in substance complained that the terminal charge of \$2 per each car of stock carried to the stock yards was unjust and unreasonable, was a discrimination against Chicago and in favor of other points to which cattle were shipped from the same territory, because at such other points no such terminal charge was exacted. In view of the method of charging adopted by the stock yards company as to dead freight passing over its lines from the lines of many railroads entering Chicago, the terminal charge above referred to was, moreover, alleged to be a discrimination against live stock as a species of traffic and in favor of dead freight. Subsequently the Chicago Live Stock Exchange, an association of commission men and raisers and owners of cattle, intervened, and attacked the terminal rate on substantially the grounds set out in the petition just referred to. The defendant railways answered. It suffices to say that the answers asserted that the terminal rate complained of was just and reasonable, and the discrimination alleged was denied. It was averred that for years previous to the imposing of the terminal rate complained of the carriers, under their contracts to carry and deliver cattle *in Chicago, had delivered such cattle to the stock yards without making any charge therefor, as in effect the rate asked for the carriage and delivery to Chicago of cattle did not include any terminal charge whatever, and such service was hence rendered gratuitously; that owing to the imposition in 1894, by the stock yards company, of the charge for trackage the carriers had exacted the \$2 per car, which was only a just and reasonable equivalent for the cost incurred and service rendered in delivering the cattle to the stock yards. It was further alleged that at the time the terminal charge was imposed the rate to Chicago for cattle from the various points referred to in the complaint was unreasonably low and the addition of the terminal charge complained of was, in any event, but a just and reasonable addition to the through rate. It was, besides, alleged that such increase had not only been notified to the public by the circular issued in the name of the various railroads previously referred to, but had also been included in the rate sheets of the various railroads filed with the Interstate Commerce Commission in accordance with law. The Atchison, Topeka, & Santa Fé Railroad, moreover, pleaded the decree rendered in the *Keenan Case*, and averred in effect that such decree conclusively estab-

lished the right to make the terminal charge in question. The various defendants, moreover, moved to dismiss the Chicago Live Stock Exchange from the proceedings for reasons not necessary to be stated.

After hearing the Commission filed its report. The motion to dismiss the intervention of the Chicago Live Stock Exchange was denied. The stock yards company was dismissed from the cause on the ground that it was not a common carrier subject to the Act to Regulate Commerce. The facts as found by the Commission concerning the terminal charge have been in substance given in the previous statement, and, omitting for the moment reference to a finding of the Commission as to a reduction made by the carriers in the through rate after the terminal charge in controversy had been imposed, the conclusions reached by the Commission are embodied in the following summary:

[326] First. Although the decree of the circuit court of appeals in the *Keenan Case* was held not to constitute *res judicata* *because of a want of identity of the parties concerned in the *Keenan Case* and those involved in the case before it, the Commission, nevertheless, declared that it was its duty to follow and apply to the case before it the legal principles announced in the *Keenan Case*. The Commission, therefore, announced that it recognized that each and all of the defendant carriers were entitled to divide their rates by making one separate and distinct charge for the carriage from the point of shipment to Chicago, and another separate and distinct charge for terminal services in Chicago beyond their own lines. This principle, however, the Commission found not to be decisive of the case before it, since, even although the right to divide the rate was fully recognized, the question remained whether the defendant carriers had in fact divided their rates, and whether the charge complained of was just and reasonable.

Second. Coming to consider the two questions just stated, the Commission held that the action of the carriers in giving notice to the public of the imposition of the \$2 terminal charge and the filing of the rate sheets with the Commission as required by law, did not constitute a division of the rates so as to separate the charge for carriage to Chicago from the charge for terminal services at that point, but amounted simply to a retention of the aggregated through rate existing before the \$2 terminal charge was asked, and the adding of this \$2 charge to the previous rate. It was found as a matter of fact that there was no evidence tending to show that the previous through rate was either unreasonably high or unreasonably low, and therefore the presumption was that the through rate prevailing prior to the imposition of the \$2 charge was just and reasonable.

Third. Considering the cost of delivery to the stock yards over the rails of the stock yards company, including the sum paid for trackage and all other expenses, the Com-

mission found, as a matter of fact, that \$2 per car would be just and reasonable. A reference to this subject, found in the report of the Commission, is excerpted in the margin.† To remove all possible *doubt as to the fact the Commission, in its opinion, on a rehearing, to which opinion we shall hereafter advert, said:

"The defendants were proceeding to show by testimony in each case that the actual cost to them of transporting these carloads of live stock, including the trackage charge and the cost of unloading, was equal to or in excess of \$2. Thereupon it was suggested by the Commission, admitted by the intervenor, and at first partly admitted by the complainant, that the cost of service, including the trackage charge and the cost of unloading, was sufficient to justify the imposition of this terminal charge, provided, *under the circumstances of the case*, it could properly be imposed. We understand that the defendants are given the full benefit of this in the report and opinion already filed. To remove all doubt upon that subject, however, if it is not clearly found, we now find that, looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards & Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge, is reasonable. *If any modification of the present findings is necessary, they are hereby modified to that extent."

The fact, however, that the terminal charge of \$2 was intrinsically just and reasonable, was held by the Commission not to show that such charge was just and reasonable "under the circumstances of the case," for the following reasons: As for many years the carriers had delivered to the stock yards for the through rate prevailing from the point of shipment to the point of delivery, they could not be assumed to have gra-

†The intervenor conceded upon the trial, and the complainants did not seriously question, that the amount of this charge was reasonable if, under the circumstances, the charge should be imposed. Before the close of the testimony the several defendants were requested by the Commission to furnish statements showing the actual or estimated expense to them in each case of making delivery from their several tracks to the Union Stock Yards.

Such statements have been filed, and they make the following showing:

Illinois Central Railroad, <i>via</i> 75-cent trackage route.....	\$2 23
<i>Via</i> 40-cent trackage route.....	1 65
Average.....	\$1 94
Chicago, Burlington & Quincy Railroad.....	2 25
Chicago & Alton Railroad.....	2 05
Chicago, Milwaukee & St. Paul Railway, <i>via</i> one route....	2 67
<i>Via</i> other route.....	2 25
Average.....	2 46
Atchison, Topeka, Santa Fé Railroad.....	2 28
Chicago Great Western Railway (average of 10 cars to train).....	2 20
Chicago & Northwestern Railway.....	3 34
Wabash Railroad.....	1 86
Chicago, Rock Island & Pacific Railway.....	1 65

Total *via* nine lines..... \$20 03
Average..... 2 22

1187

tuitously performed the service of delivery. It was therefore held that pay for such service must be presumed to have been embraced in the through rate. The through and reasonable rate previously existing having been thus found to have embraced the cost of the terminal service, the Commission decided that it was unjust and unreasonable to add to the charge for terminal services, thus previously exacted, the arbitrary sum of \$2 per car, because the stock yards company had imposed for the first time, in 1894, an average charge of \$1 per car. In other words, the \$2 terminal charge, although it was intrinsically reasonable when considered alone, became unreasonable because it was an addition to the terminal charge necessarily embraced in the pay for terminal services which had been included in the through rate existing for so many years.

The opinion of the Commission leaves no room for doubt that such were its views on the subject. Thus stating the question which required to be decided, it was said: "Whether they (the carriers) ought to make the charge they do, or any charge, or whether the charge for delivery is already fairly included in the rate, is a proposition of fact for consideration." Again, referring to the matter, the Commission said: "We do not believe that these carriers should be allowed to add an arbitrary charge to the Chicago rate, for doing a thing which they for thirty years have said was included in that rate, and which we believe, considering the manner in which rates are made up and in which this rate has been made up, ought to be included in the rate;" and the following excerpts make the same thought more clearly manifest: "We think and find that the Chicago rate on May 31, 1894, included, [329] as it had included for the last thirty years, a delivery and unloading of the stock at the Union Stock Yards, and that rate, upon the record in this case, was a just and reasonable one." Further, in calling attention to the fact that the \$2 terminal charge for the service of delivery at the stock yards would be just and reasonable, "if that service was performed by some independent agency," the Commission pointed out that the charge was not just and reasonable when made by the defendants, "because they were already receiving compensation for this service, they ought not to charge for it the second time." Further, it was said: "It is unreasonable to impose this terminal charge for the reason that the rate to Chicago already includes that charge;" and the conclusion is pointedly summed up by the observation: "Surely the fact that the railroad company is already receiving pay for this service is good ground for holding that a second charge is unreasonable."

The finding of the Commission was that the \$2 additional terminal charge was unjust and unreasonable, in so far as that charge exceeded the sum which the carriers were actually obliged to pay in consequence

of the trackage charge imposed by the stock yards company. In other words, the Commission held that the average sum which the defendants were obliged to pay for the trackage charge was \$1, and that this sum might be added without causing the existing rate to become unreasonable.

A reargument of the case was permitted. The Commission adhered to its original conclusions, and in addition held that, as the terminal charge violated the statute, because it was unreasonable, it therefore operated a discrimination against Chicago, and hence was repugnant to the Act to Regulate Commerce in this additional respect. The reasons by which the Commission was controlled were reiterated in an opinion which so clearly expresses the views entertained by it, which we have previously summarized, that an extract from the report of the Commission on the rehearing is excerpted in the margin.†

† "The Commission itself did, however, state upon the hearing at various times in terms upon which the defendants were justified in relying, that no question could be successfully made as to the reasonableness of this charge (the terminal charge in question) in certain aspects. Just exactly the scope of that intimation can be understood by referring to the circumstances under which it was given. The defendants were proceeding to show by testimony in each case that the actual cost to them of transporting these carloads of live stock, including the trackage charge and the cost of unloading, was equal to or in excess of \$2. Thereupon it was suggested by the Commission, admitted by the intervenor, and at first partly admitted by the complainant, that the cost of service, including the trackage charge and the cost of unloading, was sufficient to justify the imposition of this terminal charge, provided, under the circumstances of this case, it could be properly imposed. We understand that the defendants are given the full benefits of this in the report and opinion already filed. To remove all doubt upon that subject, however, if it is not clearly found we now find that, looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards & Transit Company, and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge, is reasonable. If any modification of the present findings is necessary they are hereby modified to that extent. That finding must, however, be carefully read in connection with the other facts in the case, and the conclusion of the Commission that the imposition of this terminal charge is reasonable. The defendants say it was admitted that this charge was reasonable, 'provided any charge could be legally made for the terminal service.' The intimation of the Commission was as indicated in the above extract from the record, 'that if this charge was proper to be imposed, it was a reasonable charge.' The reason for the conclusion of the Commission is to be found in the distinction between these two statements. What the Commission passed upon finally was, not whether a terminal charge of this sort could be legally made,—that had been already determined by the courts,—but whether

[330] *An order was issued by the Commission to carry out its conclusions. In substance
 [331] the order commanded the defendants *whose lines of railway entered the city of Chicago to desist, on and before a named date, from
 [332] charging, demanding, collecting, *or receiving, in addition to their regular published transportation charges, the sum of \$2 per carload of live stock, as compensation for terminal services rendered in making delivery thereof at the yards of the Union Stock Yards & Transit Company in the city of Chicago. Embodied in the order was the following recommendation:

"That said defendants be, and they severally are, hereby recommended not to

this particular charge could be properly imposed under the circumstances of this case. To avoid misapprehension, we will restate here the grounds for our decision, and for that purpose we confine attention to this rate as it existed on May the 31st and June the 1st, 1894. On May the 31st there was in effect a certain rate on live stock from various points to Chicago, and that rate, upon the record in this case, must be taken to be a just and reasonable one. The defendants intimate in their answer that this rate has been forced down until it was too low, and something was said in the proof looking in the same direction. Upon the other hand, the complainants started in to prove that the rate at that time was too high, but, as is found by the case, both these claims were virtually abandoned. There is nothing in the record before us to show that the rate was other than a right one, and we assume that on May the 31st the rate in effect was just and reasonable. Now, just what did this live stock rate to Chicago include? The defendants insisted on the reargument of this case that it covered the transportation of that live stock to the point where, on its way to the Union Stock Yards, it left the tracks of these several defendants, and nothing more. The complainants insisted that that rate covered a delivery of the stock at the stock yards. We are unable to see any ground whatever for the contention of the defendants. As a matter of law, the undertaking to transport live stock from one place to another includes a delivery of the stock. Originally live stock brought to Chicago by these defendants must be delivered at any one of four different points. This was necessitated by the actual competitive conditions at that market. The railway companies for the purpose of avoiding the expense and inconvenience of this kind of delivery created the present stock yards.

"It was entirely at their suggestion, and entirely for their benefit at the outset. From the time the stock yards were constructed down to June 1, 1894, the various defendants had, by arrangement with the stock yards company, the right to use the tracks of that company for the delivery of this stock at the Union Stock Yards. By the action of the various carriers that became the only place in Chicago at which live stock could ordinarily be delivered. Whenever a carload of live stock was shipped to Chicago, in the absence of special directions, it was taken

charge, demand, collect, or receive in excess of \$1 per carload as compensation for terminal or switching services rendered in the delivery of live stock at the yards of the Union Stock Yards & Transit Company in said city of Chicago, which said sum of \$1 per carload as compensation for such terminal or switching services is found and declared in and by said report and opinion to be just, reasonable, and lawful."

In its opinion on the rehearing the Commission pointed out the reasons which caused it to recommend that each railroad exact only \$1 for the additional terminal charge, instead of the actual sum which the railroads were obliged to disburse for the

to the Union Stock Yards. This was understood both by the carrier and by the shipper. No defendant had any facilities previous to June 1 for delivering live stock in any quantity at any other point than at the Union Stock Yards. Now, in view of the legal liability resting upon the carrier to make a delivery somewhere, in view of the fact that this delivery must be made at the stock yards, and was habitually made there, it seems impossible that the defendants, in making this rate from the point of shipment to Chicago, did not include in that rate, and contemplate as a part of the service covered by that rate, a delivery at the Union Stock Yards. It is absurd to say that the Chicago rate paid for the transportation of that stock up to some switch in the field, or in the city where there was no facility for a delivery, and that the transportation beyond that point was a gratuity. We think and find that the Chicago rate on May 31, 1894, included, as it had included for the last thirty years, a delivery and unloading of the stock at the Union Stock Yards, and that rate, upon the record in this case, was a just and reasonable one.

"June 1, 1894, these defendants, by concerted agreement among themselves, increased this rate to \$2.00 per car. If the rate on May 31 was a just and reasonable one, the rate on June 1 was an unjust and unreasonable one, unless some new condition justified the imposition of that additional charge. We have found that to the extent of \$1.00 a new condition did justify the additional charge, for the reason that then, for the first time, the stock yards company exacted this trackage charge. In other words, the cost of service to the defendants was increased by just \$1.00 on that day. It must follow, therefore, as a necessary conclusion, that of the increase which the defendants made, \$1.00 was justifiable and \$1.00 was unjustifiable. This is not, however, because \$2.00 is an unreasonable charge for transporting a car to the stock yards, if that service was performed by some independent agency, but because, since the defendants were already receiving compensation for this service, they ought not to charge for it the second time. Of this proposition we have no doubt. Upon the assumption that the rate May 31 was a just one, we regard the imposition of anything above what the defendants were then compelled for the first time to pay as an unwarranted exaction and a violation of the 1st section of the Act to Regulate Commerce, if it is possible to violate that section."

trackage charge. The passage from the opinion referring to this subject is excerpted in the margin.†

[333] It is to be observed that the Commission in the course of its opinion expressly reeognized the right of the defendant carriers *to increase their rates if they were unreasonably low. It is also to be borne in mind that by necessary implication arising from the opinion of the Commission it is also clear that that body likewise recognized the right of the defendant carriers under the circumstances of the particular case to segregate their rates by separating the charge made for carriage from the point of shipment to Chicago from the terminal services at that point.

The defendants refusing to comply with the order of the Commission, that body filed a petition in the circuit court of the United States for the northern district of Illinois to compel compliance. The defendants annexed and made part of their answers the responses which they had filed in the proceedings before the Commission. All the answers in effect averred the reasonableness of the charge of \$2, denied the discrimination, and expressly alleged that the charge in question constituted a separate terminal charge, embracing compensation for all the terminal services, and alleged that the effect of the filing of the rate sheets with the Interstate Commerce Commission and the notice given to the public concerning the charge of \$2 had been to segregate the rates so as to distinguish the entire terminal charge from the through rate. It was, moreover, expressly averred that at the time the terminal charge was imposed the rates to Chicago on cattle from the points covered by the proceedings before the Interstate Commerce Commission were unreason-

[334] ably low, and, in view of the outlay *occasioned at Chicago, in the rendering of the terminal services, the terminal charge of \$2 was in any event a just and reasonable increase of the then existing unreasonably low rate.

Before the circuit court the Commission contented itself with introducing in evidence certified copies of the proceedings had before it, other than the evidence taken by the Commission, and with offering such evidence as competent proof in the case. Although, on objection, the court excluded the evidence in question, it was subsequently stipulated that the transcript thereof need not be incorporated in the certificate of evidence signed by the district judge, and that, notwithstanding the objections interposed,

the transcript might be produced to and inspected by the circuit court of appeals for any proper purpose in case such inspection was deemed allowable. *The evidence introduced on behalf of the railroad companies consisted only of the circulars and tariff sheets which had been issued and filed with the Commission, promulgating the charge in question. After hearing, the circuit court found that such charge was just and reasonable, and entered a decree dismissing the petition. 98 Fed. 173. On appeal, the circuit court of appeals for the seventh circuit affirmed the decree of the circuit court. 43 C. C. A. 209, 103 Fed. 249.

The court held, as to the right of the carrier to make a terminal charge, under the circumstances disclosed by the record, that the case was controlled by the ruling of the circuit court of appeals in the case to which we have previously referred (*Walker v. Keenan*, 19 C. C. A. 668, 34 U. S. App. 691, 73 Fed. 755), and the reasoning in that case was expressly approved. Coming to consider the question of the reasonableness of the terminal charge, the court held as that rate, abstractly considered, was just and reasonable, it was in the concrete also just and reasonable, because the through rate which had prevailed for thirty years, and under which the carriers had delivered to the stock yards, embraced no charge for terminal services, such service having been performed during all the years in question gratuitously. Besides, the court considered that the filing of the schedules in 1894 with a memorandum as to the terminal charge of \$2 had operated the segregation of the two rates. The views of the court *on this subject were thus stated [335] in its opinion:

"Prior to June 1, 1894, the railway companies seem to have assumed this burden themselves, but at this time a trackage was imposed by the stock yards of from 40 to 75 cents each way upon every car going and returning from the tracks of the railway company to the stock yards. It is insisted that, as this is the only extra expense then occasioned, any charge beyond that was unreasonable and improper. I do not think that necessarily follows. While the imposition of this trackage charge by the Union Stock Yards was doubtless the immediate occasion for a reformation of its tariff, the railway companies were then at liberty to adopt a new schedule with relation to these terminal facilities, and charge what they actually cost them."

We are thus brought to consider the issue

†"The original opinion intimates that the only logical conclusion from the reasoning there stated would be to allow each carrier to retain whatever that particular carrier is obliged to pay the Union Stock Yards & Transit Company by way of this trackage charge. That would, however, result in compelling all companies to retain the smallest amount paid, since the terminal by all routes must be the same. We understood that in allowing \$1 to be retained we were virtually giving to the carriers 20 cents upon each car, but in view of the fact that many of the defendants were compelled to pay \$1.50

by way of trackage charge, this seemed, on the whole, reasonable. Upon the reargument the defendants were inquired of whether they desired a modification of this order so that each one be allowed to retain the amount actually paid, and without exception they stated that they did not ask such a modification. Attention is called to this fact at this time for the purpose of showing that what is apparently an inconsistency in the conclusion of the Commission is really in favor of the defendants, and that the defendants do not for that reason desire to have that inconsistency removed."

involved, that is, the reasonableness of the rate.

As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers, was conceded by the Commission, and was upheld by the circuit court of appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the 6th section of the Act to Regulate Commerce, wherein it is provided that the schedules of rates to be filed by carriers shall "state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." [24 Stat. at L. 380, chap. 105.] Whether the rule which we approve as applied to the facts in this case would be applicable to terminal services by a carrier on his own line which he was obliged to perform as a necessary incident of his contract to carry, and the performance of which was demanded of him by the shipper, is a question which does not arise on this record, and as to which we are, therefore, called upon to express no opinion.

[336] *We come, then, to consider whether there was a separation of the charge for carriage and the charge for the terminal services, and whether the rate—separated or aggregated, as may be found to be the case—was just and reasonable. To determine these questions, it is essential to fix the situation prior to June, 1894, at which time the increased terminal charge was first imposed. Undoubtedly, prior to that date the published rate sheets of the defendants embraced only a rate from the point of shipment to Chicago, the place of delivery. There is room, even, for no pretense that there was in such schedules a setting apart of the terminal charge from the through rate. There is also no room for question that during the many years these rate sheets were in force the carriers, under their contracts to carry to Chicago, delivered carloads of cattle to the stock yards without making any charge other than that which was specified in the through rate. Under these circumstances, in the absence of proof, can it be assumed that the carriers were, for the many years in question, gratuitously performing the terminal services? That such assumption may not be indulged in results from the ruling in *Covington Stock-Yards v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461, where it was decided that, as for a through rate to a given point, the carrier contracted to deliver at that point, the presumption was that the through rate included adequate compensation for the services rendered at the point of delivery. 186 U. S.

Applying this principle, it results that the through rate existing prior to June the 1st, 1894, certainly in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stock yards. Did the carriers, in June, 1894, when they imposed the alleged terminal charge of \$2, separate in their schedules this charge from the through rate? That is, did they divide their charges by setting apart the terminal charge embraced in their previous through rate so as to segregate it from the through rate, thus making one distinct terminal charge and another distinct through rate? The mere inspection of the schedules demonstrates that such division was not made. This is the convincing result, since the schedules did not purport to draw out from the previous through rate the sum of compensation contained therein for terminal services. On the [337] contrary, the entire previous through rate was retained, and a memorandum was placed upon the schedules to the effect that thereafter an additional charge of \$2 for delivery at the stock yards would be exacted. This was a mere addition to the sum of the terminal charge embraced in the prior through rate. We think that it cannot be said that to add an additional amount to a former charge was necessarily to divide such former charge, without holding that to add one sum to another is necessarily to divide the other. The Act to Regulate Commerce exacts that the schedules to be printed and filed by carriers must plainly state "the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." The purpose of this provision was to compel the schedules to be so drawn as to plainly inform of their import, was to exact that when the rates were changed the change should be so stated as not to mislead and confuse, all of which would be frustrated if the schedules relied upon were given the effect which the defendants now claim for them. And the reasons just given dispose of the contention that because it was found that the terminal charge of \$2, abstractly considered, would be just and reasonable, therefore it should have been held to have been just and reasonable as applied to the case in hand. This obscures the fact that compensation for the terminal service was presumptively included in the through rate existing for so many years, and therefore, the \$2 did not constitute the terminal rate, but that such rate after the \$2 was imposed consisted of that sum plus the amount of compensation for the terminal service which had always been contained in, and which continued to be embraced in, the through rate.

Under the foregoing conditions, was the imposition by the railroads of the additional charge of \$2 just and reasonable, meas-

ured by the criterion which the Commission adopted, that is, "under the circumstances of the case?" It needs no reasoning to demonstrate that the Commission correctly held [338] that the *mere imposition by the stock yards company of a new burden, averaging \$1 per ear, did not justify an additional charge by the carriers of \$2 per ear. It is likewise equally plain that if the prior rate was just and reasonable, as the Commission found it to be, that the addition, without reason, of \$1 per ear, caused the rate to become unjust and unreasonable to the extent of the \$1 extra.

It follows that the order of the Commission was right if its correctness depends upon the considerations previously stated. But such is not the case. In the report on the original hearing the Commission said:

"If the through rate were what was really aimed at by the complaint, then all ground of complaint has been removed since the complaint itself was filed. About October the 1st, 1896, rates on live stock from points embraced in the territory covered by this complaint to all western markets, including Chicago, were reduced 5 cents per 100 pounds. This would amount to from \$10 to \$15 per ear. Therefore the Texas shipper would actually deliver his stock in Chicago for from \$8 to \$13 per earload cheaper than he could before the \$2 rate was imposed, and all the complaint asks for is the abolishment of that terminal charge. This charge is imposed by the terminal carriers at Chicago, and those carriers receive and retain the amount of that charge. The complaint is that this charge is an unlawful one: that no matter what the Chicago rate may be the addition of this particular sum to that rate is in violation of the Act to Regulate Commerce."

In other words, it was held that the rate, which was unjust and unreasonable solely because of the \$1 excess, continued to be unjust and unreasonable after this rate had been reduced by from \$10 to \$15. This was based, not upon a finding of fact,—as of course it could not have been so based,—but rested alone on the ruling by the Commission that it could not consider the reduction in the through rate, but must confine its attention to the \$2 terminal rate, since that alone was the subject-matter of the complaint. But, as we have previously shown, the Commission, in considering the terminal rate, had expressly found that it was less than the cost of service, and was [339] therefore *intrinsicly just and reasonable, and could only be treated as unjust and unreasonable by considering "the circumstances of the case;" that is, the through rate and the fact that a terminal charge was included in it, which, when added to the \$2 charge, caused the terminal charge as a whole to be unreasonable. Having therefore decided that the \$2 terminal charge could only be held to be unjust and unreasonable by combining it with the charge embraced in the through rate, necessarily the through rate was entitled to be taken into consideration if the previous conclusions of

1192

the Commissioner were well founded. It cannot be in reason said that the inherent reasonableness of the terminal rate, separately considered, is irrelevant because its reasonableness is to be determined by considering the through rate and the terminal charge contained in it, and yet when the reasonableness of the rate is demonstrated, it be then held that the through rate should not be considered. In other words, two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that both the terminal charge of \$2 and the through rate as reduced when separately considered were just and reasonable, and as the further finding was that as a consequence of the reduction of from \$10 to \$15 per ear, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained.

These views dispose of the case, but before concluding we advert to a statement made by the Commission in its opinion delivered on the reargument. The expression referred to is as follows:

"It is also said that since the imposition of this terminal charge the Chicago rate has been reduced so that the total amount today, including the terminal charge, is much less than it was in 1894, when the charge was imposed. The case finds that such a reduction was made about October 1, 1896. The reduction did not, however, apply to all the territory to which the terminal charge applies, but only to certain limited portions of that territory, and the purpose of it was to equalize the rate *from those [340] sections as compared with other sections. There is no claim that this reduction was made on account of the imposition of the terminal charge, or that it would not have been made had no terminal charge been imposed, nor that if the Chicago rate, June 1, 1894, ought to have carried with it a delivery at the stock yards the present rate should not likewise do so."

It is apparent that there is an irreconcilable conflict between the statement thus made and the facts as recited by the Commission in its first report, for therein it was declared that the reduction applied "to live stock from points embraced in the territory covered by this complaint to all western markets including Chicago. . . ." The report deduced from this premise of fact the conclusion that if the through rate could be considered "all ground of complaint has been removed" by the reduction. We find it in reason difficult to treat the statements made after the reargument as substantive findings of fact, overthrowing the facts stated in the first report, for this reason: In the passage which we have already excerpted from the report of the Commission announced after the reargument, it will be seen that it is declared that the previous findings are modified to the extent necessary to make it clearly appear that the terminal rate of \$2 independently considered had

186 U. S.

been found unquestionably to be reasonable, and there is no expression in the report on the reargument tending to show that it was the purpose to modify in other particulars the findings as previously made. The case, therefore, reduces itself to this: The finding in the first report is that the reduction applied to the whole territory and removed all ground of complaint if the through rate could be considered, whilst the statement in the report after the reargument is that the reduction in the through rate did not apply to the whole territory, but was only partial. Aside from this difficulty another confronts us. The first finding of the Commission was that both the through rate and the terminal rate, separately considered as distinct charges, were in and of themselves just and reasonable at the time the complaint was filed, and this is expressly reiterated in the report delivered after the reargument. Now

[341] the passage which we have just previously excerpted from the report after the reargument states that the reduction of the through rate was partial, and applied only to portions of the territory, and that it was made in order to "equalize the rates from those sections as compared with other sections." But it is impossible in reason to accept this conclusion, even if it be treated as a finding of fact, if the finding made originally and reiterated after the reargument is to be applied, that is, that the rates when separately considered were just and reasonable. This is necessarily the case, since in consonance with reason it cannot at the same time be declared that the rates separately considered were just and reasonable at the time the complaint was filed, and yet it be found that some of the just and reasonable rates were unequal, and hence unjust, and required to be changed in order to remove the inequality, and therefore the unreasonableness, which existed in them. If, however, the conflicts to which we have referred be put out of view, and the statement in the report after the reargument, to which we have adverted, be treated as a substantive finding and as overthrowing by implication the findings expressly made in the first report and some of those expressly reiterated in the second report, we find ourselves nevertheless unable to reverse the court below and direct the execution of the order entered by the Commission. That order was general and operated upon all the carriers in the whole territory covered by the complaint. But if the statement on the rehearing which we are considering be taken as a finding and given, *arguendo*, the force previously stated, then it follows that the rate from the points in the territory to which the reduction applied were just and reasonable, and as to those points the order should not have been rendered, and there is no finding establishing the points to which the reduction applied which would enable us to separate the reasonable from the unreasonable rates. It results that the findings do not afford the basis of even sustaining the order in part. Whether or not, in making the reduction, the terminal charge en-

tered into the minds of the carriers is a matter of no concern. The question is, Was the rate as reduced just and reasonable?

Being then constrained to the conclusion that the order of "the Commission was not [342] sustained by the facts upon which it was predicated, we cannot enter into an independent investigation of the facts, even if it be conceded the record is in a condition to enable us to do so, in order that new and substantive findings of fact may be evolved, upon which the order of the Commission may be sustained. *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648-675, 44 L. ed. 309, 319, 20 Sup. Ct. Rep. 209.

It follows that the decree of the circuit court of appeals, which affirmed the decree of the circuit court, refusing to command compliance with the order of the Commission, was right, and it must, therefore, be affirmed. We think, however, in view of what has been said, and in order to prevent all possible misconception, that it should be stated that nothing in the decree refusing to execute the order of the Commission should be construed as preventing that body, if it deems it best to do so, from hereafter commencing proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory to which the reduction referred to in the opinion, if any such there be, did not apply.

The decree of the Court of Appeals is therefore affirmed without prejudice to the right of the Commission to hereafter proceed in accordance with the reservation expressed in the opinion just announced.

Mr. Justice **Brown** took no part in the decision of this cause.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Petitioner,

v.

R. H. COURTNEY, Receiver, etc.

(See S. C. Reporter's ed. 342-364.)

Principal and surety—surety companies—liability on employee's bond—notice of default—proof of claim—when in time—harmless error—imputed knowledge of default.

1. The requirement of a bond to indemnify an employer against loss by the fraud of his employee, that immediate notice must be given of a default, is fulfilled by giving notice as

NOTE.—*On the liability of surety on indemnity bond*—see notes to *United States v. Giles*, 3 L. ed. U. S. 708; *Postmaster-General v. Early*, 6 L. ed. U. S. 577; and *American Surety Co. v. Pauly*, 42 L. ed. U. S. 987.

On guaranty insurance—see note to *American Credit Indemnity Co. v. Wood*, 19 C. C. A. 271.

As to the care required of bank directors—see note to *Swentzel v. Penn Bank (Pa.)* 15 L. R. A. 305.

soon as reasonably practicable under the circumstances of the case.

2. Notice that a bank official was a defaulter, given the surety company on his bond within from ten to seventeen days after the first discovery of the default, cannot be said, as a matter of law, not to have been given as soon as reasonably practicable.
3. Proof of claim under an employee's indemnity bond, required to be filed with the surety company, with full particulars, as soon as practicable after the giving of written notice of a default or loss, is filed in time when made as soon as practicable after the full particulars as to the default are ascertained.
4. The fact that the receiver of a national bank was aware of some of the misappropriations of its president for some time before filing a proof of claim under an indemnity bond does not tend to show a violation of the requirement in such bond that proof of claim thereunder, "with full particulars thereof," be given as soon as practicable after giving notice of default.
5. Error in excluding, in an action on the indemnity bond of a bank president, a certificate of the cashier, made in answer to an inquiry by the surety company, that the president "has performed his duty in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued," together with evidence tending to establish that the giving of the certificate was an act done in the course of the business of the bank, will not require reversal of a judgment against the surety company on such bond, where the jury were charged that if they could deduce from the evidence knowledge on the part of the bank of the fraud of the president the surety company would not be liable, and the transactions of the president were not of such a character as to preclude, as a matter of law, the possibility of a belief by the directors and other officers in the sufficiency of his explanations.
6. Knowledge of an employee of another employee's default, not communicated to the employer, is not, in the absence of an express agreement, imputable to such employer so as to relieve the surety on a bond given to the employer conditioned for the faithful performance by the employee of his duties.
7. The knowledge of the vice president and of one or more of the directors of a bank, but less than a majority of the board, of a default by the president, is not rendered imputable to the bank, so as to relieve a surety on his bond from liability thereon, by the provision therein that the employer shall exercise due and customary supervision, and will not condone a default of the bonded employee, or continue him in his employment after the commission of a default, as such provision relates to the bank, and not to a minority of the board of directors, or its subordinate officers or agents.
8. The refusal to instruct the jury that, if they found the directors of a bank were careless in its management generally, they should find for the defendant in an action on a bond conditioned to secure the bank against default by its president, is not error, where the court told the jury that the clause of such bond requiring that "due and customary supervision over the employee" should be observed "for the prevention of default" imported a reasonable vigilance upon the part of the bank to prevent defaults.

Argued March 3, 4, 1902. Decided June 2, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the trial court entered on a verdict for plaintiff in a suit on an employee's indemnity bond. *Affirmed.*

See same case below, 43 C. C. A. 331, 103 Fed. 599.

Statement by Mr. Justice White:

*The action below was brought, on February 5, 1898, by Courtney, as receiver of the German National Bank of Louisville, appointed by the Comptroller of the Currency on January 22, 1897, four days after the closing of the bank. Recovery was sought upon a bond of indemnity for \$10,000 and renewals thereof, taking effect respectively on June 1, 1894, June 1, 1895, and June 1, 1896. The condition of the bond was to hold the bank harmless against any loss which it might sustain by reason of any fraud committed by Jacob M. McKnight, originally as vice president and later as president of the bank. The sum of \$18,742.74 was alleged to have been dishonestly and fraudulently embezzled, and misapplied out of the funds of the bank from July 1, 1894, to January 4, 1897, by McKnight, either as vice president or president, and a statement of the items was embodied in the petition. Due proof of the claim was averred to have been made on July 2, 1897. By answer and amendments thereto the defendant took issue as to the happening of each of the alleged defaults; it averred that McKnight, prior to January 21, 1896, had indulged in speculations in whisky and tobacco and in disreputable and unlawful *habits and pur- [344] suits; it further averred that the cashier and teller (one and the same individual), or the vice president of the bank, who became such when McKnight became the president, or the directors thereof, at or about the time of the happening of the defaults, had knowledge of the same, and that the bank condoned the defaults of McKnight for which recovery was sought. In effect, also, it was alleged that there had been a violation of each of the other conditions and stipulations of the bond. The amended answer concluded with the following averment:

"When said bond of June 1, 1894, given by defendant to said bank for the fidelity of said McKnight, as set out in the petition, was renewed for another year on June 1, 1895, to cover the period from that date to June 1, 1896, and was again renewed and continued on June 1, 1896, to cover the period from that date to June 1, 1897, said bank, through an officer other than said McKnight, represented and asserted and certified, with the knowledge of the directors of the said bank, that the books and accounts of said McKnight had been examined by said bank and were then found to be correct in every respect, and that all moneys handled by him had been accounted for up to that time, and that he had performed his duties in an

acceptable and satisfactory manner, and that said bank knew of no reason why the guaranty bond executed by this defendant should not be continued; but defendant says that, in fact, said statements, assertions, and certificates were, and each of them was, false and fraudulent, and known by said bank to be false and fraudulent, but the defendant did not know the same to be false or fraudulent, and, on the contrary, the defendant believed and relied on said statements and each of them, and but for said statements, assertions, and certificates, the defendant would not have renewed or continued said bond on June 1, 1895, or June 1, 1896, and the defendant would immediately have canceled and revoked said bond, as it had a right to do, and as the said bank knew it had a right to do. The said bank purposefully withheld from the defendant the proper information as to the acts and conduct and accounts of said McKnight, and thus misled and deceived the defendant."

[345] A reply was filed controverting the affirmative allegations of the answer, and the cause was tried to a jury. Various exceptions were taken by the defendant to the exclusion of offered evidence and to instructions to the jury. A verdict was returned for plaintiff, and from the judgment entered thereon an appeal was taken to the circuit court of appeals for the sixth circuit. That court affirmed the judgment. 43 C. C. A. 331, 103 Fed. 599.

A writ of certiorari was then allowed.

Messrs. Thomas A. Whelan and Edward J. McDermott argued the cause, and, with *Mr. St. John Boyle*, filed a brief for petitioner:

The contracts of bond companies, when the meaning is clear, must be firmly enforced.

Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124.

Notice of McKnight's defaults in the letter of February 18, 1897, was insufficient because not the "immediate notice" required by the bond.

Inman v. Western F. Ins. Co. 12 Wend. 452; *Edwards v. Lycoming County Mut. Ins. Co.* 75 Pa. 378; *Trask v. State F. & M. Ins. Co.* 29 Pa. 198, 72 Am. Dec. 622; *Railway Pass. Assur. Co. v. Burwell*, 44 Ind. 460; *Montreal Harbour Comrs. v. Guarantee Co. of N. A.* 22 Can. S. C. 542; *Queen v. Berkshire*, L. R. 4 Q. B. Div. 469.

The cashier's letter of May 15, 1896, to the surety, to secure a renewal of the bond, saying that McKnight had performed his duties satisfactorily, was competent evidence and bound the bank.

Morse, Banks & Banking, §§ 103, 162, 165 (b), 171 (d); Boone, Banking, § 115; *Thomas v. Wells*, 140 Mass. 517, 5 N. E. 485; *Magee v. Manhattan L. Ins. Co.* 92 U. S. 93, 23 L. ed. 699; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *First Nat. Bank v. Stewart*, 114 U. S. 224, 29 L. ed. 101, 5 Sup. Ct. Rep. 845; *Guarantee Co. of N. A. v. Mechanics' 186 U. S.*

Sav. Bank & T. Co. 183 U. S. 402, ante, 253, 22 Sup. Ct. Rep. 124.

The vice president's and cashier's knowledge of McKnight's defaults was the knowledge of the bank.

Thomp. Corp. § 4740; Morse, Banks & Banking, § 153; *The Distilled Spirits*, 11 Wall. 356, sub nom. *Harrington v. United States*, 20 L. ed. 167; *Bissell v. First Nat. Bank*, 69 Pa. 415; *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 20 L. R. A. 600, 13 So. 112; *Veasey v. Graham*, 17 Ga. 99, 63 Am. Dec. 228; *Bank of Pittsburgh v. Whithead*, 10 Watts. 397, 36 Am. Dec. 186; *Merchants' Nat. Bank v. Guilmartin*, 93 Ga. 504, 21 S. E. 55; *American Surety Co. v. Pauly*, 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. Rep. 552; *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, ante, 253, 22 Sup. Ct. Rep. 124.

The knowledge of directors Reutlinger and Reisch, of McKnight's defaults, was the knowledge of the bank.

Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; *Clerks' Sav. Bank v. Thomas*, 2 Mo. App. 367; *National Bank v. Fidelity & C. Co.* 32 C. C. A. 355, 61 U. S. App. 506, 89 Fed. 819; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50; Morse, Banks & Banking, § 134; *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540; *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, ante, 253, 22 Sup. Ct. Rep. 124.

The negligence of the directors was failure to use "due and customary supervision," and released the surety.

Martin v. Webb, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 428; *Marshall v. Farmers' & M. Sav. Bank*, 85 Va. 676, 2 L. R. A. 534, 8 S. E. 586; *United Society of Shakers v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731; *People v. Jansen*, 7 Johns, 331, 5 Am. Dec. 275; *Paris Bd. of Edu. v. Citizens' Ins. & Invest. Co.* 30 U. C. C. P. 132; *Montreal Harbour Comrs. v. Guarantee Co. of N. A.* 22 Can. S. C. 542; *Phillips v. Foxall*, L. R. 7 Q. B. 666.

Mr. W. M. Smith argued the cause and filed a brief for respondent:

A vague suspicion in the minds of any of the board was not sufficient to make notice to the plaintiff in error necessary.

American Surety Co. v. Pauly, 170 U. S. 133, 159, 42 L. ed. 977, 986, 18 Sup. Ct. Rep. 552.

The cashier's letter of May 15th did not bind the bank.

American Surety Co. v. Pauly, 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. Rep. 552.

The knowledge of directors Reutlinger and Reisch was not the knowledge of the bank. 2 Cook, Corp. 4th ed. § 727, p. 1564; *Casco Nat. Bank v. Clark*, 139 N. Y. 312, 34 N. E. 908; *American Surety Co. v. Pauly*, 170 U. S. 153, 42 L. ed. 984, 18 Sup. Ct. Rep. 552.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

We shall consider under separate headings

the several propositions upon which reliance is placed to demonstrate that error was committed by the trial court.

1. The court erred in admitting in evidence a notice of the default of McKnight given to the surety company by the receiver on February 18, 1897, and in instructing the jury that the requirements in the bond, that immediate notice should be given of a default, was fulfilled by giving notice "as soon as reasonably practicable and with promptness" or "within a reasonable time."

The bank was closed by the Comptroller on January 18, 1897, and the receiver was appointed four days afterwards. The experts employed by the receiver to examine the books of the bank began to discover the defaults of McKnight "about two or three weeks after the bank was closed." The notice by the receiver to the surety company that McKnight was a defaulter was given on February 18, 1897. It follows that the notice was given within ten to seventeen days after the first discovery of a default. Both the trial court and the circuit court of appeals, reviewing numerous authorities, held that the requirement in the bond "that [346] the employers shall immediately give the company notice in writing of the discovery of any default or loss" ought not to receive the construction that it was intended by the parties that notice of a default should be given instantly on the discovery of a default, but that what was meant was that notice should be given within a reasonable time, having in view all the circumstances of the case. In so deciding we think the court did not err. Indeed, this construction of the word "immediate" would seem to be applied in practice, as is illustrated by the bond of indemnity considered in the case of the *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, *ante*, 253, 22 Sup. Ct. Rep. 124, where one of the conditions was "that the company shall be notified in writing of any act on the part of said employee which may involve a loss for which the company is responsible hereunder to the employee immediately or without unreasonable delay."

A quite recent case, decided by the supreme court of New Hampshire (*Ward v. Maryland Casualty Co.* 51 Atl. 900) so lucidly states the true construction of the word "immediate" as employed in a bond cognate to the one under consideration that we excerpt a passage from the opinion (p. 902):

"The defendants' liability depends in part upon the answer to the question whether the plaintiffs gave them 'immediate' notice in writing of O'Connell's accident, the claim made on account of it, and the suit that was brought to enforce the claim. This involves an ascertainment of the meaning of the word 'immediate' as used in the policy. The word, when relating to time, is defined in the Century Dictionary as follows: 'Without any time intervening; without any delay; present; instant; often used, like similar absolute expressions, with less strictness than the literal meaning requires,—as an immediate answer.' It is evident that the word was not used in this contract in its

literal sense. It would generally be impossible to give notice in writing of a fact the instant it occurred. It cannot be presumed that the parties intended to introduce into the contract a provision that would render the contract nugatory. As 'immediate' was understood by them, it allowed the intervention of a period of time between the occurrence of the *fact and the giving of notice [347] more or less lengthy according to the circumstances. The object of the notice was one of the circumstances to be considered. If it was to enable the defendants to take steps for their protection that must necessarily be taken soon after the occurrence of the fact of which notice was to be given, a briefer time would be required to render the notice immediate according to the understanding of the parties than would be required if the object could be equally well attained after considerable delay. For example, a delay of weeks in giving notice of the commencement of the employee's suit might not prejudice the defendants in preparing for a defense of the action, while a much shorter delay in giving notice of the accident might prevent them from ascertaining the truth about it. The parties intended by the language used that the notice in each case should be given so soon after the fact transpired that, in view of all the circumstances, it would be reasonably immediate. If a notice is given 'with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay,' it will answer the requirements of the contract. *Chamberlain v. New Hampshire F. Ins. Co.* 55 N. H. 249, 265, 268; May, *Ins.* 1st ed. § 462, 14th ed. § 1089; *Donahue v. Windsor County Mut. L. Ins. Co.* 56 Vt. 375; *Lockwood v. Middlesex Mut. Assur. Co.* 47 Conn. 553, 568. Whether the notices were reasonably immediate,—like the kindred question of what is a reasonable time,—are questions of fact that must be determined in the superior court. *Tyler v. Webster*, 43 N. H. 147, 151; *State v. Plaisted*, 43 N. H. 413; *Chamberlain v. New Hampshire F. Ins. Co.* 55 N. H. 265; *Austin v. Ricker*, 61 N. H. 97; *Ela v. Ela*, 70 N. H. 163, 165, 46 Atl. 414."

We think the trial court was right in refusing to instruct, as a matter of law, that the notice was not given as soon as reasonably practicable under the circumstances of the case, or without unnecessary delay, and in leaving the jury to determine the question whether the receiver had acted with reasonable promptness in giving the notice.

2. The court erred in instructing the jury that the proof of claim sent to the surety company by the receiver on July 2, *1897, was [348] made "as soon as practicable" after the giving of notice of the default of McKnight.

This objection is also without merit. The requirement of the bond was that the employer "shall file with the company his or her claim hereunder, with full particulars thereof, as soon as practicable" after the giving of written notice of a default or loss. What was required was not a partial, but a full, statement of all the items of claimed misappropriations on which the right to re-

cover upon the bond was based. The investigation to ascertain the various defaults of McKnight continued after the giving of the preliminary notice of default, and the evidence in the record fails to give any support to the contention that the proof of claim was unreasonably delayed, and was not made as soon as practicable after the full particulars thereof were ascertained.

3. The court erred in instructing the jury that the averments contained in the petition filed by the receiver in an action in attachment against McKnight, brought in a state court of Kentucky, on March 6, 1897, to recover various items of alleged indebtedness of McKnight to the bank, should be given no effect in their deliberations, as but one of said items was embraced in the present action.

The petition referred to was presumably introduced in evidence on behalf of the defendant, as tending to establish that the proof of claim was not made by the receiver as soon as practicable after the giving of notice that McKnight had been guilty of a default. While the trial judge did not state the reasons which led him to instruct the jury to disregard the statements in the petition, the reason for such action was manifest. The petition counted upon various items, a portion only of which were embraced in the petition in the action on trial, and the fact that the petition in the attachment action showed that when filed the receiver knew of some of the misappropriations of McKnight did not tend to prove that he then had knowledge of all of the defaults of McKnight.

4. The court erred in refusing to permit the defendant to read as evidence to the jury a letter of Edwin Warfield, president of the defendant, and dated May 15, 1896, and addressed to the German National Bank of Louisville, Kentucky, and also the reply of R. E. Reutlinger, the cashier of the said bank, written on May 29, 1896, addressed *to the defendant, said letter having been an inquiry by the president of the defendant as to the renewal of the bond of McKnight, and the response being an assurance by the cashier of the bank that McKnight had up to that time performed his duties in an acceptable and satisfactory manner, and he, the cashier, knew of no reason why the bond should not be continued. These letters, it being contended, were erroneously excluded on the ground that it had not appeared from the evidence that there was special authority from the board of directors to the cashier to write the letter of response of May 29, 1896. Further, the court also, it is asserted, erroneously refused to allow the defendant to prove by circumstantial evidence that the board of directors selected the bondsman of McKnight and paid for the bond, and that the said cashier was acting in this matter with the knowledge and for the benefit and with the approval of the board of directors.

We are constrained to the conclusion that error was committed in rejecting the evidence referred to in the foregoing contention.

It was competent for the defendant to show that the bank had concerned itself in and about the obtaining of the bond and renewals in such manner as to cause the transaction to become in effect the business of the bank. The bank had notice from the terms of the original bond that it was issued in reliance upon statements and representations made on its behalf to the surety company, and that, in the ordinary course, renewals, which were to be optional with the surety company, might also be based upon further statements to be made on behalf of the bank. Thus, in the original bond, it was recited that "the said employer has delivered to the company a certain statement, it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed." It was a reasonable and proper precaution, in anticipation of a desired renewal, to propound the inquiries which were submitted by the surety company. The inquiry was contained in a written communication, addressed to the bank, it was received by the bank, and it was proper to presume that it was delivered to the official who made reply thereto, by authority of the bank, he being the executive officer who was charged with conducting the correspondence of the bank. We think the making of the certificate was an act done in the course of the business of the bank, by an agent dealing with the surety company for and on behalf of the bank. It did not purport to be, nor was it designed to be, the mere personal representation of the individual who filled the office of cashier, but it was an official act, performed on behalf of the bank. The information solicited was such as was proper to be asked of and communicated by the bank, and as the renewal was presumably made upon the faith of the statements contained in the certificate, the bank ought not to be heard, while seeking to obtain the benefits of the stipulations agreed to be performed by the surety, to deny the authority of its officer to make the representations which induced the surety to again bind itself to be answerable for the faithful performance by McKnight of the duties of his employment. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770. In *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, ante, 124, 22 Sup. Ct. Rep. 124, this court recognized as binding upon the bank a certificate given by one of its officers embodying replies to questions asked by the guarantee company respecting one of the employees of the bank, although no proof was introduced that special authority had been conferred upon the officer to make the certificate. Nor does the ruling in *American Surety Co. v. Pauly*, 170 U. S. 156, 42 L. ed. 985, 18 Sup. Ct. Rep. 561, warrant the claim that it is an authority against the admissibility of the certificate here in question. In the bond considered in the *Pauly Case*, it was not agreed that the statement of the president, upon which the bond was obtained, should be the basis of the

bond. The answers made by the person who was president of the bank to the interrogatories of the surety company were but mere commendations by one individual of another individual, at a time when, as said by the court, "no relations existed between the bank and the surety company." Again, in the *Pauly Case*, no letter of inquiry was addressed to the bank, unlike the practice pursued with respect to the renewal here in controversy, and the letter, whose contents in [351] the *Pauly Case* was claimed to be *binding on the bank, was written by one who was not charged with the duty of conducting the correspondence of the bank. As held in *First Nat. Bank v. Stewart*, 114 U. S. 224, 29 L. ed. 101, 5 Sup. Ct. Rep. 845, a communication which on its face evidences that it was written by the cashier of a bank, should not be excluded from the jury as not being an act of the bank, where "it appears with reasonable certainty to have regard to the business of the bank." In the case at bar it is manifest these elements were present, and the exclusion of the certificate, as also of the evidence designed to establish that the giving of the certificate was an act done in the course of the business of the bank, was erroneous.

But the fact that error was committed in the particulars just stated does not necessarily lead to a reversal, since the settled doctrine is that, even if error has been committed, yet if it appears clearly from the record that such error was not prejudicial, the judgment cannot be disturbed. *Origet v. Hedden*, 155 U. S. 228, 235, 39 L. ed. 130, 15 Sup. Ct. Rep. 92; *Fidelity Mut. L. Asso. v. Mettler*, 185 U. S. 308, ante, 922, 22 Sup. Ct. Rep. 662. In order to determine whether prejudice resulted from the rulings referred to, it becomes essential to state the facts as portrayed in the bill of exceptions.

McKnight was for a period of time vice president and subsequently the president of the German National Bank. Any and all claims which may have been asserted in the petition as to misconduct or default on the part of McKnight prior to the 1st of January, 1896, were abandoned at the trial, and there is nothing in the record to support the contention that anything took place prior to that date which affected the truth of the statement made in the certificate given by the cashier on May 29, 1896. In January, 1896, McKnight was president and a director; Adolph Reutlinger was vice president and a director, and R. E. Reutlinger was cashier and teller of the bank.

On January 14, 1896, the mayor of the city of Louisville died. The vacancy occasioned was to be filled by the municipal council of the city, and McKnight became a candidate for the office. There was an active contest, and the incidents connected with the election became the subject of discussion in the public press and of consequent notoriety in the community. One Edmunds, who was a business partner of McKnight, [352] was *a prominent factor in said contest, as representing the interest of McKnight, and Edmunds frequently visited the bank and

conferred with McKnight in respect to the contest. Edmunds, on his visits to the bank, "was often seen by and had conversations with the vice president and other directors of the bank, who knew the purpose of his visits." The firm of S. E. Edmunds & Co., composed of McKnight and Edmunds, had an account on the books of the bank. Edmunds, however, had no individual account with the bank.

On January 18, 1896, Edmunds came to the bank and there drew his personal check on the bank for the sum of \$1,000. McKnight directed this check to be cashed, and, as Edmunds wished ten \$100 bills for the check, McKnight, in the hearing of the vice president, told the cashier to take \$1,000 and go to a neighboring bank and get the denomination of bills desired, which he did, and they were handed over to Edmunds. The check of Edmunds which had been thus cashed, although he had no individual account with the bank, was, by the direction of McKnight, carried by the cashier as a cash item until March 12 following. On the date last named, by the direction of McKnight, the amount was charged to the account of S. E. Edmunds & Co., it not appearing that the effect of this debit was to overdraw this latter account.

It was shown that at the time Edmunds drew this check there was an understanding between himself and McKnight that he, McKnight, should be responsible for the check and see that it was paid. The money which Edmunds received it was proved was used by him in bribing four members of the city council to vote for McKnight for mayor, and in consideration of the payment, the parties, on receiving the money, signed the following agreement:

"I hereby pledge myself to vote for J. M. McKnight for mayor of the city of Louisville, first, last, and all the time, until elected or defeated before the general council."

There was no proof introduced to show that the officers or directors of the bank, other than McKnight, had any knowledge of the purpose for which the check was drawn or the use which *was made of it, un- [353] less it be that the fact that they knew that McKnight was a candidate for mayor had a tendency to show that he was engaged in unlawful practices.

On January 21, 1896, to pay his own debt, McKnight drew his individual check (he having an individual account with the bank) for \$1,253, to the order of a person to whom he was personally indebted. This check was paid. McKnight instructed the cashier not to have this check charged up, but to carry it as cash, and it was so carried until March 12, 1896, when McKnight directed that the check be debited to the account of S. E. Edmunds & Co., which was done. Subsequently, and prior to the 12th of March, 1896, another check was drawn by McKnight, on his individual account, for \$1,650, and was paid and carried by the cashier, by McKnight's direction, as cash, until March 12, 1896, when it was charged up to

the Louisville Deposit Collateral account. This latter was an account on the books of the bank of which McKnight had the management and control as president of the bank, but in which he had no personal interest. It was shown that the carrying of these checks by the cashier in his cash as money was called to the attention of the vice president of the bank, who made inquiry on the subject as to why it was done, and was informed that it was done at the request of McKnight, the latter presumably directing the checks to be charged as above stated, in consequence of such inquiry.

McKnight was defeated for mayor. It was matter of common knowledge in Louisville that there was great dissension between the elected mayor and members of the boards of aldermen and councilmen, and that members of the board of aldermen were endeavoring to block legislation proposed by the new mayor. There was proof tending to show that McKnight fomented this discord, and drew up a paper, which was signed by five aldermen, pledging themselves to be controlled in the performance of their duties by McKnight. Two other signatures, however, were required to get control of the board. McKnight was informed by Edmunds that two aldermen were wavering, and that to obtain their signatures to the agreement it would be necessary to pay each of them \$1,000. On February *6, 1896, McKnight requested the cashier to remain at the bank and keep the vault open after the regular time for closing, and said to him that he "had a big scheme on hand, and that it was a big thing." The bank was kept open, and at about half-past six Edmunds brought to the bank the two aldermen in question. Thereupon, in the presence of these two men and the cashier, Edmunds prepared a note, which was then signed by the two aldermen, as follows:

Louisville, Ky. February 6, 1897.

\$2,000.00

One year after date we promise to pay to the order of ourselves two thousand dollars without defalcation, value received, negotiable and payable at German National Bank.

After signing the note, the two aldermen went upstairs, later returned to the bank office, and then received from the cashier, who acted under the instructions of McKnight, the sum of \$2,000 in currency.

It was shown that, while upstairs in the bank building, the two aldermen affixed their signatures to the following paper, which had already been signed by five other of the aldermen:

Louisville, Ky., February 5th, 1896.

We do this day and date agree with one another, and bind ourselves on our sacred words and honor, that we will stand together on any and all propositions of legislation that may come before the body of which we are members, namely, the board of aldermen of the city of Louisville; that we will so caucus with our friend J. M. McKnight, and

act wisely, and secure for our friends an equal division of the offices and any profit that may arise therefrom; that we, as men and members of the upper board, will not allow the mayor to force upon us any appointments that we do not deem wise and to our interest, and in so doing will not act the first night of a meeting on any proposition sent in by the mayor, but will take one week for consideration and caucus.

Now we have calmly considered the above, and do again pledge ourselves one to the other before subscribing our names this day and date, February 5th, 1896, in the presence of one and the other.

*There was no testimony tending to show [355] knowledge on the part of the bank, or any of its officers and directors, other than McKnight, of the purpose for which this \$2,000 was paid, or of the relations which existed between McKnight and the men to whom it was paid, unless such knowledge was lawfully inferable from the circumstances above stated and those hereafter mentioned.

On the night of the occurrences above detailed the cashier of the bank went to the residence of his father, the vice president, and told him of the keeping open of the bank that evening and the cashing of the note. The next morning the vice president asked McKnight for an explanation of the matter, and the latter responded that the transaction was all right, and that the note was good, and that it would be guaranteed by men of credit, whom he named. McKnight also said that he would guarantee the payment of the note; that the parties were obliged to have the money that night, and he kept the bank open to let them have it. When this conversation was had McKnight had a long yellow envelope in his hand, and he told the vice president that "he had a document there in his pocket which was signed by those fellows;" that "he had a meeting upstairs and that paper was signed, and he would not sign it for the city of Louisville;" but McKnight did not mention the names of the persons who had signed it. The vice president noticed that the bank was to get no interest on the loan. He informed other members of the board of directors, and shortly afterwards the matter was brought before the board for its consideration. The vice president reported to the board that he had made some investigation and could not find that two aldermen who had signed the note had any property, and he was unable to say whether or not they were good. McKnight made the same statement to the board that he had made to the vice president, though to neither the vice president nor the bank was any explanation made about the interest feature of the transaction. He assured the directors that the note was good. This explanation satisfied the board, and they passed the note. One Jacob Reisch, a director at the time, testified on the witness stand, however, that some short time after the execution *of this note the vice president [356] told him what he had learned about the mat-

ter, and said to him that the money was used in the mayor's race. This latter statement the vice president denied having made. We quote from the bill of exceptions the following statement:

"There was also evidence tending to show that J. M. McKnight was president of the bank, and the other officers of the bank, including the directory, had entire confidence in his honesty and integrity up to the time the bank was closed; that none of them had any knowledge that any act of his, in the management of said bank, was fraudulent or dishonest, until after the closing of the bank; that said bank had a discount committee who regularly examined and passed on the papers of the bank, as required of such committee, and the directory of said bank undertook to make a monthly investigation—sometimes twice a month—of the affairs of said bank, and required the president to go through same with them and make a full report thereon; that some of the directors were in the bank almost daily inspecting its affairs, and that they did at all times observe due and customary supervision over said president for the prevention of default; that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the president, and except, further, R. E. Reutlinger, the cashier and teller of said bank, knew of said checks when they came into said bank and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge [of them]."

Now, with this state of the record in mind, we come to consider the statements in the certificate signed by the cashier, on May 29, 1896, in answer to the letter of the surety company, shortly before the bond was renewed, to determine whether prejudicial error arose from rejecting the certificate. The certificate stated that the president "has [357] performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued." There was certainly proof showing that the action of the president as to the three checks, and the charging them to accounts on the books of the bank, deceived the officers of the bank and caused them to be satisfied with the transactions. Certainly, also, there was uncontradicted evidence establishing that the explanation given by McKnight of the discount of the \$2,000 note satisfied the directors. There was no justification in the evidence on these subjects to take the case from the jury and instruct a verdict for the defendant upon the theory that in and of themselves the transactions were of such a character as to preclude the possibility of a belief in the sufficiency of the explanation made by the pres-

ident, however apparently reasonable those explanations may have been, and however honest may have been the belief in their truth. This being so, it follows that the only basis upon which it could have been found that the bank was dissatisfied was the deduction from the facts and circumstances that the bank knew of the fraud which the transactions were intended to effectuate. And this latter view was stated by the court to the jury. Referring to the alleged fraudulent checks and drafts of the president, the court said:

"The mere fact of drawing for more than you have got in the bank without any fraudulent intent in that mere transaction would hardly be a fraudulent act within the meaning of this bond.

"Now, I suppose in this case, if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own personal debts; if the bank had known that and consented to it,—there would not have been a fraudulent act by McKnight for which the bank could recover against this company.

"But if you believe from the evidence that the bank did not know of the fraudulent purposes for which the overdrafts were made, if the overdrafts were made in connection with this matter,—if you believe the bank did not know the fraudulent *purposes, [358]—then that changes the result; because if the bank did not know and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view the case—you must remember, however, that you are the sole judges of the evidence in this case and its credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part (limiting my observations now to the overdrafts), there would be no fraudulent acts upon his part merely in an overdraft, if there were no fraudulent intent behind it which was concealed from the bank."

Again, the court—referring to the \$2,000 note transaction—said:

"If you believe from the evidence that the bank did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnight's, in getting these \$2,000, was known to the bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if not the earliest, of all these transactions. If you believe from the evidence that this transaction was known and condoned by the bank at the time, before these other transactions occurred, then the defendant in this case is not liable."

In other words, reiterating in a somewhat different form the proposition previously stated, if the certificate transmitted by the cashier to the surety company had been received in evidence it would not alone have availed as a defense, because further proof would have been required showing the falsity of the statements contained in the cer-

ificate. In view, however, of the uncontradicted testimony tending to show that in the course of the transactions relied upon the president had, either by conduct or explanation, produced the impression on the bank that the transactions were bona fide, and therefore relieved the bank from any dissatisfaction as to the transactions, it must follow that the falsity of the certificate could alone have been inferred by excluding either that the transactions in and of themselves were of such a character that, as a matter of law, no explanations made of them by the president could have justified the bank in being satisfied on the subject, [359] or that the surrounding "circumstances were such as to authorize the jury to infer that the bank must have known of the fraud, and therefore to find that the bank could not possibly have been satisfied with the conduct of the president. But the first hypothesis we have pointed out was inadmissible. The second was left to the jury to determine, since the charge of the court was that if the jury could deduce from the proof knowledge on the part of the bank of the fraud of the president, the surety company would not be liable on the bond. As, therefore, the very question which the jury would have been called upon to determine if the certificate had been received in evidence was fully submitted to them and was necessarily negatived by their verdict, no foundation exists for holding that prejudicial error resulted from excluding the certificate.

5. The trial court erred in not instructing the jury that the knowledge possessed by an officer or director of the bank, of the fraudulent purposes of McKnight, though such knowledge had not been communicated to the bank, should be treated as the knowledge of the bank; and also erred in not instructing the jury that the knowledge which any officer or director of the bank might have acquired of the fraudulent conduct of McKnight, if such officer or director had exercised customary supervision, should be imputed to the bank.

The questions which these propositions embrace were raised by the exceptions taken to certain portions of the charge to the jury, referred to in the record as instructions Nos. 5, 6, and 7. In instruction No. 5 the court told the jury, in general terms, that the bank, under the stipulations contained in the bond, owed to the surety the duty of exercising due and customary supervision over McKnight to prevent the commission by him of fraudulent acts, and further instructed that if the bank knew of the fraudulent purposes of McKnight in connection with the drafts and checks upon which recovery was sought, the surety would not be liable. Exception was taken to this instruction, on the ground that it "did not submit correctly to the jury consideration of knowledge on the part of the officers or directors of the bank other than McKnight, which they had, or would have had, if customary supervision [360] *had been exercised." Instruction No. 6, and the objection made to it, reads as follows:

"I do not think that the knowledge of a

cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger, in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall anything that he knew, so far as the proof shows, that would in anywise affect the liability of the defendant in this case."

Objection was made to the foregoing portion of the charge, on the ground that the knowledge of the cashier of the acts of McKnight in respect to his overdrafts, his transactions in connection with the \$2,000 note signed by the two aldermen and with the checks to Edmunds, and the several checks for McKnight's individual account, was the knowledge of the bank, and that the jury should have been so told.

Instruction No. 7 dealt with the \$2,000 note transaction. In effect, the jury were instructed that the knowledge of the cashier acquired in the performance of his duties might be imputed to the bank, but that the vice president or an individual director did not hold such an official relation to the bank as that his knowledge of wrongdoing by McKnight, if not communicated to the bank, could be treated as the knowledge of the bank.

We do not deem it necessary to analyze the instructions given by the court for the purpose of determining whether they were in all respects accurate, because we are of the opinion that if the court in anywise erred it was in giving instructions which were more favorable to the defendant surety than was justified by the principles of law applicable to the case.

It is well settled that, in the absence of express agreement, the surety on a bond given to a corporation, conditioned for the faithful performance by an employee of his duties, is not relieved from liability for a loss within the condition of the bond by reason of the laches or neglect of the board of directors, "not amounting to fraud or bad faith." [361] and that the acts of ordinary agents or employees of the indemnified corporation, conniving at or co-operating with the wrongful act of the bonded employee, will not be imputed to the corporation. *United States v. Kirkpatrick* (1824) 9 Wheat. 720, 736, 6 L. ed. 199, 203; *Minor v. Mechanics' Bank* (1828) 1 Pet. 46, 7 L. ed. 47; *Taylor v. Bank of Kentucky* (1829) 2 J. J. Marsh. 364; *Amherst Bank v. Root* (1841) 2 Met. 522; *Louisiana State Bank v. Ledoux* (1848) 3 La. Ann. 674; *Pittsburg, Ft. W. & C. P. Co. v. Shaeffer* (1868) 59 Pa. 350, 356; *Atlas Bank v. Brownell* (1869) 9 R. I. 168, 11 Am. Rep. 231. The doctrine of these cases is thus epitomized in 59 Pa. 357:

"Corporations can act only by officers and agents. They do not guarantee to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and

payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, became responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank, was held to be no defense. *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564."

[362] So, also, in 3 La. Ann. 674, the court, after suggesting the distinction between the knowledge of the governing body of a bank, the board of directors, of the default of a bonded employee,* and the knowledge of such default by another officer or employee, not communicated to the board, thus tersely stated the applicable doctrine (p. 684):

"It cannot be said that if one servant of a bank neglects his duty, and by his carelessness permits another servant of the bank to commit a fraud, the surety of the fraudulent servant shall be thereby discharged."

And see *American Surety Co. v. Pauly*, 170 U. S. 156, 157, 42 L. ed. 986, 18 Sup. Ct. Rep. 552, and cases cited. In other words, the principle of law discussed in the case of *The Distilled Spirits*, 11 Wall. 356, *sub nom. Harrington v. United States*, 20 L. ed. 167, *viz.*, that the knowledge of an agent is in law the knowledge of his principal, is intended for the protection of the other party (actually or constructively) to a transaction for and on account of the principal had with such agent. In the very nature of things, such a principle does not obtain in favor of a surety who has bonded one officer of a corporation, so as to relieve him from the obligations of his bond, by imputing to the corporation knowledge acquired by another employee subsequent to the execution of the bond (and from negligence or wrongful motives, not disclosed to the corporation), of a wrong committed by the official whose faithful performance of duty was guaranteed by the bond. As the rule of imputation to the principal of the knowledge of an agent does not apply to such a case, it must follow that it can only obtain as a consequence of an express provision of the contract of suretyship. Was there such a provision in the bond now under consideration?

Now the clause of the bond sued on, and

as to which the court was instructing the jury in the portions of the charge under consideration, is as follows:

"That the employer shall observe, or cause to be observed, due and customary supervision over the employee for the prevention of default, and if the employer shall at any time during the currency of this bond condone any act or default upon the part of the employee which would give the employer the right to claim hereunder, and shall continue the employee in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employee which may occur subsequent to such act or default so condoned."

*Manifestly, this stipulation is not fairly [363] subject to the construction that it was the intention that the neglect or omission of a minority in number of the board of directors or the neglect or omission of subordinate officers or agents of the bank should be treated as the neglect or omission of the bank. The provision is not that a minority in number of the board of directors or that subordinate officers or agents would exercise due and customary supervision, and would not condone a default of the bonded employee or retain him in his employment after the commission of a default, but the agreement is that the bank would do or not do these things. This in reason imports that the things forbidden to be done or agreed to be done were to be either done or left undone by the bank in its corporate capacity, speaking and acting through the representative agents empowered by the charter to do or not to do the things pointed out. To hold to the contrary would imply that the bond forbade the doing of an act by a person who had not power to perform or commanded performance by one who could not perform. Assuredly, therefore, the conditions embodied in the stipulation to which we have referred, both as to doing and nondoing, contemplated in the reason of things the execution of the duties which the contract imposed on the bank, either by the governing body of the bank, its board of directors, or by a superior officer, such as the president of the bank, having a general power of supervision over the business of the corporation, and vested with the authority to condone the wrongdoing or to discharge a faithless employee. That is to say, the stipulation in all its aspects undoubtedly related to the bank, acting through its board of directors or through an official who, from the nature of his duties, was in effect the vice principal of the bank. The decision in *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, *ante*, 253, 22 Sup. Ct. Rep. 124, it may be remarked, in passing, is not antagonistic to the views we have just expressed, because in that case all the information which was held imputable to the bank had been communicated to the president of the bank.

Now, applying the principles previously expounded to the case in hand, it is evident that the court rightly refused to instruct the

[364] jury that the mere knowledge of one or more directors, *less than a majority of the board, and of the vice president of the bank, of the default of the president, was imputable to the bank. Indeed, as we have previously said, when the charge which the court gave is considered, it is apparent that the court went quite as far as the law warranted, in favor of the defendant, since the court instructed that knowledge acquired by the cashier in the course of the business of the bank, and not communicated by him to the board of directors, should be regarded as the knowledge of the bank.

6. The court of appeals erred in affirming the action of the trial court in instructing the jury that the carelessness of the directors in the management of the bank was not an issue for them to consider.

In considering the clause of the charge to the jury which provided that "due and customary supervision over the employee" should be observed "for the prevention of default," the trial court told the jury that it imported "a reasonable vigilance upon the part of the bank to prevent defaults," that is, to prevent the commission of fraudulent acts by McKnight. To instruct the jury in broad terms that if they found that the directors were careless in the management of the bank generally they should find for the defendant, could only have served to mislead. The court did not err in refusing the requested instruction.

Judgment affirmed.

Mr. Justice **Gray** and Mr. Justice **Brewer** did not hear the argument, and took no part in the decision of this cause.

[365]***BRAINARD H. WARNER** and **Louis D. Wine**, *Appts.*,
v.

LILY ALYS GODFREY.

(See S. C. Reporter's ed. 365-380.)

Appeal—remanding cause for amendment to bill—amendment setting up new ground for relief.

1. A case cannot be remanded by an appellate court for the purpose of allowing the complainant to amend a bill in order to assert a new and distinct ground of relief. If the defendants are deprived by such mandate of all opportunity to interpose any defense.
2. Parties who, with knowledge of all the facts, sue to set aside a conveyance for actual fraud, cannot be permitted by the mandate of an appellate court, after a determination by it against them of every issue actually litigated, to amend their bill by asserting constructive fraud as a new and distinct ground for relief, with a prayer for a reconveyance upon payment to defendants of such sums as have been expended by them for and on account of the property,—especially where such complainants have persistently declined to accept from the defendants an offer to reconvey upon these very terms.

[No. 191.]

Argued April 25, 1902. Decided June 2, 1902.

A PPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District ordering a conveyance, on compliance with certain conditions, to the complainant in a suit to set aside a conveyance of realty. *Reversed.*

See same case below, 17 App. D. C. 104.

Statement by Mr. Justice **White**:

On September 1, 1896, Lily Alys Godfrey, appellee herein, filed a bill in the supreme court of the District of Columbia, sitting in equity, to establish her title to five lots of land situated in the city of Washington, of which it was asserted she had been defrauded by one Stephen A. Dutton.

The defendants to the bill were Dutton and wife, Louis W. Richardson, Fred M. Czaki, and Mary Alice Godfrey (mother of complainant). Omitting averments relating to real estate other than that now in controversy, it suffices to say that the bill detailed grossly fraudulent and criminal practices, by which Dutton, without consideration, on or about March 26, 1896, obtained the title to a large amount of real estate, the property of the complainant, including that now in controversy, that is, lots 1, 2, 3, and 66, in a subdivision of block 134, in the city of Washington. It was averred that by a deed recorded April 13, 1896, Dutton and his wife conveyed, without consideration and fraudulently, the lots in question to the defendant Richardson. The latter answered the bill on December 1, 1896, and averred that he was a bona fide purchaser of the property, without notice, *actual or [366] constructive, of any equity of the complainant: that, through his brokers or agents, B. H. Warner & Co., he had paid full consideration to Dutton for the property, and he annexed to the answer, as a part thereof, the contract of purchase from Dutton, a copy of which is in the margin.†

*On March 28, 1897, a decree *pro confesso* [367] was entered as to one of the lots of land affected by the bill, which is not involved in this controversy, and title to which remained in Dutton. By the decree the legal title to said lot was established in the complainant.

By an amended bill filed on May 1, 1897, Warner and Wine were made defendants to the cause. The amendment added to the clause in the original bill, which charged

†"Brainard H. Warner, Clarence B. Rheem, Geo. W. F. Swartzell, Louis D. Wine.

"Office of B. H. Warner & Co., 916 F. St. N. W., Washington, D. C.

"Articles of agreement, made and entered into this 10th day of April, A. D., one thousand eight hundred and ninety-six, by and between —, party of the first part, and Louis W. Richardson, party of the second part, in manner and form following: The said party of the first part in consideration of the sum of five hundred (500) dollars to his agents, B. H. Warner & Co., duly paid as a deposit, the re-

that the conveyance to Richardson was without consideration, the following:

"That the said Richardson was only a nominal party to the said transaction; the real parties were the said Dutton, on the one part, and Brainard H. Warner and Louis D. Wine, on the other; that the said Wine and Warner pretend that they advanced or furnished to the said Dutton the sum of six thousand five hundred and eighty-six and $\frac{3}{10}$ (\$6,586.33) dollars, and took from the said Dutton the said conveyance to the said Richardson to secure the repayment of the said sum so claimed to have been advanced. Whether said Warner and Wine actually furnished said Dutton such sum or any sum whatsoever the complainant cannot affirm or deny, and demands strict proof in that behalf, and she avers that the said Warner and Wine had such notice of the frauds of the said Dutton as herein set forth, and of such facts and circumstances as put them on inquiry as to the conveyance to said Dutton, that in equity they should have no benefit from said conveyance to said Richardson, but the same should be decreed to be canceled and held for naught."

On July 17, 1897, before any pleading by Warner and Wine, an amended and supplemental bill was filed, accompanied with numerous interrogatories required to be answered by the defendants Warner and Wine. The averments of the original bill as to the fraudulent practices by which Dutton had obtained the property of complainant were reiterated. As respects the defendants Warner and Wine, it was charged that Dutton, on March 29, 1896, with the object of consummating the fraud which he had practiced upon the complainant, "entered into negotiations with said B. H. Warner & Co., or said defendants, Warner and Wine, through one Ellen S. Mussey, a lawyer of said city, to whom he applied for a loan on [368] the security of this *complainant's said property, and on information and belief this complainant charges that said Ellen S. Mussey, after bringing the matter to the attention of the said B. H. Warner & Co., or said Warner and Wine, reported to the said Dutton that a loan of from twenty-five to thirty

thousand dollars could readily be negotiated on the security of said property, and stated that if he would return the following week she would have everything in readiness to complete the transaction. Accordingly the said Dutton came again to the said city of Washington on or about the 10th day of April, then next, and, going to the office of said B. H. Warner & Co., then and there signed a paper-writing or contract agreeing to sell all of said lots in square 134 at and for the grossly inadequate price of \$25,000, said sum being less than one half the price or consideration at which the said B. H. Warner & Co. had been authorized to sell the said lots by said Mary Alice Godfrey."

After averring that, by reason of the circumstances referred to, the defendants were put upon notice as to whether Dutton had honestly acquired the property, it was charged that it was the duty of defendants to have notified the complainant of the proposition of Dutton, but that no notice, in fact, was given. It was averred, moreover, that the said firm and the defendants Warner and Wine "purposely and intentionally concealed the fact that the said Dutton had signed the aforesaid contract to sell said lots at and for the grossly inadequate sum of \$25,000, and that he was eager and anxious to dispose immediately of said lots so soon after acquiring the same." And further, it was averred that "the said defendants, Warner and Wine, immediately set about the acquisition of said lots for their own benefit, and, with a view to, and for the purpose of, concealing their connection with said transaction, caused the title to the said lots to be conveyed to defendant Richardson by a pretended deed, bearing date the 13th day of April, 1896," and that said Richardson, because of his youth and inexperience and his relationship to the defendant Wine, and his connection in business with the firm of B. H. Warner & Co., "was chosen as the instrument or tool of the said defendants Warner and Wine, *for the consummation of [369] their schemes to get possession of this complainant's said property for the said grossly inadequate sum of \$25,000."

A joint and several answer was filed on

receipt whereof is hereby acknowledged, hereby agrees to sell unto the party of the second part, the following-described real estate in the city of Washington and District of Columbia: Lots 66, 1, 2, and 3, square 134, Washington, D. C.

"For the sum of twenty-five thousand (25,000) dollars, which the said party of the second part agrees to pay to the said party of the first part as follows:

"Seventy-five hundred (7,500) cash, balance seventeen thousand five hundred (17,500) to be assumed, secured by deed of trust on the said described property, with interest at the rate of six per cent per annum, payable —, which amount is now upon the property and secured by a trust or trusts, and the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall execute, acknowledge, and deliver to the said party of the second part, or to his heirs as assigns, a special warranty deed and conveyance, assuring to them the fee simple of the said premises free from all encumbrances, except as

1204

to the trust referred to above, which deed shall contain the usual full covenants. The terms of sale to be complied with in five days from the date hereof, and said deposit to be applied in part payment of the purchase of the said described real estate. Title to be good and marketable or deposit returned.

"And it is understood that the stipulations aforesaid shall apply to and bind the heirs, executors, administrators, and assigns of the respective parties.

"In witness whereof the parties to these presents have hereunto set their hands and seals the above day and date.

"(Signed) S. A. Dutton. [Seal.]

"(Signed) L. W. Richardson. [Seal.]

"Signed, sealed, and delivered in the presence of—

"(Signed) Ellen S. Mussey.

As to S. A. Dutton.

"(Signed) C. B. Rheem.

As to L. W. Richardson."

186 U. S.

behalf of Warner and Wine, and therein it was averred that the lots in question were bought by them in good faith for an adequate consideration, and that the title was taken in the name of Richardson merely for the purpose of convenience in making subsequent conveyances.

Issue having been joined, testimony was taken, and in all about one hundred and forty witnesses were examined. But a portion only of the evidence, embodied in 600 printed pages, has been submitted for the inspection of this court. The court below, however, referred to the record as an "immense" one, and it was stated that the greater part of the evidence consisted of the testimony of witnesses introduced to contradict on the one hand, or to support on the other, the denial of the defendant Warner, made under oath in his answer to the amended bill and in answers to special interrogatories, that he had had any acquaintance with Dutton, or ever had any business relations with him of any description until the transaction of April, 1896. This latter testimony is not contained in the printed record filed in this court.

The trial court decreed in favor of the defendants. In the opinion by it delivered the evidence respecting the different circumstances relied upon by the complainant to establish her case was reviewed, and it was held that the evidence was inadequate to support the charge of either actual or constructive fraud on the part of the defendants Warner and Wine.

Respecting one of the alleged circumstances charged to constitute a badge of fraud, viz., that Warner and Dutton were acquainted and had business dealings together prior to the sale in question, the court upheld the contention of Warner that he had had no acquaintance or dealings with Dutton prior to said purchase. Referring to the evidence on this branch of the case, the court said:

[370] "A most careful examination has satisfied me beyond doubt that the entire testimony adduced in behalf of the complainant *designed to show that Warner was ever in the company of Stephen A. Dutton on either of the occasions as described is absolutely untrue, and that by far the greater part of it consists of unfounded falsehoods, uttered from bad motives and attempted to be sustained by deliberate perjury."

The appellate court coincided with the opinion of the trial court, that the evidence introduced at the hearing failed to sustain the claim that there had been either actual or constructive fraud, as alleged in the bill, on the part of Warner and Wine, and that, on the contrary, the proof showed there was no ground for awarding the relief prayed in the bill. It was, however, held that "from another point of view, made clear by the testimony, though it may not be specifically presented by the pleadings," the complainant, standing in the stead of Dutton, was entitled to disaffirm the sale and recover the property from Warner and Wine on repaying to said defendants the price actually paid
186 U. S.

by them to Dutton for the property and such further sums as might have been paid by them in the discharge of taxes and encumbrances. The ground for this conclusion was as follows: That the testimony showed that the firm of B. H. Warner & Co. were the agents of Dutton in negotiating the sale; and as it was further shown that Richardson, the purchaser named in the contract, was only an ostensible buyer, and that Warner and Wine, members of the firm of B. H. Warner & Co., were the real purchasers, and as it appeared that the fact of the purchase by Warner and Wine was not made known to Dutton, the latter would have had a right by a "timely bill filed for that purpose," to set aside the sale on the ground that his agents had been unfaithful to their trust by buying the property of their principal for their own account without the knowledge and consent of their principal; that this right, thus existing in Dutton, might be availed of in equity by the complainant, as the equitable owner of the property. As, however, the court found that the act of Warner and Wine in buying the property through their firm, as agents of Dutton, involved no intentional wrong, but constituted a mere legal or constructive fraud, it was held that the complainant in order to obtain equity must do equity, and that she could not avail of her right to disaffirm the purchase by Warner and Wine without reimbursing them for the money actually paid by them to Dutton, and such other sums, if any, paid by them in the discharge of taxes and encumbrances, less such sums as had been received, or ought in the exercise of due diligence to have been received, as rents and profits of the property. After deciding that upon such payment the defendants should be decreed to reconvey the property to the complainant, the court said (16 App. D. C. 117):

"It may be that, to obtain this relief, the bill will have to be amended to some extent. If so, it can be done without reopening the case for further testimony. Doubtless, too, a reference to the auditor will be necessary for a statement of the account between the parties before a final decree can be entered.

"It follows that the decree dismissing the bill must be reversed, and the cause remanded, with directions to vacate the said decree, and take such further proceedings in accordance with this opinion as may be expedient and proper.

"The costs of this appeal will be divided equally between the parties."

Upon the filing of the mandate of the court of appeals in the supreme court of the District, the complainant prepared an amendment to the bill, in which it was averred that the defendants Warner and Wine, as members of the firm of B. H. Warner & Co., were agents of the defendant Dutton to find a purchaser for the lots in question; that said defendants did not inform Dutton that they were the real purchasers of the lots; that in consequence of such fact the purchase was fraudulent at law and voidable at the election of Dutton or

of the complainant, for whom Dutton held title under a constructive trust, by reason of his fraudulent conduct in the premises. The amendment also contained an averment of a willingness, upon reconveyance of the title, to repay such sums as had been expended by the defendants for and on account of the property.

[372] This proposed amendment to the bill was served upon the defendants accompanied with a notice that it was the intention of the complainant to apply to the court for leave to file the amendment and at the same time to ask a reference of the cause to an auditor to state the account without affording the defendants *the opportunity of taking testimony to disprove the allegation of the amendment that the firm of B. H. Warner & Co. were agents of Stephen A. Dutton. The defendants at once filed an answer to the amendment, in which the following averments were contained:

"1. They deny that the firm of B. H. Warner & Co. were agents for the defendant Stephen A. Dutton, to find a purchaser for the real estate in controversy, as alleged by said amendment, or that the said firm or any of its members ever were the agents of the said Stephen A. Dutton for any purpose whatsoever. It is true that in Exhibit L. W. R. No. 1, filed as an exhibit to the answer of the defendant Louis W. Richardson, to the original bill in this cause, 'B. H. Warner & Co.,' are mentioned as agents of unnamed parties of the first part, but they aver that this circumstance grew out of the fact that a printed form of memorandum of sale belonging to the said firm, in which their names were printed as agents of the vendor, was used in the transaction, the same being the said Exhibit L. W. R. No. 1, and by a purely clerical omission the name of the said firm was not struck out and that of Mrs. Ellen S. Mussey, who was the only agent of the said Stephen A. Dutton in the matter, inserted instead. So far from being the agents of Stephen A. Dutton, neither of these defendants, nor any member of the firm of B. H. Warner & Co., was aware at the time the said memorandum of sale was prepared who was the owner of the property described in it, agency for which owner is now sought to be charged upon them, and the name of the vendor was accordingly left blank in the said memorandum for that reason. Both the said Ellen S. Mussey, who was the agent of the said Stephen A. Dutton, and the said Stephen A. Dutton himself, well knew throughout the entire transaction that the firm of B. H. Warner & Co. represented the purchaser of the said property, and in no way represented or claimed to represent the said Stephen A. Dutton."

[373] The answer further averred that, in the beginning of the controversy, the defendants had offered to convey to complainant the property in dispute upon being reimbursed simply the money which they had actually expended, and that this offer *was rejected; that the complainant having thus rejected said offer, and having subjected the defendant to the expense of a long and costly law-

suit to disprove the charges of fraud and wrong made against them, which they had successfully done, and the defendants, in doing this, having been compelled to pay out more than \$6,000 in costs and expenses, it was inequitable to allow the complainant to amend her bill by substituting a new and distinct ground of relief, and upon such ground to allow her to recover the property on simply reimbursing the defendants the amount of the purchase price and their actual outlay in the care of the property, without any allowance of interest or repayment of the expenses of the litigation. It was insisted, moreover, in the answer that, if the amendment was allowed, the defendants were entitled to be heard, in order to show that the averments contained in it were untrue, as specially set up in the answer. The court allowed the proposed amendment to be filed, and, doubtless conforming to the opinion of the court of appeals, where it was stated that the bill could be amended "without reopening the case for further testimony," in effect denied the right of the defendant to offer any testimony to disprove the truth of the averments contained in the amendment by ordering a reference to the auditor with directions simply to ascertain and report to the court "the amount of the money actually paid by Warner and Wine to the defendant Dutton, and of other sums which they had paid in discharge of the taxes and encumbrances, less such sums as had been received, or ought, in the exercise of due diligence, to be received, as rents and profits of the property from the commencement of their possession."

The auditor reported that the disbursements by Warner and Wine, for and on account of the property, for taxes, interest on trust indebtedness, water rents, and repairs, exceeded the rents and profits by \$3,868.95, which sum, added to \$6,586.33,—the sum paid for the property by Warner and Wine less the commission,—made a total of \$10,455.28, and was the sum which the complainant should pay to the defendants, as a condition of divesting them of their interest in the property. It will be observed that no interest was allowed upon the outlays of Warner *and Wine, nor was any allowance [374] made for the costs and disbursements occasioned in making their defense in the protracted litigation. These costs and disbursements were stated to aggregate \$6,918.85, of which \$1,626.00 was for examiner's fees.

Exceptions were filed to the report of the auditor, but the same were overruled, and a final decree was entered ordering the defendants to convey the lots to the complainant upon the payment within ninety days of \$10,455.28 and any further expenditure on account of the property made after the close of the account embraced in the report of the auditor. It was further provided that in the event of nonpayment within the time specified the bill of complaint should stand dismissed, with costs; and in the event of payment the respective parties should pay their own costs. On appeal the decree just referred to was affirmed, and the court of

appeals, in its opinion, stated that "the action of the court was in strict conformity with the mandate of this court and the accompanying opinion." 17 App. D. C. 104. This appeal was then taken.

Messrs. J. J. Darlington and W. F. Mattingly argued the cause and filed a brief for appellants:

A party may not state one case in his bill, and rely upon a different one in the evidence. The *allegata* must give the basis for the *probata*.

Boone v. Chiles, 10 Pet. 177, 9 L. ed. 388.

A party can no more recover upon a case proved, but not alleged, than upon a case alleged, but not proved.

Foster v. Goddard, 1 Black, 518, 17 L. ed. 232.

The court can consider only what is put in issue by the pleadings. Averments without proofs, and proofs without averments, are alike unavailing.

Washington R. Co. v. Bradley, 10 Wall. 303, *sub nom. Washington, A. & G. R. Co. v. Washington*, 19 L. ed. 895.

A case will not be allowed to turn in an appellate tribunal—and especially where great expense has been incurred by the parties in the taking of testimony—upon questions not made below, even where they are jurisdictional.

Tyler v. Moses, 13 App. D. C. 428; *Manning v. Chesapeake & P. Teleph. Co.* 29 Wash. L. Rep. 342.

Mr. John G. Johnson argued the cause and filed a brief for appellee.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The main asserted badges of fraud upon which the complainant based her contention that the conveyance by Dutton to Richardson on April 13, 1896, should be treated, so far as the complainant was concerned, as a nullity, were: (1) The gross inadequacy of the consideration; (2) a prior agency of the firm of B. H. Warner & Co., for the sale of the lots on behalf of the complainant; (3) the haste with which the negotiations for the sale were had and the sale was completed; and (4) the execution of title to Richardson for the benefit of Warner and Wine and the concealment of the interest of the last-named defendants in the purchase.

[375] *To sustain and disprove these contentions voluminous evidence was introduced, which was elaborately and carefully reviewed in the opinions delivered by the courts below. Both the trial and appellate court concurred in holding that the proof absolutely vindicated the defendants from the charges of wrongdoing made against them and clearly established the want of merit in the contentions. As no appeal was taken by the complainant from the first decree of the court of appeals, and as the relief asked by the last amendment to the bill in effect abandoned the claim that the defendants had committed a fraud upon the complainant, by basing the claim for relief solely upon the hypothesis

186 U. S.

of a constructive fraud having been practised upon Dutton, the entire want of foundation for the charges of wrongdoing urged against the defendants and upon which the long litigation proceeded may be taken as conclusively established.

Whatever may be said of the failure of Richardson in his answer to the original bill to fully and fairly disclose the actual transaction, certainly his not doing so did not long mislead the complainant or conceal from her the real facts. There is no question possible on this subject, since the complainant testified that shortly after the filing of the answer of Richardson to the original bill, statements of the defendant Warner made to the attorney of the complainant in the city of New York, disclosing the actual transaction, were communicated to her, and it also appears that the attorney for the defendants, in company with the defendant Wine, called upon the attorney of the complainant in the city of Washington and stated the facts of the transaction to him. With full knowledge, then, of the facts, and because of such knowledge, the amended and supplemental bill was filed making Warner and Wine defendants as the real purchasers.

The closest inspection of the bill, as originally filed or as amended, discloses no averment which can be construed as predicated relief upon the theory that Warner and Wine had practised a constructive fraud upon Dutton by purchasing, without his knowledge and consent, property which had been placed by him in the hands of the firm of B. H. Warner & Co. for sale. *On the contrary, [376] the sole ground of relief was the claim that Warner and Wine had in effect conspired with Dutton to defraud the complainant, and because thereof the complainant was entitled to recover the property from the said defendants without in anywise reimbursing them for their expenditures in the matter. The answer of Warner and Wine, whilst conceding that they were the real purchasers, took issue upon the charges of wrong and fraud alleged against them.

Looking into the record, we repeat, nothing is found conveying even an intimation that the parties considered during the proceedings leading up to the joinder of issue and trial which ensued that any issue existed between them than the one made by the pleadings as above stated. Indeed, the record makes clear the fact that both parties, in taking testimony, acted upon the assumption that it was a fact beyond dispute that the firm of B. H. Warner & Co. at the time of the sale represented the purchasers, Warner and Wine, and not the seller, Dutton. Thus, in interrogating the witness Mussey, who was at the time of the sale the attorney of Dutton, and who was called for the defendants, the following question was asked by counsel for complainant:

Q. So that at the time of this transaction in April, 1896, when you agreed with Mr. Warner and Mr. Wine to share with them the commission, they to have two thirds, or

1207

\$500, and you to have one third, or \$250, so far as any knowledge that you had on the subject is concerned, you were treating with them as *the brokers of Louis W. Richardson, or whoever the purchaser was*. Is that so?

A. I treated with them as the brokers, and had no interest in who purchased it, so long as the money was paid for it.

Again, in cross-examining the defendant Wine, the following question was asked by the complainant:

Q. Why did you conceal from Mrs. Mussey, at the time of the purchase of said property in April, 1896, your true connection with the said transaction as purchaser, and hold yourself out as the broker or representative of the dummy in whose name you took title to the property, taking two thirds of the commission for selling the property to yourself?

[377] *Under the circumstances which we have stated, the first question which arises is, Was the court of appeals justified, after concluding every issue actually litigated, in favor of the defendants, in remanding the case for the purpose of allowing the complainant to amend the bill in order to assert a new and distinct ground of relief constituting a complete departure from the theory upon which the bill had been framed and upon which the case had been tried? And if it was so justified, was it authorized, whilst thus remanding the case for the purpose of allowing the amendment, to provide that the case should not be reopened; in other words, that the amendment could be made and relief granted on it and the defendants be deprived of all opportunity of interposing any defense? Inverting the order in which the questions have been just stated, and under the assumption that the court was justified on the record before it in remanding the case for the purpose of allowing the amendment, we think it was error to reopen the case in order to allow the amendment asserting the new and distinct ground of relief, and at the same time to treat the case as not reopened and the record as closed, the result being to deprive the defendants of all opportunity of a hearing on the new ground of relief permitted to be asserted against them. *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

This conclusion would necessitate, in any event, a reversal, in order that a trial be had of the new and distinct issue raised by the amendment made under the sanction of the court. This does not, however, relieve us from the necessity of determining whether the court was justified in allowing the amendment, since, if it be found that error was committed in that particular, the appellants would be entitled to a decree of reversal, finally disposing of the controversy.

Obviously, the defendants Warner and Wine did not on the trial introduce any evidence to rebut a claim which was not made and which was in substance at war with the theory of the case propounded against them. As observed by the court of appeals, if the right existed in Dutton to disaffirm the sale

to Richardson, as having been, in fact, made to his agents, it would have been incumbent upon Dutton, if he desired such relief, *to [378] have filed "a timely bill for that purpose." The same obligation necessarily rested upon the complainant of distinctly and promptly asserting a right to relief of like character, if she desired such relief. This, however, was not done.

It cannot be said that the complainant failed in this particular because of ignorance on her part of the ground of relief in question, for, as we have already shown, the contract formed a part of the answer of Richardson, and the facts as to Warner and Wine being the real purchasers were known to the complainant at the time of the filing of the amended and supplemental bill. Indeed, certain also it is that every fact in the record from which the court of appeals deduced the conclusion that B. H. Warner & Co. were the agents of Dutton is shown to have been known to the complainant before the filing of the amended and supplemental bill. It would be highly inequitable to permit a litigant to press with the greatest pertinacity for years unfounded demands for specific and general relief, however much confidence he may have had in such charges, necessitating large expenditures by the defendants to make a proper defense thereto, and then, after the submission of the cause, when the grounds of relief actually asserted were found to be wholly without merit, to allow averments to be made by way of amendment, constituting a new and substantive ground of relief. This is especially applicable when the facts upon which such amendment rests were known at the incipency of the litigation, and the character of the relief was such as called for promptness in asserting a right thereto. Cogency is added to these considerations when it is borne in mind that if the facts had been embodied in the bill, so as to have allowed issue to be taken thereon, they might have been fully met and disproved by the defendants. Even if these general equitable considerations might, under exceptional circumstances, be not controlling, they are certainly so when the special facts in the case in hand are borne in mind. Thus it is shown that soon after the filing of the answer of Richardson, when Warner and Wine, through their attorneys, called the attention of the counsel of complainant to the fact that Warner and Wine were the real purchasers, the defendants named expressed a willingness to *treat the purchase by them [379] from Dutton as a loan, and to convey the property to the complainant upon being reimbursed their advances and expenses. This was declined. Again, in open court, in February, 1898, the proposition was distinctly made by counsel for the defendants to treat the transaction as a loan, "and to make conveyance of the property to the complainant on being reimbursed their actual advances." The response to this proposition was couched in the following language:

"Mr. Keane: Counsel for complainant

desires to say that an offer of this kind, made after the suit has been commenced, and after it has been in litigation since September, 1896, and after a number of witnesses have been examined upon the part of the complainant, and after the complainant has been obliged to incur heavy expenses of retaining counsel, and of incurring the further expenses necessarily incident to the preparation of the trial of the case, such a proposition comes too late, and the complainant declines such a proposition for the reasons stated, and for the further reasons that the defendants were not at the time of the alleged purchase of such property bona fide purchasers thereof, but had knowledge of such facts and circumstances as put them upon inquiry and deprived them of the standing in a court of equity of bona fide purchasers."

Thus the defendants were distinctly notified that no adjustment was possible, but that the intention was to divest them of the property without reimbursement in whole or in part.

The complainant thus having expressly declined to put an end to the litigation, upon the theory that because of the mala fides of Warner and Wine she was entitled to an unconditional recovery of the property, she ought not, in equity, upon the collapse of her efforts to establish fraud and bad faith on the part of the defendants, to be allowed to reform her pleadings and change her attitude towards the defendants in order to obtain that which she had expressly elected not to seek, and had persistently declined to accept.

[380] *The decrees of the Court of Appeals of the District of Columbia should be reversed*, and the cause remanded to that court with instructions "to reverse the decree of the Supreme Court of the District of Columbia, passed on June 13, 1900, ordering a conveyance to the complainant on compliance with certain conditions, and to affirm and reinstate the decree of the Supreme Court of the District of Columbia, passed January 24, 1899, dismissing the bill and amended bills as against certain of the defendants.

And it is so ordered.

Mr. Justice **Harlan** and Mr. Justice **Gray** did not hear the argument and took no part in the decision of this case.

COMPAGNIE FRANCAISE DE NAVIGATION A VAPEUR, *Plff. in Err.*,
v.

STATE BOARD OF HEALTH, LOUISIANA, *et al.*

(See S. C. Reporter's ed. 380-401.)

Commerce — state regulation — validity of Louisiana quarantine laws — excluding immigrants from entering infected district—due process of law—effect of Federal immigration and quarantine laws.

1. No unconstitutional regulation of commerce

is made by La. Acts 1898, No. 192, § 8, under which the state board of health may exclude healthy persons from entering a locality infested with a contagious or infectious disease, whether such persons come from within or without the state.

2. A foreign steamship company is not deprived of its property without due process of law by the action of the Louisiana state board of health, authorized by La. Acts 1898, No. 192, § 8, in prohibiting it from landing the passengers on one of its steamers at New Orleans, or any place contiguous thereto, because of the existence of an infectious disease in that city.
3. The quarantining of a French steamship because of the existence of an infectious or contagious disease at the port of arrival, under the authority of La. Acts 1898, No. 192, § 8, does not conflict with the provisions of article 15 of the treaty with Greece (assuming that such treaty is applicable because France must be treated as "the most favored nation" in Louisiana ports), that vessels therefrom, when accompanied by a proper bill of health, shall be subjected to no other quarantine than such as may be necessary for the visit of the health officers of the port of arrival, unless such vessel is subsequently infected or a general quarantine has been established against all ships coming from the port of departure.
4. The quarantine laws of the several states were not abrogated by the immigration acts of March 3, 1875, August 3, 1882, February 26, 1885, February 23, 1887, and March 3, 1891, and the regulations to enforce the same; but the safeguards which they create and the regulations which they impose on the introduction of immigrants are ancillary and subject to such quarantine laws.
5. The overthrow of the existing state quarantine systems, and the abrogation of the power on the subject of health and quarantine exercised by the states, because the enactment of state laws on these subjects would in particular instances affect interstate and foreign commerce, were not contemplated by the act of Congress of 1893 "granting additional quarantine powers and imposing additional duties upon the Marine Hospital Service" (27 Stat. at L. 449, chap. 114), in view of the provisions of § 3 of that act, directing the Supervising Surgeon General to co-operate with and aid state and municipal boards of health in the execution and enforcement of their rules and regulations, and those made by the Secretary of the Treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries.

[No. 4.]

Argued October 29, 30, 1900. Decided June 2, 1902.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment affirming a judgment of the trial court which dismissed a suit to recover damages from the state board of health alleged to have been suffered from the enforcement of a quarantine resolution. *Affirmed.*

See same case below, 51 La. Ann. 645, 25 So. 591.

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W.* 186 U. S.

R. Co. v. Com. (Va.) 13 L. R. A. 107; *McAnna & F. Co. v. Citizens' Trust & Surety Co.* 24 C.

Statement by Mr. Justice **White**:

This action was commenced in the state court against the board of health of the state of Louisiana and three persons who were members of said board, and whom it was sought to hold individually responsible for damages alleged to have been suffered from the enforcement of a resolution adopted by the board upon the theory that the resolution referred to was *ultra vires*, and hence the members of the board who voted for it [381] *were personally liable for any damages occasioned by the enforcement of the resolution. The board was thus described in the petition:

"That the defendant the state board of health was a body created by act No. 192 of the general assembly of the state of Louisiana of the year 1898, with power to sue and be sued, domiciled in this city (the city of New Orleans), and composed of seven members, whose duty it was, by the provisions of said act, to protect and preserve the public health by preparing and promulgating a sanitary code for the state of Louisiana, by providing for the general sanitation of the state, and with authority to regulate infectious and contagious diseases and to prescribe a maritime and land quarantine against places infected with such diseases."

It was asserted that the plaintiff, a corporation created by and existing under the laws of the Republic of France and a citizen of said Republic, on or about September 2, 1898, caused its steamship *Britannia* to be cleared from the ports of Marseilles, France, and Palermo, Italy, for New Orleans with a cargo of merchandise and with about 408 passengers, some of whom were citizens of the United States returning home, and others who were seeking homes in the United States, and who intended to settle in the state of Louisiana or adjoining states, and that all the passengers referred to at the time of their sailing were free from infectious or contagious diseases. It was further averred that on September 29, 1898, the vessel arrived at the quarantine station some distance below the city of New Orleans, was there regularly inspected, and was found, both as to the passengers and cargo, to be free from any infectious or contagious disease, and accordingly was given a clean bill of health, whereby the ship became entitled to proceed to New Orleans and land her passengers and discharge her cargo. This, however, it was asserted she was not permitted to do, because, on the date last mentioned, at a meeting held by the board of health, the following resolution was adopted:

"Resolved, That hereafter in the case of any town, city, or parish of Louisiana being

declared in quarantine, no body or bodies of people, immigrants, soldiers, or others shall be allowed *to enter said town, city, or [382] parish so long as said quarantine shall exist, and that the president of the board shall enforce this resolution."

It was charged that in order to enforce this resolution the president of the board of health, who was one of the individual defendants, instructed the quarantine officer to detain the *Britannia* at the quarantine station, and the president of the board addressed to the agent of the steamship the following communication explanatory of the detention of the vessel:

"Referring to the detention of the SS. *Britannia* at the Mississippi river quarantine station, with 408 Italian immigrants on board, I have to inform you that under the provisions of the new state board of health law, § 8, of which I inclose a marked copy, this board has adopted a resolution forbidding the landing of any body of people in any town, city, or parish in quarantine. Under this resolution the immigrants now on board the *Britannia* cannot be landed in any of the following parishes of Louisiana, namely: Orleans, St. Bernard, Jefferson (right bank), St. Tammany, Plaquemines, St. Charles, or St. John. You will therefore govern yourselves accordingly."

The president of the board of health, it was alleged, moreover notified the agent of the ship that if an attempt was made to land the passengers at any place contiguous to New Orleans, such place not being in quarantine, a quarantine against such place would be declared, and thus the landing be prevented.

It was averred that while the resolution of the board of health purported on its face to be general in its operation, in truth it was passed with the sole object of preventing the landing of the passengers from the *Britannia*, and this was demonstrated because no attempt was made by the board of health to enforce the provisions of the resolution against immigrants from Italy coming into the United States *via* the port of New York and thence reaching New Orleans by rail, and that after the promulgation of said resolution "more than 200 such persons varying in groups of 30 to 100 in number, have from time to time been permitted to enter said city." It was averred that the action of the board was not authorized by the state *law, and if it was, such law was void [383] because repugnant to the provision of the Constitution of the United States conferring upon Congress power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." Averring that damage had been already en-

C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

On quarantine regulations by health authorities—see note to *Hurst v. Warner* (Mich.) 26 L. R. A. 484.

As to what constitutes due process of law—

see *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and note; *Re Gannon* (R. I.) 5 L. R. A. 359, and note; *Ulman v. Baltimore* (Md.) 11 L. R. A. 224, and note; *Gilman v. Tucker* (N. Y.) 13 L. R. A. 304, and note. And see notes to *People v. O'Brien* (N. Y.) 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

tailed to the extent of \$2,500, for which not only the board, but its members who voted for the resolution, were liable, and reserving the right to claim such future damage as might be entailed by the further enforcement of the resolution, the petition asked for an injunction restraining the enforcement of the resolution in question, and prayed judgment against the board and the members named for \$2,500 *in solido*.

The court declined to allow a preliminary restraining order, and upon a hearing on a rule to show cause, the injunction was refused. The order of the board of health, which was complained of, continued, therefore, to be enforced against the ship. Subsequently the plaintiff filed a supplemental and amended petition. It was reiterated that the immigrant passengers on board the *Britannia* were free from disease when they shipped and at the time of their arrival, and, in addition, it was alleged that the steamer with the immigrants on board had sailed from her port of departure "prior to the declaration by said board of health of the existence of any infectious disease in the city of New Orleans." It was alleged that, in consequence of the insistence of the board of health and its members, in enforcing the illegal order refusing to allow the landing of the immigrant passengers, the steamer had been obliged to proceed to Pensacola, Florida, where they were landed, and then the steamer returned to New Orleans for the purpose of discharging cargo. The damage resulting was averred to be \$8,500, besides the \$2,500 previously claimed, and a judgment for this amount, in addition to the previous sum, was also asked *in solido* against the board and the members thereof, who were individually made defendants. It was, moreover, averred that the action of the board was "in violation of the laws of the United States, and the rules and regulations made in pursuance thereof, relating to quarantine and immigration from foreign countries into ports of the United States, and especially acts of Congress approved *February 15, 1893, and acts of Congress of March the 3d, 1893, August the 3d, 1882, and June the 26th, 1884, and the rules and regulations made in pursuance thereof, and of the treaties now existing between the United States, on the one part, and the Kingdom of Italy and the Republic of France on the other part."

[384] The defendants filed a peremptory exception of no cause of action, which was sustained by the trial court, and the suit was therefore dismissed. On appeal to the supreme court of the state of Louisiana the judgment of the trial court was affirmed. 51 La. Ann. 645, 25 So. 591.

Mr. W. B. Spencer argued the cause, and, with Mr. W. W. Howe, filed a brief for plaintiff in error:

The basis upon which this court has upheld the exclusion, inspection, and quarantine laws of various states is that criminals, diseased persons and things, and

paupers, are not legitimate subjects of commerce.

License Cases, 5 How. 576, 12 L. ed. 288; *Leisy v. Hardin*, 135 U. S. 113, 34 L. ed. 133, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Re Rahrer*, 140 U. S. 557, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 575, 11 Sup. Ct. Rep. 865; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Bangor v. Smith*, 83 Me. 422, 13 L. R. A. 686, 22 Atl. 379; *State v. The Constitution*, 42 Cal. 578, 10 Am. Rep. 303; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Henderson v. New York*, 92 U. S. 259, *sub nom. Henderson v. Wickham*, 23 L. ed. 543.

To permit the exclusion of any person then unobjectionable, upon the ground that, in the opinion or judgment of some official or officials, he might possibly contract at some future day some disease and thereby spread it among the community, or that he would become vicious and thereafter injure public morals or affect the public safety, would open the door to all sorts of oppression.

Re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

It is no answer to say that this statute operates equally upon all persons, resident as well as nonresident.

Minnesota v. Barber, 136 U. S. 326, 34 L. ed. 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *State Freight Tax Case*, 15 Wall. 232, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146.

Or that the board will not abuse the wide authority given it by the statute.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 205, 29 L. ed. 162, 1 Inters. Com. Rep. 392, 5 Sup. Ct. Rep. 826.

In testing the constitutionality of a statute, its natural and reasonable effect should be regarded.

Chy Lung v. Freeman, 92 U. S. 279, 23 L. ed. 551; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.

There can be no doubt as to the power of this court to entertain and decide the issue whether the rights of the plaintiff in error under the 14th Amendment have been invaded or infringed.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Chicago & N. W. R. Co. v. Chicago*, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506.

The plaintiff in error is a person within the meaning and scope of the 14th Amendment.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

The word "person" includes an alien, and the Amendment entitles him to the protection of liberty and property.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Hoover*, 30 Fed. 51; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *United States v. Wong Dep Ken*, 57 Fed. 206; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Re Ah Fong*, 3 Sawy. 154, Fed. Cas. No. 102.

The right of the plaintiff in error freely to enter the port of New Orleans with its ships, and to lawfully trade there free of damaging and arbitrary interference by the state of Louisiana or any agency thereof, is granted alike by the Constitution, the treaty of the United States with France, and the legislation of Congress.

U. S. Rev. Stat. §§ 1977, 709.

This right is property under every definition of that term, and its deprivation or curtailment constitutes a taking of property and an infringement of liberty.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Tiedeman*, Pol. Power, § 3.

The effect of a state statute may be considered in testing its constitutionality.

Yick Wo v. Hopkins, 118 U. S. 373, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064; *Chy Lung v. Freeman*, 92 U. S. 279, 23 L. ed. 551; *Henderson v. New York*, 92 U. S. 268, *sub nom.* *Henderson v. Wickham*, 23 L. ed. 547; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239.

No one is bound to trust that an illegal power will be legally and moderately used.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 205, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Henderson v. New York*, 92 U. S. 268, *sub nom.* *Henderson v. Wickham*, 23 L. ed. 547.

If arbitrary power be given, it is not law, for "law is the definition and limitation of power."

Yick Wo v. Hopkins, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

The statute as applied and construed is void for the reason that it is in conflict with treaties between the United States on the one part and the Republic of France and the Kingdom of Italy on the other part, guaranteeing certain rights, privileges, and immunities to the citizens and subjects of said countries.

Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; *Baker v. Portland*, 5 Sawy. 566, Fed. Cas. No. 777; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Nishimura Ekiu v. United*

States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Head Money Cases*, 112 U. S. 580, *sub nom.* *Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Re Ah Fong*, 3 Sawy. 144, Fed. Cas. No. 102.

The section of the act complained of is unconstitutional; it is not a law; it confers no rights; it imposes no duty; it affords no protection; it is, in legal contemplation, as inoperative as though it had never been passed.

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121.

The case stands, in such event, as if the members of the board had acted without sanction of law; and they must respond for the damages occasioned by their illegal acts.

Beers v. Board of Health, 35 La. Ann. 1132, 48 Am. Rep. 256.

Mr. F. C. Zacharie argued the cause and filed a brief for defendants in error:

Quarantine laws of the various states are consistent with the Constitution of the United States, although they affect, to a greater or less degree, foreign commerce.

Gibbons v. Ogden, 9 Wheat. 189, 6 L. ed. 68; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Henderson v. New York*, 92 U. S. 269, *sub nom.* *Henderson v. Wickham*, 23 L. ed. 548; *Smith v. Alabama*, 124 U. S. 474, 31 L. ed. 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 493, 31 L. ed. 709, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 112, 34 L. ed. 133, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 661, 29 L. ed. 520, 6 Sup. Ct. Rep. 252; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Miller, Const.* 480; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 463, 30 L. ed. 241, 6 Sup. Ct. Rep. 1114.

The 14th Amendment to the Constitution of the United States does not interfere with, impair, or abolish the exercise of the legitimate police powers of the states.

Parker & W. Public Health & Safety, § 15, and note; Prentice, Pol. Powers, p. 27, and notes.

No treaty with a foreign power can relieve foreigners and aliens, whether immigrant or not, from conforming to the police laws of a state.

Quarantine laws of the states are not abolished or modified by the United States immigration laws, or other laws of the Federal government.

Prentice, Pol. Powers, 419.

In judging of the validity of a quarantine law, as of any other police law of a state, the only question to be decided is whether the act is a reasonable exercise of the power, and not one for ulterior and different purposes. If it is reasonable, it is not unconstitutional, and must stand.

Prentice, Pol. Powers, 105; Parker & W. Public Health & Safety, §§ 50 *et seq.*

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The law of Louisiana, under which the board of health exerted the authority which is complained of, is found in § 8 of act No. 192, enacted in 1898. The portion of the section which is essential is as follows, the provision which is more directly pertinent to the case in hand being italicized:

[385] "In case that any parish, town, or city, or any portion thereof, shall become infected with any contagious or infectious disease, to such an extent as to threaten the spread of such disease to the other portions of the state, the state board of health shall issue its proclamation declaring the facts and ordering it in quarantine, and shall order the local boards of health in other parishes, towns, and cities to quarantine against said locality, and shall establish and promulgate the rules and regulations, terms and conditions on which intercourse with said infected locality shall be permitted, and shall issue to the other local sanitary authorities instructions as to the measures adopted in quarantining against persons, goods, or other property coming from said infected localities, and these rules and regulations, *terms and conditions shall be observed and obeyed by all other health authorities, provided that should any other of the noninfected portion of the state desire to add to the regulations and rules, terms and conditions already imposed by the state board, they do so on the approval of the state board of health. *The state board of health may, in its discretion, prohibit the introduction into any infected portion of the state, persons acclimated, unacclimated, or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease.* The state board of health shall render the local boards of health all the assistance in their power and which the condition of their finances will permit."

The supreme court of the state of Louisiana, interpreting this statute, held that it empowered the board to exclude healthy persons from a locality infested with a contagious or infectious disease, and that this power was intended to apply as well to persons seeking to enter the infected place, whether they came from without or from within the state. The court said:

"The law does not limit the board to prohibiting the introduction of persons from one portion of the state to another and an infected portion of the state, but evidently looked as well to the prohibition of the introduction of persons from points outside of the state into any infected portion of the state. As the object in view would be 'to accomplish the subsidence and suppression of the infectious and contagious diseases, and to prevent the spread of the same,' it would be difficult to see why parties from outside of the state should be permitted to enter into infected places, while those from the different parishes should be prevented from holding intercourse with each other.

"The object in view was to keep down, as

far as possible, the number of persons to be brought within danger of contagion or infection, and by means of this reduction to accomplish the subsidence and suppression of the disease and the spread of the same.

"The particular places from which the parties who were to be prohibited from entering the infected district or districts came could have no possible influence upon the attainment of the result sought to be attained.

*"It would make no possible difference [386] whether this 'added fuel' sought to be excluded should come from Louisiana, New York, or Europe."

Referring to past conditions and the public dangers which had arisen from them, the evil which the statute of 1898 was intended to remedy was pointed out as follows:

"During the fall of 1897, and during the existence of an epidemic, a vessel arrived in the Mississippi river with immigrants aboard under conditions similar to those under which the 'Britannia' reached the same stream in 1898.

"The excited public discussions at the time as to the right of the state board, under the then existing law, to prevent the landing of the immigrants and as to its duty in the premises, were so extended as to authorize us to take judicial notice of the fact, and in our opinion the clause in the present act which covers that precise matter was inserted therein for the express purpose of placing the particular question outside of the range of controversy.

"For a number of years past immigrants have been coming into New Orleans in the autumn from Italy.

"There was a probability when the general assembly met in 1898 that the epidemic of 1897 might be repeated, and a great probability that immigrants would seek to enter, as they had done the year before, to the great danger, not only of the people of Louisiana, but of the immigrants themselves.

"Independently of this, there was great danger to be apprehended from the increasing intercourse between New Orleans and the West India islands in consequence of a war with Spain.

"It was to ward off these dangers that this particular provision was inserted in the act of 1898."

And by implication from the reasoning just referred to the existence of the conditions rendering it necessary to call the power into play in the case before it was recognized. Thus construing the statute, the state court held that it was not repugnant to the Constitution of the United States and was not in conflict with any law or treaty of the United States. These latter considerations present the questions which arise for our decision. All the assignments of error relied upon to show the *invalidity of the statute of the state of Louisiana, and hence the illegality of the action of the board of health from the point of view of Federal considerations, are, in the argument at bar, summarized in four propositions. We shall consider them separately and thus dispose of the case. In doing so, however, as the

first and second contentions both rest upon the assertion that the statute violates the Constitution of the United States, we shall treat them together.

"First. The statute drawn in question, on its face and as construed and applied, is void for the reason that it is in violation of art. 1, § 3, ¶ 8, of the Constitution of the United States, inasmuch as it vests authority in the state board of health, in its discretion, to interfere with or prohibit interstate and foreign commerce.

"Second. The statute is void for inasmuch as it is in conflict with § 1 of the 14th article of Amendment to the Constitution of the United States, in that it deprives the plaintiff of its liberty and property without due process of law, and denies to it the equal protection of the law."

That from an early day the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question. That until Congress has exercised its power on the subject, such state quarantine laws and state laws for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce, is not an open question. The doctrine was elaborately examined and stated in *Morgan's L. & T. R. & N. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114. That case involved determining whether a quarantine law enacted by the state of Louisiana was repugnant to the commerce clause of the Constitution because of its necessary effect upon interstate and foreign commerce. The court said:

"Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the states when *the vessel is coming from some other state of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the states as exclusively their own, and, therefore, not ceded to Congress. For, while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.

1214

Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Henderson v. New York*, 92 U. S. 259, 272, sub nom. *Henderson v. Wickham*, 23 L. ed. 543; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252.

"But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States, a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the state on the subject are valid. This follows from two reasons:

"1. The act of 1799, the main features of which are embodied in title LVIII. of the Revised Statutes, clearly recognizes the quarantine laws of the states, and requires of the officers of the Treasury a conformity to their provisions in dealing with vessels affected by the quarantine system. And this very clearly has relation to laws created after the passage of that statute, as well as to those then in existence; and when, by the act of April 29, 1878 (20 Stat. at L. 37, chap. 66), certain powers in this direction were conferred on the Surgeon General of the Marine Hospital Service, and consuls and revenue officers were required to contribute *services in preventing the importation of disease, it was provided that 'there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under state laws,' showing very clearly the intention of Congress to adopt these laws or to recognize the power of the states to pass them.

"2. But, aside from this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress."

Again, in *Louisiana v. Texas*, 176 U. S. 1, 21, 44 L. ed. 347, 355, 20 Sup. Ct. Rep. 251, 258, the court was called upon to consider a quarantine law of the state of Texas which by its terms was applicable to and was enforced as to both interstate and foreign commerce. After referring approvingly to the case which we have above cited, the court, speaking through Mr. Chief Justice Fuller, said:

"It is not charged that this statute is invalid, nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the states is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the states in the exercise of their reserve powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid un-

186 U. S.

til displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government."

Further, in calling attention to the fact, as remarked by the court in *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114, that in the nature of things quarantine laws and laws relating to public health must necessarily vary with the different localities of the country, it was said:

"Hence, even if Congress had remained silent on the subject it would not have followed that the exercise of the police power of the state in this regard, although necessarily operating on interstate commerce, would be therefore invalid. Although from the nature and subjects of the power of regulat-
[390]ing commerce *it must be ordinarily exercised by the national government exclusively, this has not been held to be so where, in relation to the particular subject-matter, different rules might be suitable in different localities. At the same time, Congress could by affirmative action displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation."

Despite these conclusive adjudications, it is earnestly insisted in the argument at bar that by a correct appreciation of all the decisions of this court on the subject, the rule will be discovered to be that the states may enact quarantine or other health laws for the protection of their inhabitants, but that such laws, if they operate upon or directly affect interstate or foreign commerce, are repugnant to the Constitution of the United States independently of whether Congress has legislated on such subjects. To sustain this contention a most copious reference is made to many cases decided by this court, where the nature and extent of the power of Congress to regulate commerce was considered and the validity of state legislation asserted to be repugnant to such power was passed upon. To analyze and review the numerous cases referred to in order to point out their want of relation to the question in hand would involve in effect a review of the whole subject of the power of Congress to regulate commerce in every possible aspect, and an analysis of practically the greater body of cases which have in this court involved that serious and difficult subject from the beginning. We shall not undertake to do so, but content ourselves with saying, after duly considering the cases relied upon, that we find them inapposite to the doctrine they are cited to sustain, and hence, when they are correctly appreciated, none of them conflict with the settled rule announced by this court in the cases to which we have referred.

The confusion of thought which has given rise to the misconception of the authorities relied upon in the argument, and which has caused it to be supposed that they are apposite to the case in hand, is well illustrated by the premise upon which the proposition that the cited authorities are applicable

rests. That proposition is thus stated in the printed argument (*italics in the original*):

*"Turning now to the decisions of this [391] court, it will be found that the basis upon which it has upheld the exclusion, inspection, and quarantine laws of various states, is that criminals, diseased persons and things, and paupers, *are not legitimate subjects of commerce*. They may be attendant evils, but they are not legitimate subjects of traffic and transportation, and therefore, in their exclusion or detention, the state is not interfering with *legitimate* commerce, which is the only kind entitled to the protection of the Constitution."

But it must be at once observed that this erroneously states the doctrine as concluded by the decisions of this court previously referred to, since the proposition ignores the fact that those cases expressly and unequivocally hold that the health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution. True it is that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid because such objects were not legitimate commerce. But this implies no limitation on the power to regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even although interstate and foreign commerce is affected, and the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce. True, also, it was held in some of the cases referred to by counsel, that where the introduction of a given article was absolutely prohibited by a state law upon the asserted theory that the health of the inhabitants would be aided by the enforcement of the prohibition, it was decided that, as the article which it was thus sought to prohibit was a well-known article of commerce, and therefore *the legitimate subject of inter- [392]

state commerce, it could not be removed from that category by the prohibitive effect of state legislation. But this case does not involve that question, since it does not present the attempted exercise by the state of the power to absolutely prohibit the introduction of an article of commerce, but merely requires us to decide whether a state law, which regulates the introduction of persons and property into a district infested with contagious or infectious diseases, is void, because to enforce such regulation will burden interstate and foreign commerce, and therefore violate the

Constitution of the United States. It is earnestly insisted that the statute, whose constitutionality is assailed, is, on its face, not a regulation, but an absolute prohibition against interstate commerce, and it is sought to sustain this contention by various suggestions as to the wrong which may possibly arise from a perversion and an abuse by the state authorities of the power which the statute confers. Thus it is said, what is an infectious and contagious disease is uncertain, and involves a large number of maladies. How many cases of such malady are essential to cause a place to be considered as infected with them is left to the determination of the board of health. That board, it is argued, may then arbitrarily, upon the existence of one or more cases of any malady which it may deem to be infectious or contagious, declare any given place in the state, or even the whole state of Louisiana, infected, and proceed to absolutely debar all interstate or foreign commerce with the state of Louisiana. True it is, as said in *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114:

"In all cases of this kind it has been repeatedly held that, when the question is raised whether the state statute is a just exercise of state power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose. See *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Cannon v. New Orleans*, 20 Wall. 577, 22 L. ed. 417."

[393] But this implies that we are to consider the statute as enacted and the natural results flowing from it. It does not import that we are to hold a state statute unconstitutional by indulging in *conjecture as to every conceivable harm which may arise or wrong which may be occasioned by the abuse of the lawful powers which a statute confers. It will be time enough to consider a case of such supposed abuse when it is presented for consideration. And it is also to be borne in mind, as said by this court in *Louisiana v. Texas*, 176 U. S. 1, 22, 44 L. ed. 347, 355, 20 Sup. Ct. Rep. 251, 258, if any such wrong should be perpetrated "Congress could by affirmative action displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation." And the views which we have previously expressed suffice to dispose of the contention that the subjecting of the vessel of the plaintiff in error to the restriction imposed by the quarantine and health law of the state operated to deprive the defendant in error of its property without due process of law, in violation of the 14th Amendment. It having been ascertained that the regulation was lawfully adopted and enforced, the contention demonstrates its own unsoundness, since in the last analysis it reduces itself to the proposition that the effect of the 14th Amendment was to strip the government, whether state or national, of all power to enact regulations

protecting the health and safety of the people, or, what is equivalent thereto, necessarily amounts to saying that such laws when lawfully enacted cannot be enforced against person or property without violating the Constitution. In other words, that the lawful powers of government which the Constitution has conferred may not be exerted without bringing about a violation of the Constitution.

"Third. The statute as applied and construed is void, for the reason that it is in conflict with treaties between the United States on the one part and the Republic of France and the Kingdom of Italy on the other part, guaranteeing certain rights, privileges, and immunities to the citizens and subjects of said countries."

Reliance is placed, to sustain this proposition, on the provisions of a treaty concluded with the Kingdom of Italy on February 26, 1871; on the terms of a treaty with Great Britain of July 3, 1815, as also a treaty between the United States and the Kingdom of Greece, concluded December 22, 1837, and one concluded *with the Kingdom of Sweden [394] and Norway on July 4, 1827. The treaties of other countries than Italy are referred to upon the theory that as by the treaty concluded with France on April 30, 1803, by which Louisiana was acquired, it was provided that France should be treated upon the footing of the most favored nation in the ports of the ceded territory, therefore the treaties in question made with other countries than France were applicable to the plaintiff in error, a French subject.

Conceding, *arguendo*, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that they were not intended to, and did not, deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a state quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress. Without reviewing the text of all the treaties, we advert to the provisions of the one made with Greece, which is principally relied upon. The text of article 15 of this treaty is the provision to which our attention is directed, and it is reproduced in the margin.†

*It is apparent that it provides only the [395] particular form of document which shall be taken by a ship of the Kingdom of Greece and reciprocally by those of the United

†"Article 15. It is agreed that vessels arriving directly from the United States of America at a port within the dominions of His Majesty the King of Greece, or from the Kingdom of Greece, at a port of the United States of America, and provided with a bill of health granted by an officer having competent power to that effect at the port whence such vessel

States for the purpose of establishing that infectious or contagious diseases did not exist at the point of departure. But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty having provided the certificate and given it effect under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people or to render the exertion of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them. Especially where the restriction imposed upon the vessel is based, not upon the conditions existing at the port of departure, but upon the presence of an infectious or contagious malady at the port of arrival within the United States, which, in the nature of things, could not be covered by the certificate relating to the state of the public health at the port whence the ship had sailed.

"Fourth. The statute as applied is void for the reason that it is in conflict with the laws of the United States relating to foreign immigration into the United States."

In the argument at bar this proposition embraces also the claim that the statute is void because in conflict with the act of Congress of 1893 entitled "An Act Granting Additional Quarantine Powers and Imposing
[396] Additional Duties upon the Marine *Hospital Service." 27 Stat. at L. 449, chap. 114. And that it also is in conflict with the rules and regulations adopted for the enforcement

shall have sailed, setting forth that no malignant or contagious diseases prevailed in that port, shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessel shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes; Provided always, that there shall be on board no person who, during the voyage, shall have been attacked with any malignant or contagious disease; that such vessels shall not, during the passage, have communicated with any vessel liable itself to undergo a quarantine; and that the country whence they came shall not at that time be so far infected or suspected that, before their arrival, an ordinance had been issued in consequence of which all vessels coming from that country should be considered as suspected, and consequently subject to quarantine." [8 Stat. at L. 506.]

186 U. S.

of both the immigration laws and the quarantine law referred to.

The immigration acts to which the proposition relates are those of March 3, 1875, of August 3, 1882, of June 26, 1884, of February 26, 1885, of February 23, 1887, and March 3, 1891, and the regulations to enforce the same. Without undertaking to analyze the provisions of these acts, it suffices to say that, after scrutinizing them, we think they do not purport to abrogate the quarantine laws of the several states, and that the safeguards which they create and the regulations which they impose on the introduction of immigrants are ancillary, and subject to such quarantine laws. So far as the act of 1893 is concerned, it is manifest that it did not contemplate the overthrow of the existing state quarantine systems and the abrogation of the powers on the subject of health and quarantine exercised by the states from the beginning, because the enactment of state laws on these subjects would, in particular instances, affect interstate and foreign commerce. An extract from § 3 of the act, which we think makes these conclusions obvious, is reproduced in the margin.†

†Sec. 3. That the Supervising Surgeon General of the Marine Hospital Service shall, immediately after this act takes effect, examine the quarantine regulations of all state and municipal boards of health, and shall, under the direction of the Secretary of the Treasury, co-operate with and aid state and municipal boards of health in the execution and enforcement of the rules and regulations of such boards and in the execution and enforcement of the rules and regulations made by the Secretary of the Treasury, to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one state or territory or the District of Columbia from another state or territory or the District of Columbia; and all rules and regulations made by the Secretary of the Treasury shall operate uniformly and in no manner discriminate against any port or place: and at such ports and places within the United States as have no quarantine regulations under state or municipal authority, where such regulations are, in the opinion of the Secretary of the Treasury, necessary to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, or into one state or territory or the District of Columbia from another state or territory or the District of Columbia, and at such ports and places within the United States where quarantine regulations exist under the authority of the state or municipality which, in the opinion of the Secretary of the Treasury, are not sufficient to prevent the introduction of such diseases into the United States, or into one state or territory or the District of Columbia from another state or territory or the District of Columbia, the Secretary of the Treasury shall, if in his judgment it is necessary and proper, make such additional rules and regulations as are necessary to prevent the introduction of such diseases into the United States from foreign countries, or into one state or territory or the District of Columbia from another state or territory or the District of Columbia, and when said rules and regulations have been made they shall be promulgated by the Secretary of the Treasury and enforced by the sanitary authorities of the states and municipalities, where the state or municipal health au-

[397] *Nor do we find anything in the rules and regulations adopted by the Secretary of the Treasury in execution of the power conferred upon him by the act in question giving support to the contention based upon them. It follows from what has been said that the Supreme Court of Louisiana did not err in deciding that the act in question was not repugnant to the Constitution of the United States, and was not in conflict with the acts of Congress or the treaties made by the United States which were relied upon to show to the contrary and *its judgment is therefore affirmed.*

Mr. Justice **Brown**, with whom was Mr. Justice **Harlan**, dissenting:

The power of the several states, in the absence of legislation by Congress on the subject, to establish quarantine regulations, to prohibit the introduction into the state of [398] persons infected *with disease, or recently exposed to contagion, and to impose a reasonable charge upon vessels subjected to examination at quarantine stations, is so well settled by repeated decisions of this court as to be no longer open to doubt. This case, however, does not involve that question, but the broader one, whether, in the assumed exercise of this power, the legislature may declare certain portions of the state to be in quarantine, and prohibit the entry therein of *all* persons whatsoever, whether coming from the United States or foreign countries, from infected or uninfected ports, whether the persons included are diseased or have recently been exposed to contagion, or are perfectly sound and healthy, and coming from ports in which there is no suspicion of contagious diseases.

I have no doubt of the power to quarantine all vessels arriving in the Mississippi from foreign ports for a sufficient length of time to enable the health officers to determine whether there are among her passengers any persons afflicted with a contagious disease. But the state of Louisiana undertakes to do far more than this. It authorizes the state board of health, at its discretion, to "prohibit the introduction into any infected portion of the state of persons acclimated, unacclimated, or said to be immune, when in its judgment the introduction of said persons would add to or increase the prevalence of the disease;" and at its meeting on September 29, 1898, the board of health adopted the following resolution:

"That hereafter, in the case of any town, city, or parish of Louisiana being declared in quarantine, no body or bodies of people, immigrants, soldiers, or others shall be allowed to enter said town, city, or parish so long as said quarantine shall exist, and that the

president of the board shall enforce this resolution."

In other words, the board of health is authorized and assumes to prohibit in all portions of the state which it chooses to declare in quarantine, the introduction or immigration of all persons from outside the quarantine district, whether infected or uninfected, sick or well, sound or unsound, feeble or healthy; and that, too, not for the few days necessary to establish the sanitary status of such persons, but for an indefinite and possibly *permanent period. I think this is [399] not a necessary or proper exercise of the police power, and falls within that numerous class of cases which hold that states may not, in the assumed exercise of police power, interfere with foreign or interstate commerce.

The only excuse offered for such a wholesale exclusion of immigrants is, as stated by the supreme court, "to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection, and by means of this reduction to accomplish the subsidence and suppression of the disease, and the spread of the same." In other words, the excuse amounts to this: that the admission, even of healthy persons, adds to the possibility of the contagion being communicated upon the principle of adding fuel to the flame. It does not increase the danger of contagion by adding infected persons to the population, since the bill avers that all the immigrants were healthy and sound. All it could possibly do is to increase the number of persons who might become ill if permitted to be added to the population. This is a danger, not to the population, but to the immigrants. It seems to me that this is a possibility too remote to justify the drastic measure of a total exclusion of all classes of immigrants, and that the opinion of the court is directly in the teeth of *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, wherein a state statute, which prohibited the driving or conveying of any Texas, Mexican, or Indian cattle into the state, between March 1 and November 1 in each year, was held to be in conflict with the commerce clause of the Constitution. Such statute was declared to be more than a quarantine regulation, and not a legitimate exercise of the police power of the state. Said Mr. Justice Strong (p. 472, L. ed. p. 530): "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self-protection, it

authorities will undertake to execute and enforce them; but if the state or municipal authorities shall fail or refuse to enforce said rules and regulations the President shall execute and enforce the same and adopt such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose. The Secretary of the Treasury shall make such

rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers, and crew, which shall be published and communicated to and enforced by the consular officers of the United States."

may establish quarantine and reasonable inspection laws,—it may not interfere with the transportation into or through the state, beyond what is absolutely necessary *for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce.” The statute was held to be a plain intrusion upon the exclusive domain of Congress; that it was not a quarantine law; not an inspection law, and was objectionable because it prohibited the introduction of cattle, no matter whether they may do an injury to the inhabitants of a state or not; “and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.” Cases covering the same principle are those of *State v. The Constitution*, 42 Cal. 578, 10 Am. Rep. 303, and *Bangor v. Smith*, 83 Me. 422, 13 L. R. A. 686, 22 Atl. 379.

I am also unable to concur in the construction given in the opinion of the court to the treaty stipulation with France and other foreign powers. The treaty with France of 1803 provides that “the ships of France shall be treated upon the footing of the most favored nations in the ports above mentioned” of Louisiana. Article 15 of the treaty with Greece of December 22, 1837, set forth in the opinion, provides that vessels arriving directly from the Kingdom of Greece at any port of the United States of America, “and provided with a bill of health granted by an officer having competent power to that effect at the port whence such vessel shall have sailed, setting forth that no malignant or contagious diseases prevailed in that port, shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessels shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes: *Provided always*, That there shall be on board no person who, during the voyage, shall have been attacked with any malignant or contagious diseases; that such vessels shall not, during their passage, have communicated with any vessel liable itself to undergo a quarantine; and that the country whence they came shall not at that time be so far infected or suspected that, before their arrival, an ordinance had been issued in consequence of which all vessels coming from that country should be considered as suspected, and consequently subject to quarantine.”

[401] “If the law in question in Louisiana, excluding French ships from all access to the port of New Orleans, be not a violation of the provision of the treaty that vessels “shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessels shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes,” I am unable to conceive a state of facts which would constitute a violation of that provision. Necessary as efficient quarantine laws are, I

know of no authority in the states to enact such as are in conflict with our treaties with foreign nations.

CAPITAL CITY LIGHT & FUEL COMPANY,
Plff. in Err.,
v.

CITY OF TALLAHASSEE.

(See S. C. Reporter's ed. 401-413.)

Contracts—impairment of obligation—electric-light franchise—exclusive privilege.

The right granted to a corporation by a municipal ordinance to construct and maintain an electric-light plant, even assuming such right was exclusive, was not impaired by Fla. Laws, chap. 4600, or Fla. act May 27, 1899, empowering the city to construct and maintain its own electric-light plant, where nothing had been done by the grantee looking towards the erection and operation of such a plant, although it had erected and operated the gas plant which it was authorized by the same ordinance to construct and maintain.

[No. 209.]

Submitted April 7, 1902. Decided June 2, 1902.

IN ERROR to the Supreme Court of the State of Florida to review a judgment which affirmed a judgment of the Circuit Court of the Second Judicial District of that state dismissing a bill in a suit by a gas and electric-light company to enjoin a city from constructing and operating its own electric-light plant. *Affirmed*.

See same case below, 28 So. 810.

Statement by Mr. Justice **Peckham**:

The plaintiff in error, being the plaintiff below, brings this case here by writ of error to the supreme court of the state of Florida for the purpose of reviewing a judgment of that court, affirming the judgment of the circuit court of the second judicial district of that state, dismissing plaintiff's bill of complaint against the defendant with costs.

The bill shows that the Tallahassee Gas & Electric Light Company was incorporated pursuant to the laws of the state, December 20, 1887, for the purpose, as stated in its articles of association, of constructing, maintaining, and operating gas works and electric-light works in the city of Tallahassee, and for the manufacture of gas for light and fuel or for the purpose *of disposing of [402] or dealing in coal or wood for fuel, and in maintaining and operating electric-light machinery for supplying lights in the city, or for manufacturing or dealing in any and all manner of artificial light or heat within that

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

city. After its incorporation the company applied to the city council for the franchise of constructing gas and electric-light works in the city for the purposes declared in its charter, and, pursuant to such application, an ordinance of the city council was duly passed on January 4, 1888, the 1st section of which authorized the company "to construct gas and electric-light works in the city of Tallahassee, and for that purpose that the said company shall have the right to lay their pipes in any and all streets in said city and in the alleys and lots of the same, and to erect such lamp posts or poles or towers as may be necessary or essential for furnishing gas or electric lights in said city of Tallahassee, and to this end the Tallahassee Gas & Electric Light Company are authorized to make such excavations or erect such structures, poles, or towers, and run wires thereto along the streets of said city, as may be necessary or essential."

Provision was also made in the ordinance as to the manner of excavating the streets, constructing the works, and as to the quality and price of the gas to be furnished and the time within which the gas works should be completed and the plant put in operation. It was also provided that the company should file a written acceptance of the ordinance, whereupon the same should become binding upon both parties.

Section 7 of the ordinance provided for the completion of the gas works and for operating the same within a short time, stated therein, and ended with the following provision:

"And the said Tallahassee Gas & Electric Light Company shall put in and operate electric lights as soon as sufficient consumers can be secured to pay 8 per cent interest per annum on the additional capital required to purchase the machinery for and put in practical operation the said electric lights."

Sections 10 and 11 of the ordinance read as follows:

"Sec. 10. That the said city of Tallahassee, in consideration of the foregoing requirements being complied with on the part [403] *of the said Tallahassee Gas & Electric Light Company, their associates, successors, and assigns, shall and hereby obligates itself to take all gas which it may wish to use in lighting its streets or buildings from said company at a price of not more than one and one-half dollars (\$1.50) per one thousand feet for such as may be used in public buildings used exclusively by said city, and at a price of not more than (\$30) thirty dollars per annum for each street lamp as hereinbefore provided for in § 6 of this ordinance, for the period of twenty-five consecutive years from the completion of said gas works: *Provided*, That nothing herein shall be construed as an obligation on the part of the said city of Tallahassee to take any gas from said company.

"Sec. 11. That the privileges and licenses herein and hereby granted shall be exclusive in and to said Tallahassee Gas & Electric

Light Company, their associates, successors, and assigns, for and during the term of twenty-five years."

After the adoption of the ordinance the company filed its acceptance thereof, and proceeded to the construction of its gas works, which it completed, and thereafter furnished gas without any complaint until November 8, 1893, when a receiver was appointed, and subsequently its property sold under a foreclosure decree. It was bid in by William A. Rawls, and a deed made to him. Thereafter, and on March 19, 1894, the plaintiff in error was incorporated, and the property conveyed to it by Rawls. It was stated in the articles of incorporation that the general nature of the business of the company to be transacted by it was "to acquire, construct, improve, maintain, and operate gas works and electric-light works in and adjacent to the city of Tallahassee, in Leon county, state of Florida, and to manufacture gas for light and fuel; to dispose of and deal in coal or wood for fuel; to construct, maintain, and operate electric-light machinery for supplying lights in and about the said city, or for manufacturing and dealing in any and all manner of artificial light or heat within or adjacent to said city."

The company was incorporated for the purpose of operating under the terms and provisions of the ordinance of the city above mentioned. the property purchased by Rawls, which he *had purchased for the pur-[404] pose of transferring to the company, and in pursuance of such purpose the property was made over to the company, which entered into the possession and assumed the management and control thereof, and continued the manufacture of gas for the purpose of supplying the city and its inhabitants with light and heat, and it has since coming into the possession of the property enlarged and extended its plant, and met the increased demands of the city and its inhabitants, the city having ever since recognized, treated, and dealt with the company as the lawful successor of the Tallahassee Gas & Electric Light Company, and the legal assignee of all the rights, franchises, privileges, and contracts created and conferred on that company by the ordinance of the city of Tallahassee.

The legislature on June 5, 1897, passed an act, chapter 4600 of the Laws of Florida, entitled "An Act to Enable Cities and Towns to Manufacture and Distribute Gas and Electricity, and to Construct, Purchase, Lease, and Establish and Maintain within Its Limits One or More Plants for the Manufacture and Distribution of Gas and Electricity for Furnishing Light for Municipal Use, and for the Use of Such of Its Inhabitants as May Require and Pay for the Same as Herein Provided." Thereafter, and on May 27, 1899, the legislature of the state passed another act, to enable the city of Tallahassee to exercise the powers provided by the act of 1897, above mentioned. This act of 1899 granted to the city the right to construct and maintain its own electric-light

plant upon complying with certain conditions specified in the act. These conditions the city proceeded to comply with, and passed a resolution to build and operate an electric-light plant of its own, which was ratified at an election by the people of the city, and the city council was about to proceed to carry out the plan for the erection and operation of such electric-lighting plant to light the city under the provisions of the act of 1899, when this suit was commenced.

[405] The plaintiff duly protested at each step against the action of the city council for the erection and operation of such a plant, and claimed that it would be a violation and impairment of the contract which it held with the city, and would very greatly injure, if not ruin, the plaintiff in error. It was also stated *that there has never been a time since the establishment of the gas works in that city that the plaintiff in error, or its predecessor, could have procured sufficient consumers to pay 8 per cent per annum on the additional capital required to purchase the machinery for and put into practical operation an electric-lighting system therein. The bill prayed that the city and its officers might be enjoined from establishing and maintaining an electric plant, and from furnishing electric light to the inhabitants of the city during the balance of the period of twenty-five years for which the exclusive franchise of constructing gas and electric works in that city, and for using the streets thereof for that purpose, and for furnishing gas and electric light to the inhabitants of the city was granted, to wit, until the year 1913. The bill also prayed that the city should be enjoined from making or entering into any contract or from performing any contract with any corporation or firm for furnishing electric lighting and other machinery, and that the city should be enjoined from issuing its bonds for the payment of any such plant.

This bill was demurred to for want of equity, in that it showed no facts entitling complainant to relief against the defendant as to the matters contained in it. The demurrer was sustained and the complainant's bill dismissed, and the judgment entered thereon was affirmed by the supreme court of Florida. 28 So. 810.

Mr. Frederick T. Myers submitted the cause for plaintiff in error:

The power to light the streets carried with it the choice of means to accomplish that end.

Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 271, 30 L. R. A. 540, 18 So. 677.

The law of incorporation of the Tallahassee Gas & Electric Light Company must be construed in connection with the law of incorporation of the city of Tallahassee.

State ex rel. Jacksonville v. Jacksonville Street R. Co. 29 Fla. 590, 11 So. 226.

The legislature, where not restrained by constitutional limitation can grant the exclusive right to a corporation or individual to furnish light or water to a city.

186 U. S.

State v. Milwaukee Gaslight Co. 29 Wis. 454, 9 Am. Rep. 598; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 670, 29 L. ed. 523, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 680, 29 L. ed. 527, 6 Sup. Ct. Rep. 273; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.* 27 La. Ann. 138.

Such franchise, when granted and accepted and acted upon, becomes a contract which cannot be impaired by subsequent legislation.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 671, 29 L. ed. 524, 6 Sup. Ct. Rep. 252; *Quincy v. Bull*, 106 Ill. 351; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Where the contract is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The power of a municipal corporation to light its streets does not make it the duty of the city to do so.

Baily v. Philadelphia, 184 Pa. 594, 39 L. R. A. 837, 39 Atl. 494.

It may even lease its own gas works to a private party or corporation under contract to light the city.

Ibid.

And a provision of an ordinance leasing city gas works, that the city will not in any way interfere with, limit, restrict, or imperil the exclusive right thereby vested in the gas company, does not create a monopoly against public policy, where the franchise of the lessee is derived from the legislature, and not from the city, and it merely makes the privileges exclusive so far as the city is concerned.

Baily v. Philadelphia, 184 Pa. 594, 39 L. R. A. 837, 39 Atl. 494; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 348, 19 Sup. Ct. Rep. 77.

The inability of a common council to bind the discretion of its successors for a term of years in respect to a municipal or governmental function does not extend to a lease of city gas works, in respect to which the city acts in a business capacity solely.

Baily v. Philadelphia, 184 Pa. 594, 39 L. R. A. 837, 39 Atl. 494; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

The provision of the ordinance, that the privileges and licenses thereby conferred should be exclusive to the company, their associates, successors, and assigns, for twenty-five years, while not conferring on the company an exclusive franchise to the use of the streets, was at least a contract on the part of the city that the municipal-

ity itself would not become a competitor with the company in such business during that period.

Baily v. Philadelphia, 184 Pa. 594, 39 L. R. A. 837, 39 Atl. 494; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Atlantic City Waterworks Co. v. Atlantic City*, 39 N. J. Eq. 367; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23.

The exclusive privilege of using the then known instrumentalities of artificial lighting, and the exclusion of competition by either means, must have been an inducement for putting in a plant for immediate lighting by either of these instrumentalities. If the grant had been only of the right to use the one, then the right to use the other could have been acquired by a different company, or could have been exercised by the city itself.

Stein v. Bienville Water Supply Co. 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529.

But the fact that the company fails to avail itself of all the instrumentalities covered by its charter to accomplish the purpose had in view in its creation does not have the effect of relieving the legislature from the constitutional inhibition against the violation of the obligation of contract, and of permitting it to grant to another corporation or individual the right to use such neglected instrumentality.

St. Tammany Waterworks Co. v. New Orleans Waterworks Co. 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405.

Mr. George P. Raney submitted the cause for defendant in error:

Statutes which are *in pari materia* are to be construed together, and effect given to them; and contemporaneous legislation not precisely *in pari materia* with any particular act to be construed may be referred to on the question of intent.

23 Am. & Eng. Enc. Law, tit. *Statutes*, pp. 311-315; *Florida, A. & G. R. Co. v. Pensacola & G. R. Co.* 10 Fla. 160; *Ex parte O'Donovan*, 24 Fla. 281, 4 So. 789; *Ferrari v. Escambia County Bd. of Health*, 24 Fla. 390, 5 So. 1; *United States v. Freeman*, 3 How. 556, 11 L. ed. 724; *Beals v. Hale*, 4 How. 37, 11 L. ed. 865; *Huidekoper v. Douglass*, 3 Cranch, 66, 2 L. ed. 367; *Chicago, M. & St. P. R. Co. v. United States*, 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. Rep. 1194; *Vanc v. Newcombe*, 132 U. S. 235, 33 L. ed. 315, 10 Sup. Ct. Rep. 60; *Frost v. Wenie*, 157 U. S. 46, 39 L. ed. 614, 15 Sup. Ct. Rep. 532; *People v. Smith*, 69 N. Y. 175; *Re Rochester Water Comrs.* 66 N. Y. 422; *Chase v. Lord*, 77 N. Y. 18.

The city council of Tallahassee had, under the municipal statutes in operation at the time of the passage and approval of the ordinance, no power to grant to or create in the Tallahassee Gas & Electric Light Company exclusive authority to construct gas and electric light works in the city.

Dill. Mun. Corp. 4th ed. §§ 89, 692, 693; *Florida C. & P. R. Co. v. Ocala Street &*
1222

Suburban R. Co. 39 Fla. 306, 22 So. 692; *Grand Rapids Electric Light & P. Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co.* 33 Fed. 659; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 516, 22 N. E. 381; *Minturn v. Larue*, 23 How. 435, 16 L. ed. 574; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *Birmingham & P. M. Street R. Co. v. Birmingham Street R. Co.* 79 Ala. 465, 58 Am. Rep. 615; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Newport v. Newport Light Co.* 89 Ky. 454, 12 S. W. 1040; *State ex rel. Jacksonville v. Jacksonville Street R. Co.* 29 Fla. 590, 11 So. 226; *Stein v. Bienville Water Supply Co.* 141 U. S. 68, 35 L. ed. 623, 11 Sup. Ct. Rep. 892; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *State, Davis, Prosecutor, v. Harrison*, 46 N. J. L. 79.

The power granted to the Gas & Electric Company by Fla. Acts 1868, chap. 1639, did not confer any power on the municipality.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

The proviso to the ordinance, as not to taking any gas, considered in connection with the fact of an entire absence from the ordinance of any agreement upon the part of the city to take any electric light from the company, shows that there was no intention upon the part of the city to exclude itself from the right to supply itself through its own instrumentalities with electric light, and that it was not bound by the ordinance to refrain from so doing.

Lehigh Water Co.'s Appeal, 102 Pa. 515; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *Stein v. Bienville Water Supply Co.* 141 U. S. 68, 35 L. ed. 623, 11 Sup. Ct. Rep. 892; *Newport v. Newport Light Co.* 89 Ky. 454, 12 S. W. 1040.

The mere impairment or destruction of the value of a gas franchise or business through the competition resulting from the establishment of an electric-light plant and business would be no obstacle to the grant or establishment of the latter business, in the absence of a prior valid grant of an exclusive right to the latter, or of a prior valid contract not to grant or establish an electric plant or business.

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; *Washington & B. Turnp. Co. v. Maryland*, 3 Wall. 210, 18 L. ed. 180; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

No statute will be adjudged unconstitutional
186 U. S.

tional at the application of a party whose rights are not shown to be affected by its enforcement.

Cooley, Const. Lim. 6th ed. 196; *Jones v. Black*, 48 Ala. 540; *Smith v. McCarthy*, 56 Pa. 359; *Franklin County v. State ex rel. Patton*, 24 Fla. 55, 3 So. 471.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The plaintiff in error claims that, under the city ordinance, it has a valid contract for the exclusive use of the streets of the city of Tallahassee for the purpose of furnishing both gas and electric light, and that the subsequent acts of the legislature, providing for the erection and operation by the [406] city of an *electric-light plant, impair the obligation of its contract, and are therefore void.

As the case involves the provision of the Federal Constitution, which prohibits the states from passing any law impairing the obligation of a contract, and as the state court has given effect to subsequent legislation, which, it is claimed, results in the impairment of the obligation of plaintiff's contract with the city, we are bound to determine for ourselves as to the existence and meaning of the alleged contract, in order to determine the question whether subsequent legislation has impaired the obligation thereof.

Plaintiff in error claims the exclusive right to use the streets and furnish both gas and electric lights by virtue of § 11 of the ordinance of the city council, referred to in the foregoing statement of facts, and by virtue of the provisions of § 38 of the general corporation act of August 8, 1868. We concur in substance in the opinion of the state court of Florida, wherein it stated as follows:

"A careful reading of the ordinance passed in 1888 will show that the city is under no obligation whatever to the appellant or its predecessor company to light the streets and public buildings of the city with either gas or electricity manufactured by said companies. Nothing is said in the ordinance about lighting the streets or public buildings with electricity manufactured by the company. In respect to gas, the city was not required to use any at all, but it obligated itself to take all gas that it might wish to use in lighting its streets and buildings from the company at prices not to exceed the amounts named for a certain term of years. There is no contract, therefore, between the city and the company that the latter shall have the right to furnish the city for lighting its streets and public buildings, all or any, electricity used for that purpose, nor is there any stipulation in the ordinance that the city will use nothing but gas, nor that the city will not own or operate an electric-light plant for supplying the city and its inhabitants with light. If the city is debarred from erecting an electric-light plant by the ordinance passed by it, it is because that ordinance legally grants

the company the exclusive privilege and license to use *the streets, alleys, and lots of the city for the purpose of constructing and operating a plant and its instrumentalities for furnishing electric lights in the city." [407]

The general law of Florida for the incorporation of municipal corporations, passed August 6, 1868, while empowering a city to provide for lighting its streets, and giving to it the power to regulate and control the use of its public streets, gives the city no power to grant an exclusive use of its streets to any person or corporation for the purpose of lighting the city or for providing light to its citizens. The power to obtain such exclusive use of the streets of the city, if not granted by the municipal corporation act of 1868, is said to be found in the general act passed August 8, 1868, or two days subsequently to the above act, and known as chapter 1639 of the Laws of Florida, providing for the incorporation of corporations other than those of a municipal character. Section 38 of such act reads as follows:

"Any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation: *Provided, however,* That this investment shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit, the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience, and to take private property for the public use, and the like."

The defendant in error contends that the proper construction of that section does not authorize the exclusive use of the public streets of the city for lighting purposes even if consented to by the city; that it cannot reasonably be supposed that the legislature, while omitting to give to cities the power of granting exclusive privileges in its streets for lighting or any other purpose, would, at the same time, by another act, grant to a private corporation incorporated thereunder, the right to the exclusive possession of the streets thereof for the purpose of executing the *business for which it was incor- [408] porated: that if it were intended that the city should have power to grant such exclusive use it would have been stated in the act providing for the incorporation of cities, and, if it were not so intended, it cannot be implied from the language of the section above quoted, found in an act referring to corporations other than municipal. The two acts, it is said must be reconciled, and it can be done by excepting from the application of the 38th section the right to an exclusive use of the public streets of a city for any purpose. The plaintiff in error concedes that the city has full control and management of its streets, and that the plaintiff could not use the streets for the purpose of laying its pipes, etc., therein without the

consent of the city. But it urges that, having secured such consent, it is authorized to maintain the exclusive use by reason of the 38th section above quoted, even if the city had no right to grant it under the act providing for the incorporation of cities. This question, while stated, was not decided by the court below, and we do not find it necessary to decide it ourselves.

The ordinance adopted by the city council has reference to two absolutely separate and distinct privileges, although they are contained in one and the same ordinance. One privilege is to use the streets of the city for the purpose of laying down gas mains and other pipes, to distribute gas throughout the city, and to supply consumers with that article. The other is the right to the use of the streets of the city for the purpose of erecting poles and other things to convey the electricity necessary for lighting purposes. These two privileges are as absolutely separate and distinct as is a privilege to convey by railroad from that by steamboat or by stage coach. It is seen by the terms of the ordinance that it was not contemplated that these different privileges and plants should be availed of and constructed at the same time, but, on the contrary, the gas plant was to be constructed at once, while the obligation to construct the other was left in abeyance and not to be entered upon until consumers enough could be secured to pay 8 per cent per annum on the additional capital required to purchase the machinery for and [409] put in practical operation the *lighting by electricity. The two grants might, therefore, have been in two separate ordinances and given to separate persons, firms, or corporations. The operation of one would not interfere with that of the other, except, perhaps, on a question of financial success, but so far as the character of the two grants is concerned, each one is wholly separate and distinct from the other.

The city has never been under any obligation to take electric lighting from the corporation, even after the plant had been erected and was in operation. The exclusive character of the privilege, assuming it to exist by virtue of § 38 of the corporation law, already referred to, does not commence until the company has begun to do the thing required by the ordinance, as the consideration for the grant of the privilege. Nothing has been done by the plaintiff in error towards commencing work looking to the erection and operation of the electric plant. Upon this subject the supreme court of Florida stated as follows:

"It appears from the pleadings that neither the Tallahassee Gas & Electric Light Company, nor the appellant company, ever established an electric-light plant in the city of Tallahassee in pursuance of the authority conferred upon either of them. From the organization of the first company up to the time the gas plant was sold at judicial sale about six years had elapsed, and from the time of the judicial sale to the time the city began proceedings to enable it to establish an electric-light plant about six years more

elapsed. During all this period of time neither company attempted to construct an electric-light plant as authorized by its charter. In the meantime that provision in the general incorporation law relating to exclusive privileges had been repealed by the legislature of 1891, and an act passed in 1897 specially authorizing cities and towns to establish gas and electric light plants to supply themselves and their citizens with light, and still later, in 1899, special legislative authority was given the city of Tallahassee to establish an electric-light plant. Neither the Tallahassee Gas & Electric Light Company, nor appellant company, has acquired any vested right to erect an electric-light plant by the investment of any money in any such *plant, and the question arises [410] as to whether or not any constitutional right has been impaired by the repeal of the statute granting the alleged exclusive privilege and by the legislation authorizing the city to do that which is a public benefit, and that which for some twelve years the companies have neglected to do as authorized by their charters and the city ordinance. We are unable to see that any vested right of either company, so far as the establishment of an electric-light plant is concerned, is impaired by the legislation which authorized the city to do that which it now proposes to do. In the first place, the statute, properly construed, does not grant the exclusive privilege in respect to the electric-light plant as claimed. A grant of exclusive privileges to appellant's predecessor would be the grant of a franchise from the state, the possession of which would enable it to obtain a practical monopoly of the gas and electric-light business in Tallahassee for the term specified. All such grants are strictly construed against the grantee, and nothing passes thereby but such as is clearly intended. *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529; *Florida, A. & G. C. R. Co. v. Pensacola & G. R. Co.* 10 Fla. 145. Under the express language of this statute the exclusive privilege did not attach until the corporation was not only organized, but put into successful operation, and the privileges were to attach for twenty years from the time the corporation commenced to carry out in good faith the terms of its articles of incorporation. The condition upon which attached the exclusive privilege, so far as the electric-light plant was concerned, has never been performed, for the company has never been put into successful operation, so far as that branch of its business is concerned, nor has it ever commenced to carry out in good faith the terms of its articles of incorporation in regard to erecting an electric-light plant. The first company never acquired the right to the exclusive privilege mentioned in the statute, because it failed to perform the condition precedent, and therefore it had no exclusive privilege to transfer to appellant company, so far as the electric-light plant is concerned. In the next place, even if an exclusive privilege of *this nature, tending to establish a monopoly, [411] was granted without such express condition

precedent as we find in our statute, such grant does not become a contract or a vested right so as to be protected by the Constitution of the state or the United States, until the company has, to say the least, begun to do the thing required by the charter as the consideration for the grant of such privilege. *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714. See also *Chincleclamouche Lumber & Boom Co. v. Com. ex rel. Atty. Gen.* 100 Pa. 438.

"Our attention is called to that clause in the 7th section of the city ordinance which required the company to put in electric lights only when sufficient consumers could be secured to pay 8 per cent interest per annum on the additional capital required to purchase the machinery and put in successful operation electric lights. It would appear from this clause that from the beginning the company only intended to avail itself immediately of that provision of its charter authorizing it to erect a gas plant and to use the other power granted by its charter, together with the city ordinance, to shut out competition in its business from electric-light companies, intending only to put in an electric-light plant whenever that plant could be made to secure it an annual profit on its investment in that plant of 8 per cent. It is quite apparent that the legislature never intended to secure to it any such right, but, on the contrary, intended the privilege to extend only so far as to secure the company from competition in matters wherein it has complied with its charter by being put into successful operation. We have seen that the city had no authority to grant exclusive privileges to use its streets for the purpose of furnishing light from gas and electricity, but, even if it did have such power, it could not confer such exclusive right and at the same time defer construction of the plant until such time as it could be made to pay 8 per cent upon the investment. The effect of such a provision in an ordinance like the one we are considering is that the city will not permit any other person or corporation to use its streets for the public purpose of furnishing electric lights *for twenty-five years, but at the same time will not require the person or corporation to whom the exclusive privilege is granted to furnish such lights until such time as it can make an annual profit of 8 per cent on its investment. The city has no such power over its streets, which are held by it in trust for the public benefit (*Florida C. & P. R. Co. v. Ocala Street & Suburban R. Co.* 39 Fla. 306, 22 So. 692; *Gonzalez v. Sullivan*, 16 Fla. 791, 820), and even if it did, so long as the grantee failed to invest money in a plant, the ordinance could be repealed or modified, being without consideration.

"We have not overlooked the fact that the first company performed its charter powers in part by erecting and operating a gas plant, and as to that plant, and the business

connected therewith, it may have possessed exclusive privileges under the statute which could not be impaired by subsequent legislation, and it may be that such privileges passed to appellant through the judicial sale. As to that we express no opinion. But while the purpose of erecting both plants would be the same, in that they would both furnish light to the city and its people, yet they furnish a different light and require separate and different plants and instrumentalities for their operation. We think they are so distinct in character as to amount to separate undertakings, and they are so treated in the articles of association of both companies, and in the ordinance. Power to operate the one would not include power to operate the other, and permission to use the streets for one would not include permission to use them for the other. *Newport v. Newport Light Co.* 89 Ky. 454, 12 S. W. 1040. The exclusive privileges as to the electric-light plant could not have operated as a consideration for erecting the gas plant, for such privileges under the statute were to attach to the electric-light business only when that plant was put in."

We concur in the result arrived at in the foregoing extract from the opinion of the state court, and, in common with that court, we hold that there has been no impairment of any contract between the city and the plaintiff in error or its predecessor, and that the city has the right to avail itself of the privileges *granted by the acts of 1897 and [413] 1899 of the legislature already mentioned, so far as regards the electric lighting of the city.

The judgment is therefore affirmed.

SOLOMON HOTEMA, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 413-422.)

Homicide — instructions — insanity — former jeopardy.

1. A statement contained in the charge of the court on a trial for murder, that the lack of any evidence of motive is immaterial so far as the question of guilt or innocence is concerned, is not erroneous although the defense is insanity, where that part of the charge containing such statement is directed to the subject of proving motive, and in it the jury are charged that it is unnecessary to show a motive for the commission of the crime so long as the evidence satisfies the jury that the person charged was in fact guilty of the act, and had sufficient mental ability to be held responsible for his acts.

NOTE.—As to what intoxication will excuse homicide—see note to *Harris v. United States* (D. C.) 36 L. R. A. 465.

On insane delusions—see note to *Kimberly's Appeal* (Conn.) 37 L. R. A. 261.

On former jeopardy—see notes to *Com. v. Fitzpatrick* (Pa.) 1 L. R. A. 451; *Altenburg v. Com.* (Pa.) 4 L. R. A. 543; *Ex parte Lange*, 21 L. ed. U. S. 872; and *United States v. Perez*, 6 L. ed. U. S. 165.

2. An objection to the submission of the question of irresistible impulse to the jury on a trial for murder is not available to defendant on appeal, where the bill of exceptions contains none of the evidence, and the submission of the question, if authorized by the evidence, was as fair to defendant as he could ask.
3. A charge on a trial for murder, that the recent use of whisky by the defendant is no defense, is not erroneous where the court has already charged that there must be a wilful and intentional killing in order to warrant a conviction of murder.
4. A charge that defendant's belief in witches, and of his right to kill them, if the product of a diseased brain, relieves him from responsibility for murder, but that he is responsible if his belief is simply an erroneous conclusion of a sane mind, properly submits the issue of the defendant's mental capacity to the jury, when read in connection with the charge that the burden is on the government of proving beyond a reasonable doubt that the defendant was sane at the time of the commission of the crime, and that defendant is responsible for his acts if at the time of their commission he was of sufficient mental capacity to understand their nature and quality and that the particular act was wrong and a violation of the law of the land, for which he would be amenable to punishment.
5. A plea of former jeopardy to an indictment for murder cannot be based upon the fact that, upon the trial of two consolidated indictments for two other murders committed by defendant on the same day as the one charged in the indictment in question, he was found not guilty on the issue of insanity, which is the defense set up to such indictment.

[No. 572.]

Submitted April 28, 1902. Decided June 2, 1902.

IN ERROR to the District Court of the United States for the Eastern District of Texas to review a conviction of murder. *Affirmed.*

The facts are stated in the opinion.

Mr. Jacob C. Hodges submitted the cause for plaintiff in error.

Assistant Attorney General Beck submitted the cause for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

[414] ***Mr. Justice Peckham** delivered the opinion of the court:

The plaintiff in error was indicted for the murder of Vina Coleman on April 14, 1899, in the Indian territory. He is an Indian of the Choctaw tribe of Indians, and after having pleaded not guilty to the indictment the venue was changed upon motion, and the cause was sent for trial to the United States district court holden at Paris in the eastern district of Texas. Upon the trial before that court the defendant set up the defense of insanity, the jury found him guilty of murder as charged in the indictment, and he was sentenced to suffer the penalty of death. The defendant in the indictment has brought the case here to review

that judgment. There is no part of the evidence contained in the bill of exceptions.

The errors which are assigned in this case relate to those contained in the charge of the court to the jury. The first one we notice is an exception to a statement contained in the charge of the court that, "in this case it is not material, so far as the question of the guilt or innocence is concerned, that the evidence fails to show any motive for the killing." The defendant claims that this is error, because the want of motive is material, and the jury should consider that fact in determining the issue as to defendant's sanity at the time of the homicide. The exception to this single remark of the court fails to give the proper view of the charge, and gives a false impression as to the meaning of the court therein. The attention of the court was directed to the subject of proving motive upon the trial of a person charged with murder, and he charged that it was unnecessary to show a motive for the commission of the crime so long as the evidence satisfied the jury that the person charged was in fact guilty of the act; that it was not necessary to prove by any particular expression of the party charged that he had some personal, or what may be termed express, malice toward the individual who was killed. The court charged as follows upon this subject:

"Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, and in the peace of the United States, with malice aforethought, either *express or implied. The [415] term 'express malice' means that the homicide was the result of a formed design, based upon a wicked and depraved spirit, and is maliciously conceived and wickedly and maliciously executed without justifiable or lawful excuse. The most usual illustrations, and the ones best understood generally of the term 'express malice,' are such as lying in wait for the intended victim, and when he approaches he is slain, or the preparation and administration of poison for the purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be killing upon express malice. These are only illustrations of what is meant by the terms 'express malice,' and any homicide that is shown to have been the result of wilful intent and committed without legal excuse is said to be a killing upon express malice.

"By the term 'implied malice' is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful, that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the act. In that state of case the law attaches or implies malice to the nature of the act done; that is, the taking of human life without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party charged intentionally did the

act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and therefore if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. Therefore in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing, because if the killing was intentional and was not justifiable, the law implies the criminal intent, and, unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts."

[416] *The expression in the charge which plaintiff excepted to, when read in connection with all that the court said upon the question, is undoubtedly correct.

Prior to giving specific instructions in regard to the legal meaning of the word "insanity," and as to its sufficiency as a defense to the party accused of crime, the court made some general statements upon that subject as follows:

"Every person, charged with crime, is presumed to be sane; that is, of sound memory and discretion, until the contrary is shown by proof. No act done in a state of insanity can be punished as an offense. The question of the insanity of the defendant has exclusive reference to the act with which he is charged and the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by law. If he was insane at the time of the commission of the act, he is entitled to be acquitted. A safe and reasonable test is that whenever it shall appear from all the evidence that at the time of committing the act the defendant was sane, and this conclusion is proved to the satisfaction of the jury, taking into consideration all the evidence in the case, beyond a reasonable doubt, he will be held amenable to the law. Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind proved to be diseased, the person reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists."

The court also charged:

"That the burden is upon the government throughout the entire case to prove every essential element of the case charged, and if you should have a reasonable doubt, taking into consideration all the evidence in this case, that the defendant Hotema was sane at the time of the commission of the act charged, you will acquit him. . . . The real test, as I understand it, of liability or nonliability rests upon the proposition

whether at the time the homicide was committed Hotema had a diseased *brain, and it [417] was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and control of his mental faculties were impaired so that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition, he cannot be punished by law. But if his brain was not in this condition, he can be punished by law, remembering that the burden is upon the government to establish that he was of sound mind, and by that term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong, and knowing that the act he was committing at the time he was performing it was a wrongful act in violation of human law, and he could be punished therefor, and that he did not perform the act because he was controlled by irresistible and uncontrollable impulse. In that state of case the defendant could not be excused upon the ground of insanity, and it would be your duty to convict him. But if you find from the evidence, or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease, and the homicide was the product of such disease, and that he was incapable of forming a criminal intent, and that he had no control of his mental faculties and the will power to control his actions, but simply slew Vina Coleman because he was laboring under a delusion which absolutely controlled him, and that his act was one of irresistible impulse, and not of judgment, in that event he would be entitled to an acquittal."

In relation to the latter part of this charge, in which the court speaks of an irresistible impulse to commit the murder, counsel for the defendant says that he made no claim that the defendant was actuated by an irresistible impulse, and that there is nothing in the evidence to show that he was; that what he did claim was that the defendant was laboring under an insane delusion, and that this charge did not bring that subject before the jury. As there is no portion of the evidence returned in the bill of exceptions, we are unable to judge whether there was *any which would justify or which [418] did justify, the court in submitting the question of irresistible impulse to the jury. If there had been evidence on that subject, the submission of the question was certainly as fair to the defendant as he could ask. We decide nothing further than that.

Upon the other portion of the charge, as to the general liability of the defendant to the criminal law and to the obligation of the government to prove him guilty beyond a reasonable doubt upon taking into consideration all the evidence, and in regard to every essential element of the crime, the charge of the court was undoubtedly cor-

rect. *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353.

Some evidence was given, as is stated by the court in its charge, in regard to the defendant's drinking whisky about the time the homicide is said to have been committed. As to his alleged irresponsibility, the court charged:

"Upon this matter you are instructed that the recent use of whisky would not be a defense in this case, and you are to take the evidence as a whole, not by piecemeal, but all the evidence introduced in this case upon both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of whether or not Hotema was insane at the time the homicide was committed, or whether he was impelled and caused to perform the act by reason of the liquor he had drunk, if any. What I intend for you to understand is this: If the evidence as a whole fails to show, beyond a reasonable doubt, that Hotema was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of whisky he had drunk; but, in arriving at that conclusion, the jury are to look to all the evidence, and if, from all the evidence, they are satisfied that he slew Vina Coleman by reason of the whisky he had drunk, and not as a result of an insane delusion above referred to, in that event it would be your duty to convict the defendant; but if you have a reasonable doubt with regard to this matter, you will resolve it in favor of the defendant and acquit him."

[419] We can see no cause for fault finding with that portion of *the charge on the part of the defendant. The court had already charged there must be a wilful and intentional killing in order to warrant a conviction of murder. If that were present, we have no doubt the fact that defendant had drank some whisky before the killing was unimportant.

Then in regard to the subject of delusion the court charged:

"There is evidence in this case tending to show that Hotema believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe were being affected by witches, and that the deaths that were occurring in the neighborhood were due to the evil influence of witches, and that the party he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant Hotema believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught, and that he acted upon that belief, thinking he had the right to kill the party he is charged with killing, because he thought she was a witch, but at the time he knew it was a violation of human law and that he would be punished therefor, in that event it would not be an insane delusion upon the part of Hotema, but would be an erroneous conclusion, and, being so, 1228

would not excuse him from the consequences of his act. And, also, if you further believe that he came to the conclusion from his investigation and understanding of the Scriptures that this party was a witch, and that the defendant also used spirituous liquors, and these two combined were the cause or causes that led him to the commission of the act, and that either or both of these were the sole inducement that caused him to do the act, he would not be guiltless and would be responsible therefor. Upon the other hand, I charge you that if you should find from the evidence in this case that Solomon Hotema, the defendant, believed that there were witches, and that he had a right to kill them, and if you further find that such belief was the product of a diseased brain, or if you have a reasonable doubt that such condition of brain existed at the time of the homicide, and that his act was the result of such diseased brain, you will acquit him.

"In this case you are to determine the following questions:

"1st. Was the defendant Hotema at the time he committed *the homicide charged [420] laboring under an insane delusion produced by an impaired brain, and did it go to the extent for the time being of controlling his will power, reflection, reason, and judgment, and was the homicide committed by reason of such insane delusion? If the proof has shown beyond a reasonable doubt that such was not the case, you will convict the defendant, but if there is a reasonable doubt as to such mental condition, you will resolve such doubt in favor of the defendant, and acquit him.

"2d. Did Hotema commit the homicide, not laboring under an insane delusion, but believing that by teachings of the Bible he had right to kill the party he did kill because he thought she was a witch, and at the time of such killing he performed the same solely upon such belief, and was not laboring under an insane delusion? If you believe this state of case existed, and so believe it beyond a reasonable doubt, you will find the defendant guilty as charged in this indictment, but if you have a reasonable doubt in regard thereto, you will acquit the defendant."

The court had already properly instructed the jury as to the test to be applied to the general defense of insanity. In substance it had charged the jury that if defendant knew the nature and quality of his act when he committed it, and that it was wrong and a violation of the law of the land, for which he would be punished, that he was responsible for the act he committed. And upon the matter of irresistible impulse, the charge was, as we have said, at least as favorable to the defendant as he had any right to ask.

We think, taking the whole charge together, that the judge properly laid down the law in regard to the responsibility of the defendant on account of his alleged mental condition. It placed the burden on the government (following *Davis v. United States* 186 U. S.

States, supra) of proving beyond a reasonable doubt that the defendant was sane at the time of the commission of the act, as one of the essential features of the crime. It also held that within the legal definition of insanity the defendant was responsible for his acts if at the time of their commission he was of sufficient mental capacity to understand their nature and quality, and that the particular act in question was wrong [421] and *a violation of the law of the land for which he would be amenable to punishment under that law.

Upon the condition of mind of defendant regarding witches, the court held that if his belief in witches and his right to kill them were the product of a diseased brain, he was irresponsible, and if the jury had a reasonable doubt on that question, it should acquit. If his belief were not the product of an insane delusion, but simply an erroneous conclusion of a sane mind, he was, as the court charged, responsible.

The court, by the portions of the charge above adverted to, directed the attention of the jury to the distinction between a mere erroneous opinion and an insane delusion, the product of a diseased mind or brain. The subject is somewhat difficult, and the line of distinction not always easily drawn, but it exists, and we think that in this case the condition of mind which would render the defendant irresponsible was sufficiently and properly indicated by the court in its charge. It assumed that defendant might have formed an erroneous opinion regarding witches and witchcraft, and yet might not have been insane within the legal definition, and therefore, although possessing such erroneous ideas and acting on them, he might still be responsible criminally for his actions. And on the other hand, if his opinion on the subject were the result of insane delusions, and he acted on them, he was irresponsible, and responsibility must be proved beyond a reasonable doubt. We think this was all the defendant could require.

A special plea to the indictment in this case was filed by the defendant, setting up the fact that he had been once placed in jeopardy, and it appeared in the plea that the defendant on the same day on which he killed Vina Coleman also killed two other persons, and two indictments were found charging defendant with the murder of each of such persons, the indictments were thereupon consolidated and upon his trial on the consolidated indictments the defense set up was insanity, the same ground as set up in this case, and it was alleged that the only issue made in the case was whether the defendant was sane or insane at the time that he killed the two persons. The jury upon [422] indictments *for the murder of the two found him not guilty, on the issue of insanity. The indictment in this case was for the killing by the defendant of the third of the three persons, and it is upon these facts that he sets up the plea of once in jeopardy.

While the plea, on such facts, is wholly
186 U. S. U. S., Book 46.

without merit, and need not be further noticed, it is only adverted to for the purpose of recognizing the fact that the defendant has been charged with the murder of three different persons on the same day, and that seemingly there was no motive shown for the killing of any of them, or, at any rate, there was none shown for the killing of the person described in the indictment in this case, as the charge of the court in substance concedes. It also appears in this record that the first jury impaneled in this case was unable to agree upon a verdict. We are thus made acquainted, from the record, with the fact that one jury, upon the question of the insanity of the defendant, has, upon the trial of the consolidated indictments charging him with two distinct and separate murders, acquitted him of the alleged crimes on that ground; another jury has been unable in this case to agree upon the question; a third one has, in the case now before us, convicted him. Being unable to see any legal error committed by the trial court we are bound to affirm the judgment. The question whether, upon a consideration of the facts, the extreme penalty of the law should be carried out upon this defendant, is one which must be addressed to the consideration of the executive, as it is not one over which this court has jurisdiction. *The judgment must be affirmed.*

*PETER HAGAN and Edward F. Martin, [423]
Petitioners,
v.

SCOTTISH UNION & NATIONAL INSURANCE COMPANY.

(See S. C. Reporter's ed. 423-434.)

Marine insurance — policy "for account of whom it may concern" — written and printed provisions — change in interest.

1. A policy of marine insurance taken out in the name of a person "for account of whom it may concern" covers the interest of the person for whom it was intended by the party taking out the insurance, even though the particular person intended is not then known.
2. The words "for account of whom it may concern," inserted in writing immediately following the name of the insured in a policy of marine insurance, protect a subsequent vendee of an interest in the vessel, notwithstanding the retention in the policy, which is written on a blank intended for insurance of property on land, of the printed clause that such policy shall be entirely void, unless otherwise provided by agreement, if any change in interest, title, or possession shall be made.

[No. 206.]

Argued April 8, 1902. Decided June 2, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the

NOTE.—As to the effect on an insurance policy of the words, "for whom it may concern"—see note to *Hooper v. Robinson*, 25 L. ed. U. S. 219.

Third Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of Pennsylvania in favor of libellants in a libel in admiralty on a policy of marine insurance. *Reversed.*

See same case below, 43 C. C. A. 55, 102 Fed. 919.

Statement by Mr. Justice Peckham:

This is a libel in admiralty by the petitioners, Peter Hagan and Edward F. Martin, on a policy of insurance issued by the Scottish Union and National Insurance Company, November 19th, 1897, against loss or damage by fire to an amount, not exceeding \$2,000, on the tug boat Senator Penrose. The district court made a decree for the libellants. 98 Fed. 129. *This decree was reversed by the circuit court of appeals for the third circuit. 43 C. C. A. 55, 102 Fed. 919.

By the policy it is provided, among other things, that the company—

"In consideration of the stipulations herein named and of twenty-five dollars premium does insure *Peter Hagan and Company for account of whom it may concern* for the term of one year from the 19th day of November, 1897, at noon, to the 19th day of November, 1898, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding *two thousand* dollars, to the following-described property while located and contained as described herein, and not elsewhere, to wit:

"On the iron tug Senator Penrose, her hull, tackle, apparel, engines, boilers, machinery, appurtenances, furniture, and supplies.

"Privilege to engage in such employment as may be incidental to her trade; also to lay up and haul out on railways and dry docks and to undergo alterations and repairs; also to use kerosene oil for lights.

"Other insurance permitted without notice until required.

"N. Y. and Penna. standard.

Percentage coinsurance clause.

"If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than 80 per cent of the actual cash value thereof, this company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said 80 per cent of the actual cash value of such property.

"Attached to policy No. 2,139,457, Scottish U. & N. Insurance Co.

"S. D. Hawley & Son,
Agents, Resident Managers."

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid

[425] or not, on property covered *in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at
1230

night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within-described premises for, more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building or ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage; or if with the knowledge of the insured foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss," etc.

The words "Peter Hagan and Company for account of whom it may concern" are written with a pen, while the paragraphs commencing with the words "On the iron tug," and ending with the words "S. D. Hawley & Son, Agents, Resident Managers." are in typewriting, and on a separate strip attached to the face of the policy.

In June, 1898, Peter Hagan, who obtained the insurance, sold one-half interest in the tug to Edward F. Martin, and the latter held that interest at the time of the destruction of the tug by fire. No notice was given to the insurance company of the fact that Martin had acquired an interest in the boat. The respondents denied all liability to the plaintiffs because no notice was given of the change of ownership or of the interest in the tug by respective libellants as required by the terms of the policy.

Mr. John Frederick Lewis argued the cause, and, with **Mr. Horace L. Cheyney** filed a brief for petitioners:

The words "for account of whom it may concern" are in writing, and therefore controlling, as expressive of the intention of the parties.

Robertson v. French, 4 East, 130; *Parsons, Marine Ins.* p. 65.

Inconsistent printed portions of the form used do not merely modify the written clauses, but are as completely annulled as if they had been erased from the policy.

Dudgeon v. Pembroke, L. R. 2 App. Cas. 284; *Arnould, Marine Ins.* p. 294; *Egbert v. St. Paul F. & M. Ins. Co.* 71 Fed. 741.

The legal meaning of the phrase, "for account of whom it may concern," covers those owning the thing insured at the time the policy is executed, and those who may acquire an interest thereunder by the subsequent adoption of the policy.

Buck v. Chesapeake Ins. Co. 1 Pet. 151, 7 L. ed. 90; *Howard F. Ins. Co. v. Chase*,
186 U. S.

5 Wall. 509, 18 L. ed. 524; *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219; *Henshaw v. Mutual Safety Ins. Co.* 2 Blatchf. 99, Fed. Cas. No. 6,387; *Duncan v. China Mut. Ins. Co.* 129 N. Y. 237, 29 N. E. 76; *Fire Ins. Asso. v. Merchants & M. Transp. Co.* 66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905; *Phillips, Ins.* § 382; *Arnould, Marine Ins.* 112.

Evidence is clearly admissible to show the established trade meaning of this clause.

Joyce, Ins. § 217; *Greenl. Ev.* 15th ed. § 292; *Arnould, Marine Ins.* p. 275; *Richards, Ins.* p. 52; *Arnould, Marine Ins. MacLachlan ed.* p. 287; *Mason v. Skurray*, 1 Park, *Marine Ins.* 245; *Moody v. Surridge*, 2 Esp. 633; *Coit v. Commercial Ins. Co.* 7 Johns. 385, 5 Am. Dec. 282; *Astor v. Union Ins. Co.* 7 Cow. 202; *Parr v. Anderson*, 6 East, 202; *Robertson v. Clark*, 1 Bing. 445; *Houghton v. Gilbert*, 7 Car. & P. 701; *Peisch v. Dickson*, 1 Mason, 10, Fed. Cas. No. 10,911; *The Barnstable*, 84 Fed. 895; *Loneragan v. Buford*, 148 U. S. 581, 37 L. ed. 569, 13 Sup. Ct. Rep. 684.

When a policy is ambiguous, that construction should be taken which is against the underwriter.

The Insurance Cos. v. Wright, 1 Wall. 456, sub nom. *Orient Mut. Ins. Co. v. Wright*, 17 L. ed. 505; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 679, 24 L. ed. 565; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423, Affirmed in 35 C. C. A. 493, 93 Fed. 621; *Phoenix Ins. Co. v. Wilcox & G. Guano Co.* 13 C. C. A. 88, 25 U. S. App. 201, 65 Fed. 724; *McMaster v. New York L. Ins. Co.* 78 Fed. 33, Affirmed in 90 Fed. 40; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *Ogden v. East River Ins. Co.* 50 N. Y. 389, 10 Am. Rep. 492; *Allen v. St. Louis Ins. Co.* 85 N. Y. 473; *Western Ins. Co. v. Cropper*, 32 Pa. 351, 75 Am. Dec. 561; *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. 350; *Franklin F. Ins. Co. v. Brock*, 57 Pa. 74.

A policy of insurance should never be forfeited after a loss, except in a clear case.

Phillips, Ins. § 107; *McMaster v. New York L. Ins. Co.* 78 Fed. 33, Affirmed in 90 Fed. 40.

Mr. **Henry R. Edmunds** argued the cause and filed a brief for respondent:

No one can claim the benefit of an insurance made by another for account of whom it may concern, without showing that it was the intention of the person obtaining the insurance to embrace his interest in the goods at the time of the insurance.

De Bollé v. Pennsylvania Ins. Co. 4 Whart. 68, 33 Am. Dec. 38.

Anyone having title to the property at the time of the loss may, by adoption of the contract, avail himself of its advantages, provided it be shown that his interest was within the contemplation of the party procuring the insurance.

Fire Ins. Asso. v. Merchants & M. Transp. Co. 66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905; *Newson v. Douglass*, 7 Harr. & J. 417, 16 Am. Dec. 317.

186 U. S.

As a general proposition, the clause under consideration, and others of similar import, apply only to those who were contemplated at the time the insurance was made.

1 *Parsons, Shipping & Admr.* 46; *Routh v. Thompson*, 11 East, 428; *Bauduy v. Union Ins. Co.* 2 Wash. C. C. 391, Fed. Cas. No. 1,112; *Catlett v. Pacific Ins. Co.* 1 Paine, 594, Fed. Cas. No. 2,517; *Haynes v. Rowe*, 40 Me. 181; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553; *Seamans v. Loring*, 1 Mason, 127, Fed. Cas. No. 12,583; *Lambeth v. Western M. & F. Ins. Co.* 11 Rob. (La.) 82.

The intention, at the time, of the party who directs the insurance to be effected, is the great point to be ascertained in determining whose interest the policy can be applied to protect.

Arnould, Marine Ins. 1887 ed. p. 110.

Any change in the ownership or title of the property insured makes the insurance and policy void.

Sherwood v. Agricultural Ins. Co. 73 N. Y. 447, 29 Am. Rep. 180; *Hine v. Woolworth*, 93 N. Y. 75, 45 Am. Rep. 176; *Smith v. Phoenix Ins. Co.* (Cal.) 23 Pac. 383, see same case on rehearing, 91 Cal. 323, 13 L. R. A. 475, 27 Pac. 738; *Fire Asso. of Philadelphia v. Flournoy*, 84 Tex. 632, 19 S. W. 793; *Tallman v. Atlantic F. & M. Ins. Co.* 29 How. 71; *Abbott v. Sturtevant*, 30 Me. 44; *Schroedel v. Humboldt F. Ins. Co.* 158 Pa. 459, 27 Atl. 1077; *Oldham v. Anchor F. Ins. Co.* 90 Iowa, 225, 57 N. W. 861.

*Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The decision of this case turns upon the significance to be given to the written provision of the policy which provides for insuring "Peter Hagan and Company for account of whom it may concern."

In the district court Judge McPherson said:

"The decision of the case depends upon the effect to be given to the words 'for whom it may concern.' This clause, so far as it may be in conflict with other language in the policy, must, upon familiar principles, be regarded as dominant. It expresses the special agreement of the parties, for it is in writing, while the conflicting provisions are in print; and general printed conditions usually give way to deliberately chosen written words. Moreover, even if the court doubted which provision should prevail, another well-known rule requires the policy to be construed against the company rather than against the insured; and, therefore, upon either ground, the clause now under consideration is controlling. . . . The first step, therefore, in a given case is to determine what interest the person taking out the policy intended to protect. It is not essential that he should have had any specific individual in mind. It is enough if he intended to protect the interest that afterwards passed to the person injured; and if he so intended, the policy may be adopted afterwards by a subsequent sole or partial owner of the interest, although such

may have been unknown to the person taking out the insurance, or to the company, at the time the policy was written. In the present case I have no doubt (and I find the fact to be) that Hagan intended to insure, and to keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object the policy would more naturally have been taken out in his own name, omitting the qualifying phrase. But he intended to protect the ownership of the boat, whether

[427] vested in himself alone, *or shared with, or transferred to, other persons. This being his intention, and Martin having afterwards adopted the policy by the agreement of sale and by accounting for a proper share of the premium, I think no further difficulty exists. The facts bring the dispute within the rule laid down in *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219, and in other cases to which reference need not be made."

The decree of the district court was reversed by the circuit court of appeals, with directions to dismiss the libel with costs. Judge Dallas, speaking for that court, said:

"It is true that the written terms of the policy will control where they are in plain conflict with its printed clauses; but no part of the instrument is to be rejected if it can be maintained as a whole, and in the present instance the printed provisions in question and the written words 'for account of whom it may concern,' are not irreconcilably repugnant. That the policy was issued for account of whom it might concern is undeniable, but whom could it concern? Possibly the then existing or future creditors of the boat, or perhaps the constituents of Peter Hagan & Co.; but, no matter for whose account the insurance may have been effected, it cannot be supposed that it was taken for the benefit of anyone who, by the express, though printed, terms of the contract, was distinctly excluded from having or acquiring any interest under it. It is not necessary to our conclusion that we should question the rule of law which was applied by the court below, and we do not do so. It is not doubted that a policy in the name of a special party, on account of whom it may concern, will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known; but we find nothing in this case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein. On the contrary, we think, as we have already said, that the retention in the policy of the provision that it should be entirely void if any transfer in interest, title, or possession should be made, absolutely precludes the inference of an intent to make the policy applicable to any person claiming under or by virtue of such a transfer."

[428] *In these two extracts from the opinions delivered in the courts below we find the different views of the judges of those courts upon the question at issue. It is to be observed, in the first place, that the policy in

1232

question covers property on the water, viz., a tug boat, yet the printed portion of the policy shows that it was intended generally to be used for insuring property on land. A marine policy was made out upon blanks not intended for that kind of insurance. Consequently many of the printed provisions were wholly inapplicable to insurance of property on the water.

Where a marine policy is thus taken out upon a blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language, by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application.

In *Dudgeon v. Pembroke*, decided in the English House of Lords, in 1877, L. R. 2 App. Cas. 284, at 293, in speaking of this question of the difference between the written and the printed portions of a policy, and in delivering the opinion of the court, Lord Penzance said:

"My lords, the policy in this case is a time, and not a voyage, policy, and not only so, but an ordinary time policy. There can, I apprehend, be no doubt upon that point. It has been suggested that, by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to the ship, the policy is something less, or something more, than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe, and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law to permit of any such conclusion."

*This rule is recognized and assented to [429] by both courts below. If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail. It becomes necessary, therefore, to determine what is the meaning of the written portion of the policy, and what was intended by the parties by the language "on account of whom it may concern." Both courts below concur in the statement that a policy so worded will cover the interest of the person for whom it was intended by the party taking out the insurance, even though the particular person intended was not then known. It was said in the district court that it was enough if the person taking out the insurance intended to protect the interest that afterwards passed to the person injured; that it was not essential that he should have had any specific in-

dividual in mind at the time when he took out the insurance. The opinion of the court of appeals concedes that a policy in the name of a special party, "on account of whom it may concern," will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known. But the court of appeals was unable to discover anything in the case to support a finding that Hagan (the person taking out the insurance) intended to insure a subsequent vendee of the boat or of an interest therein, because of the retention in the policy of the printed provision that it should be entirely void, unless otherwise provided by agreement, if any change in the interest, title, or possession should be made. The retention of this printed provision, the court said, precluded the inference of any intent to make the policy applicable to any person claiming under or by virtue of such transfer.

[430] We concur in the view that by virtue of the language contained in the policy, "on account of whom it may concern," it is not necessary that the person who takes out such a policy should have at that time any specific individual in mind. If he intended the policy should cover the interest of any person to whom he might sell the entire or any part of the interest insured, that would be enough. In *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219, it was said that a policy upon a cargo in the name of A, on account [430] of whom it may concern, will inure to the interest of the party for whom it was intended by A, provided he at the time of effecting the insurance had the requisite authority from such party or the latter subsequently adopted it. The facts in that case differ materially from those presented by this record, but the meaning of the language "on account of whom it may concern" is stated in the opinion of the court, and authorities are therein cited which show that it is not necessary that at the time of effecting the insurance the person taking it out should intend it for the benefit of some then known and particular individual, but that it would cover the case of one having an insurable interest at the time of the happening of the loss, and who was intended to be protected at the time the party took out the insurance.

In 1 Phillips, Insurance, it is stated:

"Sec. 385. The rule, that an insurancee 'for whom it may concern' will avail in behalf of the party for whom it is intended, does not mean that any specific individual must be intended. . . . But he may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person subsequently ascertained to have such an insurable interest, who adopts the insurance.

"Sec. 388. One may become a party to the insurance effected in his behalf, in terms applicable to his interest, without any previous authority from him, by adopting it, either
186 U. S.

before or after a loss has taken place and is known to him, though the loss may have happened before the insurance was made."

In 2 Duer, Marine Insurance, p. 28, it is stated as follows:

"In England, the policy in its usual and almost invariable form contains a general clause, the terms of which are sufficiently comprehensive to embrace all persons who have an insurable interest in the property, and a lawful right to be insured. The insurance is expressed to be 'in the name of A. B. (the person effecting the policy), as well in his own name as for and in the name and names (without specification) of all and every other person and persons to whom the same (the property insured) doth, may, or shall appertain, in part or in all.' In the *United States, as on the continent of Eu-[431] rope, the general clause is framed in various forms of expression, and the construction necessarily varies, as the terms used are more or less extensive in their application. In some cases the insurance is expressed to be 'on account of the owners.' In some, on 'account of a person or persons, to be thereafter named;' but its most usual form is, 'on account of whom it may concern.' An insurance on account of the 'owners,' is probably limited to those who have a legal interest in the subject insured. But the words, 'on account of whom it may concern,' are co-extensive in their possible application with the general clause of the London policy."

And the learned author adds in a note the following:

"The Philadelphia policies retain the English form; and why it has been departed from in any of the cities of the Union, it is not easy to understand. The words are the most comprehensive and significant that could be chosen, since they apply not only to all persons, but to every species of interest. As the clause, however, 'for whom it may concern,' has received the same construction, it is not now necessary to alter it."

The English form insures the person to whom the property insured "doth, may, or shall appertain," thus insuring the owner or one who has an interest in the property at the time when the loss occurs. And the author says the words "on account of whom it may concern" have the same significance as the language used in the English form.

We are constrained to differ from the conclusion arrived at by the circuit court of appeals in its statement that there was nothing in the case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein, because of the retention in the policy of the provision that it should be entirely void, unless otherwise provided by agreement, if any change, etc., should be made. It seems to us that the very purpose of stating that the insurance was on account of whom it may concern was to do away with the printed provisions in regard to the sole ownership and to the change of interest. It was an agreement "otherwise provided," than in the

[432] printed portion of the policy. It provided for the happening *of a contingency by which at the time of the loss the person taking out the insurance might not be the sole and unconditional owner of the thing insured because of a change in the interest or title happening by the act of such person between the time of taking out the insurance and the occurrence of the loss. This, we think, was the intention of the party taking the insurance, to be arrived at by reading the written language of the policy and by reference to the fact that he intended to insure the whole title, and not his mere interest therein from time to time. Otherwise we do not see what effect is given to the written portion of the instrument.

There is no doubt, and the district court so found, that Hagan intended by the policy to secure the insurance upon the entire title, and he therefore intended thereby to protect that title during the running of the policy, and when the clause is added in writing that it was issued on account of whom it may concern, it shows that he intended that such title should be protected in the hands of any person to whom he might transfer the same or any portion thereof. If otherwise, and the intention were only to protect his own interest, the policy, as stated by the district judge, would naturally have been taken out in his own name, omitting the qualifying phrase, on account of whom it may concern. This phrase was put in for some purpose, and such purpose was, as it seems to us, to protect the whole title without making it necessary to notify the company and obtain its consent to any transfer of interest.

At the time when Hagan took out the policy he was the sole owner, and unless he intended the written words to apply to those to whom he might afterwards assign his interest or some portion thereof, the language would seem to fill no purpose.

If the policy were to become void in case of a transfer of all or any part of the interest of the person taking out the insurance unless the company were notified and provided by agreement indorsed on the policy for such change, we do not see that any alteration in its terms and meaning was accomplished by the insertion of the phrase in question. By the interpretation contended for by the company, it would have the same right, if the written provision were contained [433] therein, *to refuse to otherwise provide by agreement for the transfer of an interest, that it would have if such provision were stricken out, and the terms of the policy would in truth be unaltered by the insertion of that provision. We think this would be a totally different result from that contemplated by the parties. The words "on account of whom it may concern" do not refer to those interested in the policy simply at the time it is taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, and who were within the contemplation of him who took out the insurance at 1234

the time that he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied. We think this is the common-sense interpretation of the language used, and that it is justified and required by the authorities, many of which are cited in *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, ante, 213, 22 Sup. Ct. Rep. 133, has no bearing upon this case. There the party insured proved by parol an alleged waiver, by the general agent of the company, of one of the conditions in the policy, which required that such waiver should only be given in writing and indorsed on the policy. It was contended that the company was estopped because of the conduct of the agent in the existing circumstances in issuing such policy and taking the premium, from setting up and claiming the benefit of the condition. This court held that the evidence was improperly received, and reversed the judgment.

In this case there is no question of receiving parol evidence to alter or change any condition in the policy. It is simply a question of construction as to the meaning of the language used in the policy, and as to the intention of the party taking it out, and whether the written portion (the intention of the party being as stated) is inconsistent with any printed portion thereof; and if so, whether it should prevail as against such printed portion. We think the written portion is inconsistent with the printed condition as to change of interest, and as to sole ownership and there being such inconsistency the written portion *must be held to [434] cover the assignee of a part interest in the tug, as intended at the time by the party taking out the insurance.

The judgment of the Circuit Court of Appeals must be reversed, and that of the District Court of the United States for the Eastern District of Pennsylvania affirmed, and it is so ordered.

Mr. Justice Gray did not hear the argument, and took no part in the decision of this case.

FARMERS' LOAN & TRUST COMPANY,
Trustee, *Petitioner*,
v.

PENN PLATE GLASS COMPANY *et al.*

(See S. C. Reporter's ed. 434-458.)

Mortgage—equitable right of mortgagee to insurance moneys—effect of successful opposition to receivership—obligation to insure for benefit of mortgagee—purchase subject to mortgage.

1. The successful opposition, by the owner of

NOTE.—As to the liability of a purchaser of land for the mortgage debt—see notes to *Boone v. Clark* (Ill.) 5 L. R. A. 276; *Gifford v. Cor-*
186 U. S.

the equity of redemption in mortgaged property, to the appointment of a receiver on the ground that the mortgage was not good security for the debt, does not make such owner a receiver, for the benefit of the holders of the bonds secured thereby, of the insurance money collected on policies taken out by such owner on its own interest, where there was no contractual obligation which bound it to effect insurance covering the interest of such bondholders, and the trustee in the mortgage might itself have taken out such insurance and compelled reimbursement for the premiums advanced.

2. No obligation to insure for the benefit of the mortgagee rests upon the purchaser of property subject to a mortgage which provides that the sale of the mortgaged premises shall operate as a satisfaction of the mortgage indebtedness and all the covenants therein contained, even though an obligation to effect such insurance was imposed upon the mortgagor by the terms of the mortgage, and under the state law a purchaser of property subject to a mortgage impliedly agrees to indemnify the mortgagor against his liability on the mortgage.

[No. 180.]

Argued April 24, 25, 1902. Decided June 2, 1902.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed in part a decree of the Circuit Court for the Western District of Pennsylvania in favor of complainant in a suit to foreclose a mortgage. *Affirmed.*

See same case below, 43 C. C. A. 114, 103 Fed. 132.

Statement by Mr. Justice **Peckham**:

[435] *This is a suit in equity, brought by the petitioner in the United States circuit court for the western district of Pennsylvania, and the case comes here on certiorari to the circuit court of appeals for the third circuit. The suit was commenced to foreclose a mortgage given January 1, 1891, by the Penn-

rigan (N. Y.) 6 L. R. A. 612; O'Conner v. O'Conner (Tenn.) 7 L. R. A. 33; Rice v. Sanders (Mass.) 8 L. R. A. 315, and Elliott v. Sackett, 27 L. ed. U. S. 678.

Right of mortgagee to benefit of insurance taken in name of mortgagor, in absence of agreement to insure for benefit of mortgagee.

The mortgagee is not entitled to the proceeds of a policy of insurance taken out by the mortgagor or by the owner of the equity of redemption, in the absence of any contract to insure for the mortgagee. *Carter v. Rockett*, 8 Paige, 437; *Ryan v. Adamson*, 57 Iowa, 30, 10 N. W. 287; *Vandegraaff v. Medlock*, 3 Port. (Ala.) 389, 29 Am. Dec. 256; *Stamps v. Commercial F. Ins. Co.* 77 N. C. 209; *Columbla Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. ed. 512.

This is also recognized to be the rule in *Nichols v. Baxter*, 5 R. I. 491; *Chipman v. Carroll*, 53 Kan. 163, 25 L. R. A. 305, 35 Pac. 1109; *Lange v. Grahe*, 11 Ohio C. C. 171; *Plimpton v. Farmers' Mut. F. Ins. Co.* 43 Vt. 497, 5 Am. Rep. 297; *Wheeler v. Factors & T. Ins. Co.* 101 U. S. 439, 25 L. ed. 1055; and *Lindley v. Orr*, 83 Ill. App. 70. In the last case the court 186 U. S.

sylvania Plate Glass Company (hereinafter called the mortgagor company) upon its property in the county of Westmoreland and state of Pennsylvania, to complainant, the Farmers' Loan & Trust Company, a corporation of New York, to secure the payment of \$250,000 of bonds then to be issued by the mortgagor company. A supplemental bill was filed, by leave of the court, which averred a loss by fire of a large portion of the premises mortgaged, and on the allegations contained in the supplemental bill the complainant asked that a decree should be entered granting to it a lien on the insurance moneys to the extent necessary to pay the bondholders the balance which might be due, after applying to their payment the proceeds of the sale of the property mortgaged. A decree was entered by direction of the circuit court, providing for the foreclosure and sale of the property and for the application of the insurance moneys as prayed for. Upon appeal to the circuit court of appeals the decree of the circuit court was reversed as to the insurance moneys, and the court below was directed to enter a decree that those moneys should be paid to the defendant, the Penn Plate Glass Company, Circuit Judge Acheson dissenting. The opinion of the judge of the circuit court, as well as those delivered in the circuit court of appeals, will be found reported in 43 C. C. A. 114, 103 Fed. 132.

The material facts in the case are as follows: The Farmers' Loan & Trust Company is a corporation of the state of New York. The defendant, the Pennsylvania Plate Glass Company (the mortgagor company), is a corporation of the state of Pennsylvania, organized for the purpose of constructing and operating plate-glass works in the city of Irwin in that state. The defendant, the Penn Plate Glass Company, is also a corporation of the state of Pennsylvania, and is also organized for the purpose of constructing and operating plate-glass works in the same city. The defendant William L. Kann is a citizen of the state of *Pennsyl- [436]

says that "policies of insurance against loss by fire are personal contracts with the assured, which do not attach to the property insured, or in any manner go with the same as incident to a conveyance or transfer of the title, or the creation of a lien thereon, without express agreement or manifest intention on the part of the assured that the insurance was effected for the benefit of such person interested in the property."

And this is true although the policy contains a clause providing that the assured may assign the policy to the mortgagee. *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044.

Or where the policy was taken out on account of the mortgagor "for whom it may concern." *McDonald v. Black*, 20 Ohio. 185, 55 Am. Dec. 448.

Where there is a contract or covenant to insure for the benefit of the mortgagee, the latter is generally regarded as entitled to an equitable lien on the proceeds of a policy obtained by the mortgagor, as is shown by a note to *Chipman v. Carroll* (Kan.) 25 L. R. A. 305.

vania. On January 1, 1891, the mortgagor company executed to the complainant trust company a mortgage on its property in Westmoreland county, Pennsylvania, to secure the payment of \$250,000 of bonds as therein stated. Among other things, it was provided by article 1 of the mortgage that, until default should be made in the payment of the principal or interest of the bonds secured by the mortgage, or in the performance of some one or more of the covenants, stipulations, or agreements required by the mortgage to be kept, performed, or done by the mortgagor, it was to be permitted to possess and operate the premises and glass works with the appurtenances described in the mortgage.

By articles 2 and 3 it was provided that in case default should be made in the payment of any instalment of the interest on any of the bonds or of any of the coupons accompanying the same, or in the performance of any of the covenants, agreements, or stipulations contained in the mortgage and thereby required to be kept and performed by the mortgagor, and if such default continued for six months after demand made in writing, the mortgagee might take possession of the property, or foreclosure proceedings might be taken.

By article 4 the mortgagor is exempted from all personal liability for the mortgaged debt, and from the obligations of the other covenants contained in the mortgage, the article providing as follows:

"It being expressly understood and agreed by and between the parties hereto, and by and between the said party of the first part and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors, or shareholders, either by the said holders of the said bonds or coupons or any of them, or by any person or corporation to whom the same or any of them may be assigned or transferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed or to subject the same to the payment of the said debts, *and that the sale of the said mortgaged premises, whether under the power of sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

It was provided by article 10, among other things, as follows:

"The right of action under this indenture is vested exclusively in the trustee, and

under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding on or under this indenture, for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustee, according to its sound discretion; but the trustee shall be under no obligation to institute any such suit or to take any proceedings under this indenture, or to enter any appearances, or in any way defend in any suit in which it may be made defendant, or to do anything whatever as trustee until it shall be indemnified to its satisfaction from any and all costs and expenses, outlays and counsel fees, and other reasonable disbursements, and from all possible claims for damages, for which it may become liable or responsible on proceeding to carry out such request or demand. The trustee may, nevertheless, begin suit, or appear in and defend suit, or do anything else in its judgment proper to be done by it as such trustee, without such indemnity, and in such case it shall be compensated therefor from the trust fund.

"The trustee shall be under no obligation to recognize any person as holder or owner of any bonds secured hereby, or to do or refrain from doing any act pursuant to the request or demand *of any person, until such [438] supposed holder or owner shall produce said bonds and deposit the same with the trustee.

"It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other, or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done. It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney, or employee selected with reasonable discretion; it shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the

discharge of the same; and all such fees, commissions, compensations, and disbursements shall constitute a lien on the mortgaged property and premises."

Many other provisions and conditions were contained in the mortgage, which are not material to be mentioned.

Most of the moneys arising from the issuing of these bonds were applied towards the construction of the plant of the mortgagor company at its place of business in the city of Irwin, Pennsylvania. The company soon got into financial difficulties, and about January, 1894, the defendant Kann became a stockholder therein and was elected its treasurer. By March 19, 1894, the company had become involved in litigation, and was very greatly embarrassed financially, and some of the other officers of the company had disagreements with Kann in [439] regard *to his advances of money, so that on the day last named a bill in equity was filed against the company, in the name of some of its creditors and directors, in the court of common pleas of Westmoreland county, Pennsylvania, praying, among other things, for the appointment of a receiver of the property of the company, and for a decree winding up its business. In that suit Joseph W. Stoner, the then secretary of the company, was appointed receiver, and such proceedings were had therein that on or about June 18, 1894, the court made an order for the sale of all the property of the mortgagor company, and the same was sold at public auction to defendant Kann for the sum of \$37,500, he being the highest bidder at the sale, which was open and public, and attended by others who made bids on the property. The sale was made subject to the mortgage to the complainant, and a deed was given by the receiver, pursuant to the order of the court, to Kann, the deed bearing date July 2, 1894, and reciting that the property was thereby conveyed "subject to a mortgage made by said Pennsylvania Plate Glass Company to the Farmers' Loan & Trust Company of the state of New York, dated 1st of January, 1891, recorded in Westmoreland county in mortgage book No. 43, page 1," and being the mortgage or deed of trust made to complainant as stated. Kann continued in possession as owner of the property under this deed from the receiver until about July 1, 1895, when he conveyed, by deed dated on that day, all of the mortgaged property, together with the improvements made thereon by himself, to the defendant, the Penn Plate Glass Company, for a consideration named in the deed of \$83,500. Kann in his evidence says the consideration really amounted to \$118,000. The deed from Kann to the company also recited that the property therein conveyed was "subject to a mortgage made by said Pennsylvania Plate Glass Company to the Farmers' Loan & Trust Company of the state of New York, dated 1st of January, 1891, recorded in Westmoreland county, in mortgage book No. 43, page 1."

While Kann held the property he paid the interest on the bonds, but default was made

in the payment of the coupons maturing on July 1, 1895, and no coupons have been paid since that time.

*There was some insurance on the property [440] when it went into the hands of the receiver in the suit which was commenced to wind up the affairs of the company, a portion of which insurance had not been paid for at the time of the appointment of the receiver, and he thereupon secured directions from the court to maintain the insurance, and for the purpose of paying the premiums thereon he issued receiver's certificates under the order of the court. Some, but not all, of this insurance was still in force when the receiver turned the property over to Kann at the time of the deed, July 2, 1894. This insurance expired by the lapse of time, and afterwards, and while Kann was in possession of the property under his deed from the receiver, he procured insurance upon his own interest therein and in his own name. These policies subsequently expired. The Penn company when organized, and after it had purchased the property, took out insurance in its own name upon the same and for its own benefit exclusively, the amounts running from \$250,000 to about \$400,000, and the policies containing this provision: "This property is subject to a bonded indebtedness of \$250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders." There was no insurance on the property during the time that the Penn company owned it, other than as just stated, but that insurance was to an amount more than sufficient to secure the bondholders under the mortgage if the moneys were to be so applied.

While the property was in the hands of Kann and after the insurance thereon had expired, which had been procured by the mortgagor company or by its receiver, the mortgagee notified Kann and required him to keep up or renew or take out other insurance for the benefit of the bondholders under the mortgage, up to the amount thereof, and the same notice and requirement were given to and demanded of the mortgagor company. That company made default, and Kann refused to take out any such insurance, and denied that he was under any obligation so to do. After Kann sold and conveyed the property to the Penn company, the complainant notified that company and required it to insure in a sum sufficient to afford security for the bondholders under the mortgage to complainant. The Penn company refused *to so insure, and [441] denied any obligation to do so, but, on the contrary, did insure for its own benefit, the policies of insurance containing the provision excluding the interest of the bondholders under the mortgage.

As stated, the mortgagor company, and also Kann and the Penn company, defaulted in the payment of the coupons due July 1, 1895, and upon those due January 1 and July 1, 1896, and thereupon complainant commenced this suit by the filing of its bill July 8, 1896, asking for the foreclosure of

the mortgage, and making the mortgagor company, Kann, and the Penn company defendants. On the same day a motion for a receiver was noticed on the ground that the mortgage was not good security for the debt. The mortgagor company made default, and has not appeared in the suit. The other defendants duly appeared and opposed the motion. It was heard on July 20, 1896. Shortly after the motion had been argued counsel for the complainant received notice from the judge before whom the motion had been made, stating that he had concluded to deny the application for the appointment of a receiver. Upon a subsequent day, the parties being in court (no formal order denying the motion having as yet been filed), the counsel for the complainant said to the court that in the motion for a receiver it occurred to him that the court had not considered the fact that this property was without insurance; that there was danger of fire; that the plaintiff was a trustee without funds, and that that was a matter that ought to be considered; that the trustee was entitled to insurance. Counsel upon the other side denied that they were bound to insure under the terms of the mortgage, and so the dispute continued before the judge, counsel for the complainant insisting that complainant should have insurance, and counsel for the other side denying that complainant was entitled to it at the cost of the defendants; and at the end the judge remarked that he could not then decide that question, but intimated to counsel for defendants that if they were bound to insure they ought to protect the complainant as trustee and mortgagee. Finally it was suggested that a bond should be given of the tenor now to be mentioned, but counsel for complainant stated, in his evi-

[442] dence upon the subject given in this *case, that he did not wish to be misunderstood, and that it must be admitted that counsel for the defendants, upon the occasion mentioned, expressly denied that they were bound to insure for the benefit of the bondholders; the bond or agreement was given just as its terms set forth, that if defendants were bound to insure the insurance would stand for the benefit of the complainant, and if not, the complainant would get nothing. The bond or agreement was then given by Emanuel Wertheimer and defendant Kann. It was put in evidence, and Wertheimer and Kann therein agreed "that in the event of a loss by fire of the property described in the said Pennsylvania Plate Glass Company mortgage, that then there shall be paid out to the said Farmers' Loan & Trust Company, trustee, in trust for the holders of valid bonds secured by the said mortgage, a sum equal to the total amount of such valid bonds, out of the policies of insurance existing in favor of the Penn Plate Glass Company. Provided, that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of said property, is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described

mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage." This agreement was given, as counsel for complainant stated, in order to meet the views of the court, "that if I was entitled to insurance I should have a bond, and if I was not entitled to insurance, I would get nothing."

By an interlocutory order, as mentioned in the decree subsequently entered, and grounded upon this agreement, the court appointed Emanuel Wertheimer as receiver for the purpose of receiving the insurance moneys under the various policies of insurance, and, pursuant to such appointment, Wertheimer was directed to hold, as such receiver, \$125,000 of the insurance moneys so collected, and if it should be finally decreed that the complainant had an equitable lien upon such insurance moneys, then the receiver was to pay over to the complainant so much of that sum as should be necessary to pay and discharge the \$90,000 of the bonds secured by the mortgage, not including the \$160,000 of such bonds belonging to Wertheimer, in regard *to which he released [443] and waived all claim to an equitable lien upon the said sum of \$125,000 so collected and held by him, and he was also to pay to the complainant and discharge the coupons upon such \$90,000 of bonds.

The formal order denying the motion for a receiver was filed September 7, 1896. Considerable testimony was taken in the case subsequently to that time upon the various issues made by the pleadings, but the trial had not been concluded, when on April 12, 1898, a fire occurred, by reason of which, as claimed on the part of the mortgagee, the greater part of its security was destroyed. A supplemental bill was then filed by complainant by leave of court, and various insurance companies which had insured the property for the Penn company were brought in as parties to the suit, and the complainant demanded, in addition to the relief which was prayed for in the original bill, a decree providing that the complainant should have a first lien on the insurance moneys paid or to be paid under such policies for the purpose of paying the bondholders holding the \$90,000 of bonds as above mentioned, any balance which might be due them after the sale of the mortgaged premises should be made, if such sale should result in any deficiency in the payment of those bonds.

Testimony was taken relative to the averments contained in the supplemental bill. It was proved on behalf of the Penn company that since Kann and the Penn company had the title to, and possession of, the property, there had been spent by them upon the property, by way of repairs and improvements, between \$180,000 and \$200,000.

The decree of the circuit court, after providing for the foreclosure and sale of the mortgaged premises, made specific provision for the application of the insurance moneys in the hands of Wertheimer to the payment of any deficiency that might arise, after ap-

plying the proceeds of the sale of the mortgaged property to the payment of the bonds mentioned in the decree.

Messrs. Herbert B. Turner and John G. Johnson argued the cause, and, with **Mr. John S. Ferguson**, filed a brief for petitioner:

The duty of a court to protect the subject-matter of a mortgage by insurance is too plain for argument, and protection of the property is the primary object of an equity receivership.

Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 104, 36 L. ed. 639, 12 Sup. Ct. Rep. 787.

The trustee's motion for a receiver was equivalent to an attempt to take possession.

American Bridge Co. v. Heidelberg, 94 U. S. 798, 24 L. ed. 144; *Allen v. Dallas & W. R. Co.* 3 Woods, 316, Fed. Cas. No. 221; *State v. Northern C. R. Co.* 18 Md. 193; *Dumville v. Ashbrooke*, 3 Russ. Ch. 98, note; *Whitehead v. Wooten*, 43 Miss. 523; *Morrison v. Buckner*, Hempst. 442, Fed. Cas. No. 9,844.

The facts in the case create a situation from which natural equity compels the implication of a promise on the defendants' part to hold a part of these insurance moneys in trust for the complainant, and to pay over the same upon the adjustment of its loss.

Moses v. Macferlan, 2 Burr. 1008; *Ex parte Ford*, L. R. 16 Q. B. Div. 307; *Pothier, Obligations*, 113; *Beach, Modern Eq. Jur.* § 1.

That a case is novel, and not clearly within the limits of any adjudged case, does not warrant the denial of relief in equity.

Beach, Modern Eq. Jur. § 1; *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626.

If the insurance policies which have been taken out by the appellant, the Penn Plate Glass Company, had been taken out by the original mortgagor, the Pennsylvania Plate Glass Company, the complainant would unquestionably have had an equitable lien upon them, to the extent of the loss, under the mortgage.

Wattengel v. Schultz, 11 Misc. 165, 32 N. Y. Supp. 91; *Cromwell v. Brooklyn F. Ins. Co.* 44 N. Y. 42, 4 Am. Rep. 641; *Wheeler v. Factors' & T. Ins. Co.* 101 U. S. 439, 25 L. ed. 1055.

Even in the case of ordinary purchases subject to a mortgage, or to the payment of a mortgage, the law in Pennsylvania has always been that by such purchases the vendees at least impliedly agree to indemnify the vendors against liability on the mortgage.

Campbell v. Shrum, 3 Watts, 60; *Blank v. German*, 5 Watts & S. 42; *Woodward's Appeal*, 38 Pa. 327; *Moore's Appeal*, 88 Pa. 452, 32 Am. Rep. 469.

The words, "subject to the payment of the mortgage," or their equivalent, still continue, since the act of June 12, 1878, to be
186 U. S.

sufficient to imply a covenant to indemnify the mortgagor.

Lennox v. Brower, 160 Pa. 193, 28 Atl. 839; *Blood v. Crew Levick Co.* 171 Pa. 339, 33 Atl. 348.

Under the circumstances of this case, the liability of the vendee extends to the mortgage provision as to insurance.

Keller v. Ashford, 133 U. S. 624, 33 L. ed. 673, 10 Sup. Ct. Rep. 494; *Trotter v. Hughes*, 12 N. Y. 79, 62 Am. Dec. 137.

If the mortgagor had remained the owner of the premises, and had effected the insurance which was in existence at the time of the fire, the insurance money would have been a fund impressed with the lien of the mortgage debt.

Wheeler v. Factors' & T. Ins. Co. 101 U. S. 439, 25 L. ed. 1055.

The fund raised by the insurance, thus impressed with the duty of indemnity of the mortgagor, is collateral security for the performance by the mortgagor of its duty to insure, and, as such, inures to the benefit of the trustee.

Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494.

Mr. Louis Marshall argued the cause and filed a brief for respondents:

A covenant on the part of the mortgagor to insure will not be implied.

Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. ed. 512; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044.

When general words occur at the end of a clause or sentence, they refer to and qualify the whole.

Dwarris. Statutes, 704; 2 *Institutes*, 50; *Gyger's Estate*, 65 Pa. 311; *Eby's Appeal*, 70 Pa. 311; *Fisher v. Connard*, 100 Pa. 63; *United States v. Babbit*, 1 Black, 55, 17 L. ed. 94; *Great Western R. Co. v. Swindon & C. Extension R. Co.* L. R. 9 App. Cas. 787; *Coxson v. Dolan*, 2 Daly, 66.

The implication of a covenant on the part of the mortgagor, from language bearing upon the relations between the trustee and the bondholders, would be most extraordinary.

Hale v. Finch, 104 U. S. 261, 26 L. ed. 732.

The proceeds of a contract of insurance procured by the owner of the equity of redemption of mortgaged property do not represent the property, and, in the absence of special covenant, do not inure to the benefit of the mortgagee.

Carter v. Rockett, 8 Paige, 437; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. ed. 512; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044; *Gleason v. First Nat. Bank*, 13 Fed. 720; *Nippes' Appeal*, 75 Pa. 478; *Lerow v. Wilmarth*, 9 Allen, 382; *Loos v. Wilkinson*, 113 N. Y. 500, 4 L. R. A. 353, 21 N. E. 392.

Equity will not impute an intention to the appellees to do that which their express language negated.

Hawkins v. United States, 96 U. S. 697, 24 L. ed. 610.

When called upon by the petitioner to procure policies of insurance for its benefit, they disavowed any obligation to procure it, and gave the petitioner ample opportunity to procure such insurance for its own benefit, in the exercise of its undoubted right.

Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 L. ed. 473; 1 Jones, *Mortg.* § 397.

The covenant sought to be inferred would be satisfied by insurance effected for the benefit of the mortgagor.

1 Jones, *Mortg.* 5th ed. § 401; *Lees v. Whiteley*, L. R. 2 Eq. 143.

That covenant is a personal covenant which does not bind subsequent owners of the property, because it is not a covenant running with the land.

Dunlop v. Avery, 89 N. Y. 592; *Reid v. McCrum*, 91 N. Y. 412; 1 Jones, *Mortg.* 5th ed. § 400; 2 May, *Ins.* § 452; 1 Biddle, *Ins.* § 254.

If the purchaser buys a mere equity of redemption, he is not personally liable for the mortgage debt, or liable, either legally or equitably, to indemnify his grantor against the mortgage.

1 Jones, *Mortg.* 5th ed. § 738.

A deed which is merely made subject to a mortgage specified does not alone render the grantee personally liable for the mortgage debt. To create such liability there must be such words as will clearly import that the grantee assumed the obligation of paying the debt.

1 Jones, *Mortg.* 5th ed. § 748; *Shepherd v. May*, 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. Rep. 119; *Elliott v. Sackett*, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. Rep. 375; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Hoy v. Bramhall*, 19 N. J. Eq. 74; *Chilton v. Brooks*, 71 Md. 45, 18 Atl. 868; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Smith v. Truslow*, 84 N. Y. 660.

Such an agreement is a contract between the grantee and the mortgagor only, and does not, unless assented to by the mortgagee, create any obligation from the grantee to the mortgagee.

Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494.

The bonds secured by the mortgage refer to the latter instrument, whose terms and conditions must be deemed embodied in the bonds; and the rights and remedies of the holder are such only as are conferred by the terms of the mortgage, which exclude the idea of personal liability on the part of the mortgagor.

McClelland v. Norfolk S. R. Co. 110 N. Y. 469, 1 L. R. A. 299, 18 N. E. 237; *Batchelder v. Council Grove Water Co.* 131 N. Y. 42, 29 N. E. 801.

By reason of inability of the mortgagor to respond for liability, even if it existed, the appellee could in no event be called upon to make good a loss which has not been suffered.

King v. Whitely, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137;

Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Moore's Appeal*, 88 Pa. 450, 32 Am. Rep. 469; *Samuel v. Peyton*, 88 Pa. 465. See also *Girard L. Ins. & T. Co. v. Stewart*, 86 Pa. 89; *Blood v. Crew Levick Co.* 171 Pa. 328, 33 Atl. 344.

The grantor of Kann—the Receiver of the Pennsylvania Plate Glass Company—having acquired the property conveyed by him pursuant to a judicial decree, and being bound by no covenant of indemnity, there is no privity between the petitioner as mortgagee, and the appellee, which, under any circumstances, would bind the latter to the former.

Samuel v. Peyton, 88 Pa. 465. See *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *King v. Whitely*, 10 Paige, 465; *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626; *Eakin v. Shultz* (N. J.) 47 Atl. 274.

The value of the mortgaged property would not have been the reasonable, probable, or proximate amount of damage resulting from the failure to insure. At the most the amount expended in the procurement of insurance would have been recoverable by the petitioner from the mortgagor.

Dodd v. Jones, 137 Mass. 322; *National Mahaiwe Bank v. Hand*, 80 Hun, 584, 30 N. Y. Supp. 508.

Messrs. S. Schoyer, Jr., Bernard Carter, and *S. B. Schoyer* filed a brief for appellee, the Penn Plate Glass Company:

No contract, express or implied, was ever entered into by the Penn Company to effect any insurance for the benefit or protection of the trustee, or for the benefit or protection of its *cestui que trust*.

Pom. Eq. Jur. 364, 365; *Cromwell v. Brooklyn F. Ins. Co.* 44 N. Y. 47, 4 Am. Rep. 641; *Wheeler v. Factors' & T. Ins. Co.* 101 U. S. 442, 25 L. ed. 1057; *Nichols v. Baxter*, 5 R. I. 493; *Carter v. Rockett*, 8 Paige, 437.

A covenant contained in a mortgage, to insure for the benefit of the mortgagee, is entirely personal in its character, does not apply to the land or run with it, but is collateral to the remaining covenants, and does not bind the vendee of the equity of redemption.

Platt, Covenants, 3 Law Library, 183; 1 Jones, *Mortg.* § 400; *Dunlop v. Avery*, 89 N. Y. 597; *Reid v. McCrum*, 91 N. Y. 412; 1 Biddle, *Ins.* § 254; 2 May, *Ins.* § 452; *Carter v. Rockett*, 8 Paige, 437.

Never at any time or anywhere has it been held that a deed of the equity in mortgaged property subject to the mortgage imposed any liability on the grantee in respect of the mortgage debt, unless by the terms of the mortgage there is a personal liability on the part of the mortgagor to pay the debt.

Moore's Appeal, 88 Pa. 453, 32 Am. Rep. 469; *Blood v. Crew Levick Co.* 171 Pa. 328, 33 Atl. 344; *Keller v. Ashford*, 133 U. S. 622, 33 L. ed. 672, 10 Sup. Ct. Rep. 494.

Even if there were no express provisions in the mortgage allowing the mortgagee to insure and to make the premiums a charge on the land or fund, still, if there was a cov-

enant to insure for the benefit of the mortgagee and the mortgagor failed to do so, the mortgagee could insure and charge the premiums to the mortgage, and the cost of such insurance would be a proper measure of damages for the breach of the covenant to insure.

Fowley v. Palmer, 5 Gray, 549; *White v. Brown*, 2 Cush. 412.

Where there is no personal obligation or covenant in the mortgage to pay the mortgage debt, then the only remedy is against the property mortgaged.

2 Jones, Mortg. No. 1,225.

The words "under and subject," or "subject to the mortgage," created only a contract of indemnity.

Moore's Appeal, 88 Pa. 453, 32 Am. Rep. 469; *Blood v. Crew Levick Co.* 171 Pa. 339, 33 Atl. 348.

Where there is no personal liability on the part of the mortgagor to pay the mortgage debt, no contract whatsoever arises, from those words, upon the part of the grantee, and there is no liability on him to pay the mortgage debt or perform the covenants of the mortgage.

Ibid.

The implied contract for this personal responsibility, thus made, being one altogether between the mortgagor and his grantee, it necessarily follows that whatever right the mortgagee has to enforce this contract is altogether a derivative right, and one derived altogether from, and dependent upon, the contract made between the mortgagor and his vendee, to which the mortgagee is no party.

Keller v. Ashford, 133 U. S. 623, 33 L. ed. 673, 10 Sup. Ct. Rep. 494.

The courts of the United States, in the administration of state laws in cases between the citizens of different states, have an independent jurisdiction co-ordinate with that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of these laws.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Carroll County v. Smith*, 111 U. S. 563, 28 L. ed. 519, 4 Sup. Ct. Rep. 539; *Bolles v. Brimfield*, 120 U. S. 763, 30 L. ed. 788, 7 Sup. Ct. Rep. 736.

Independently of the Pennsylvania act of 1878, if there is no personal obligation on the mortgagor to pay the mortgage debt, there is none upon the grantee, and therefore no implied contract to pay the same arises.

Moore's Appeal, 88 Pa. 453, 32 Am. Rep. 469; *Blood v. Crew Levick Co.* 171 Pa. 328, 33 Atl. 344.

The implied contract between the vendor of the equity of redemption and his grantee, evidenced by the words, "subject to the payment of the described mortgage debt," grows altogether out of the fact that the amount of the money represented by the mortgage debt is held to have been a part of the purchase money agreed to be paid by the vendee for the property, and which amount was

left in the hands of the vendee to be applied to this purpose.

Woodward's Appeal, 38 Pa. 326; *Moore's Appeal*, 88 Pa. 452, 32 Am. Rep. 469; *Blood v. Crew Levick Co.* 171 Pa. 328, 33 Atl. 344.

The implied contract thus made is one made altogether between the grantor of the equity of redemption and his grantee. To this contract the mortgagee is no party.

Keller v. Ashford, 133 U. S. 622, 33 L. ed. 672, 10 Sup. Ct. Rep. 494.

The only right which the mortgagee has for the collection of his debt is the right to make it out of the property mortgaged, or out of the personal responsibility of the mortgagor upon his covenant in the mortgage.

Elliott v. Sackett, 108 U. S. 140, 27 L. ed. 681, 2 Sup. Ct. Rep. 375; *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* 149 U. S. 447, 37 L. ed. 803, 13 Sup. Ct. Rep. 944; 1 Jones, Mortg. § 748.

There is no covenant in the mortgage which obliges the mortgagor to insure for the benefit of bondholders.

Lees v. Whiteley, L. R. 2 Eq. 143; 1 Jones, Mortg. § 401; 1 Pingrey, Mortg. § 553.

*Mr. Justice **Peckham**, after making [444] the foregoing statement of facts, delivered the opinion of the court:

The only question involved in this case arises from the provision made in the decree by the circuit court judge, impressing what is termed an equitable lien upon the insurance moneys collected on the policies taken out by the Penn company, sufficient to pay any balance which may remain unpaid on the bonds secured by the mortgage to complainant, after the application of the proceeds of the sale of the property mortgaged. The circuit court held that the complainant had such equitable lien, while the circuit court of appeals, Judge Acheson dissenting, was of the contrary opinion, and therefore reversed that portion of the decree which provided for it.

The policies upon which the moneys were collected to pay the loss happening by fire, were taken out by the Penn company for the purpose of covering its own interest in the property, and the language of the policies covered such interest only. There was no contract in the policies covering the interest of the complainant as mortgagee, nor was the insurance, in fact, effected for the purpose of carrying out any agreement or obligation on the part of the Penn company with the complainant to effect insurance covering the interest of the bondholders. On the contrary, this purpose was disaffirmed and the obligation denied. The Penn company had the right to insure its own interest, and unless there were some contractual obligation on its part on the subject, which bound it, or some conduct on its part, or on the part of Kann, its immediate grantor, which would estop it from setting up the fact that it had procured the insurance for itself, the moneys arising out of the contracts which it made with the various insurance companies cannot be taken from it and

bestowed on the complainant for the benefit of the bondholders secured by the mortgage in suit. Some obligation of the defendant of a contractual nature must exist, or some conduct must be proved, estopping the defendant from denying such obligation, before the court can be authorized to take such moneys and bestow them upon the mortgagee for the benefit of the bondholders.

[445] *The complainant asserts that, without regard to any provision in the mortgage, it has an equitable lien upon the Penn company's insurance, and that, under the circumstances, such company must be treated as in the position of a receiver appointed on complainant's motion in this case. The peculiar circumstances upon which the claim is based that defendants should be so treated, seem principally to be the denial of complainant's motion for the appointment of a receiver at the time of the commencement of this suit to foreclose the mortgage, and the fact that the Penn company had insurance on the property. The denial of the motion for a receiver, it is averred, was brought about by the opposition of the defendants Kann and the Penn company, and it is argued that they ought not to have opposed the motion, and their opposition was improper and in bad faith. But it must be remembered they were parties to the suit, and in the legal protection of their rights it was perfectly proper for them to oppose, before the court, the appointment of a receiver, even though their opposition secured the denial of the complainant's motion. We see nothing upon which to base an accusation of bad faith in this conduct of defendants. The complainant, however, regards the application for a receiver as the same in substance as an application to take possession of the premises in pursuance of the provisions of the mortgage, consequent upon a default in the payment of the principal or interest of the bonds, or because of a violation of any other of the covenants contained in such mortgage. Even if that be so, we see nothing in such fact to in any way alter the right of defendants to oppose by argument before the court the appointment of a receiver. There is no pretense that they made any allegations upon the hearing which were untrue, or that their opposition was based upon anything other than conceded facts. Possibly the circuit court ought to have appointed a receiver upon the application of the complainant. That was a matter resting a good deal in its sound discretion. The Penn company and Kann were, however, entirely within their legal rights when they opposed such application, and we are unable to see that their conduct in so doing in any manner altered those

[446] rights *or added to their own legal obligations. Very likely a receiver, if he had been appointed, would on his own motion have taken out insurance upon the property, or would have been directed by the court to do so, in order to cover the interest of the bondholders. But no receiver was appointed and no such insurance was taken out, and we cannot see that the defendant, the Penn

company, has in any manner made itself liable to pay to the complainant any of the insurance moneys which it obtained to cover its own interest only, in the property, because of the successful opposition made by it to the appointment of a receiver.

The court on hearing all sides and interests denied the application. There was nothing which then prevented the complainant from itself taking out insurance under the 10th article of the mortgage. It could have taken out such insurance as a thing proper to be done by it as trustee within the provisions of the mortgage, and in such case it would have been entitled, by the specific provisions in the 10th article, to reimbursement therefor and to compensation from the trust fund. We do not say that it was its duty to do so, for it had no cash of the mortgagor on hand, but it had the power under the article to advance the insurance premiums and the right to demand reimbursement and compensation for having done so. The fact that it had no funds at its command at that time is very likely an answer to the proposition that it was its duty to have itself procured insurance; but if it had advanced the money and thus procured the insurance, the amount which it advanced would have been a lien on the trust fund and payable thereout before any claim on the part of the bondholders could have been asserted. The risk of loss to the complainant by making such advances would have been nothing. We refer to the subject to show that the mere fact that the trustee was without actual cash in hand to procure the insurance is not material.

Nor can we see that the execution of the agreement soon after the court had decided to deny the application for the receiver in any way affects the liability of the defendants on this branch of the case. From the time that Kann bought the premises on the receiver's sale and took a deed therefor subject to *the mortgage, he denied any liability [447] on his part to insure the premises for the bondholders, and refused so to do, and the Penn company from the time it became the purchaser of the premises also denied any liability to insure and refused to do it. The denial of this obligation to insure and the refusal on the part of both Kann and the Penn company had been explicit, open, and continuous from the time the property had first been acquired up to the hearing upon the motion for a receiver. Whether the defendants or either of them were bound to insure for the benefit of the bondholders was a question which the circuit court said it could not decide at that time. This was after the court had stated its determination to deny the motion for a receiver. Finally it was agreed between counsel who were then before the court that Kann and Wertheimer would sign an agreement that in the event of a loss by fire there should be paid to complainant out of the policies of insurance existing in favor of the Penn company a sum equal to the total amount of valid bonds secured by the mortgage, provided it was finally adjudicated that the company, the

then owner of the property, was bound or liable by anything contained in the mortgage or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the mortgage.

We do not see that this agreement altered in any degree or added to the rights or obligations of the defendants in regard to insurance on the premises. The agreement simply was that if the defendants were bound to insure, then they would take moneys arising from the insurance policies sufficient to pay the bonds. Whether they were or were not so liable was not determined or in any way intimated. If the court had then decided that they were liable, they would have had the opportunity of placing the necessary amount of insurance to cover the interest of the bondholders in addition to that which the Penn company then had covering its own interest, but no such decision was arrived at, and no such order was made, and no extra or other insurance taken out, and all parties seemed to be content to rest upon their legal rights, and to take the risk of an error as to what those rights [448] were. To make a decree after a loss has happened, by which the moneys arising from policies covering only the interest of the Penn company and procured by it as security for such interest against the loss of property by fire, requires the existence of an obligation on the part of that company founded upon considerations other than the fact that it had opposed the appointment of a receiver, and that the agreement had been made in the circumstances mentioned. In our view there are no facts disclosed by this record which authorize or justify the court in regarding the defendants in the same light as if they were receivers appointed upon the motion made by complainant in this suit and as such had taken out these policies. The court with all the facts before it refused to appoint such receiver, and the fact that these defendants, Kann, and the Penn company, successfully opposed the appointment, furnishes no tenable ground to regard them as receivers because of such successful opposition. This ground of liability must, therefore, be rejected.

While it is true that as a consequence of this voluntary agreement entered into by Kann and Wertheimer, the latter was appointed a receiver to collect and hold a sufficient amount of the insurance moneys to pay these bonds, and in that way the moneys may be described as being in court, yet the court did not obtain jurisdiction to make any disposition of those moneys in behalf of complainant except upon the conditions made in the agreement, by virtue of which alone the moneys came under its immediate control. Unless the court held that there was a liability, as expressed in the agreement, it obtained no jurisdiction over these moneys to make a disposition of them in accordance with general equitable principles. There is no fund in court to be thus disposed of. We must confine ourselves, therefore, strictly to the question of whether

there was a right on the part of the complainant to enforce the application of these insurance moneys, in the hands of the companies or of the defendants, to the payment of these bonds, and a corresponding liability of defendants to apply these moneys for the benefit of the bondholders, free from any assumed power of the court to make a disposition of the funds on general equitable principles because they are in its possession, and to that extent subject to its immediate control.

*In this view, we must ask was there any [449] obligation resting upon these defendants to insure by reason of the contents of the mortgage and of the deeds under which the Penn company now claims title? In order to determine whether there was an obligation of this nature it must first be decided there was such obligation on the part of the mortgagor company, because if that company was never under any obligation to insure, it is clear that the grantees subject to the mortgage were also free from any liability of that nature.

It is claimed that the mortgagor company became liable to insure by reason of the provision in article 10 of the mortgage, or at least that it became thus liable to insure, when, under that provision, it was required to do so by the mortgagee. That portion of the article directly in question here, after providing that it should be no part of the duty of the trustee to do certain things therein named, continued: "Nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done."

It is argued that by this language a covenant arose on the part of the mortgagor, by which it covenanted to insure the property if required to do so by the mortgagee. Reading the whole of that article with the other provisions of the mortgage, we think there is great force in the reasoning of Judge Gray in the circuit court of appeals, by which he concludes that there was no original obligation imposed by the mortgage on the mortgagor to insure for the benefit of the mortgagee. But we do not ourselves decide that no such obligation existed. The court of appeals did not place its determination upon that ground alone, but, after discussing it and coming to the conclusion which it did, it then proceeded to discuss the question whether the defendant company was liable upon the assumption that there rested upon the mortgagor an original obligation imposed upon it by the mortgage to insure for the benefit *of the stockholders. [450] We will make the same assumption, and the inquiry then arises as to the obligation of the defendants to themselves insure for the benefit of the bondholders after they re-

spectively became the owners of the equity of redemption in the premises.

Kann became the purchaser under a receiver's sale ordered by the court and pursuant to its directions, and he received from the officer conducting that sale a deed conveying to him the premises subject to the mortgage of the complainant. He thus occupies the position of a purchaser at a judicial sale which was ordered to be made subject to the lien of an existing mortgage upon the premises to be sold, and he made no agreement which in terms obligated him to pay a dollar of the mortgage, or to comply with a single one of the covenants of the mortgagor. Whatever his obligations may have been in regard to the mortgage or to the covenants of the mortgagor arising from the simple fact of his taking a deed subject to that mortgage, the obligations of his grantee are no greater than his own. The Penn company took the title which he had subject to the same mortgage as in his case, and with no promise on its part, in terms, to pay the mortgage or to insure the premises for the benefit of any other interest than its own.

Counsel for the complainant argue that the extent of the obligation of grantees or purchasers subject to a mortgage in Pennsylvania has always been, at the least, that by taking such a deed the grantee impliedly agrees to indemnify the grantor against his liability on the mortgage. Many cases are cited by the parties on both sides in relation to this question.

In *Moore's Appeal*, 88 Pa. 450, 32 Am. Rep. 469, decided in 1879, Chief Justice Sharswood delivering the opinion of the court, it was held that such a clause was a covenant of indemnity only, as between the grantor and the grantee, for the protection of the former. Or, in other words, it was held that on taking the land the grantee will indemnify the grantor to the extent of the mortgage, in the same manner as if the consideration had been paid in cash and then applied by the mortgagor at the time. It was also held that an agreement to pay the encumbrance might be implied from the circumstances of any particular case. In the course of his opinion the Chief Justice reviews many prior cases in that state, and, in speaking of the words "subject to the mortgage thereon," said:

"Why should a covenant be inferred from these words by the vendee to the vendor to do more than protect the latter from loss? If there is no existing personal liability in the vendor by reason of his bond or promise under which he can be compelled to pay if the mortgaged premises prove insufficient, what reason is there that he should exact a covenant from his vendee for the benefit of a stranger? If such personal liability does exist why should he exact anything more than indemnity? Surely, then, something should appear to create the inference of such a covenant. The words 'under and subject' import no such thing. They import that the vendee takes the land encumbered, and at most that so taking it at an agreed consid-

eration, which includes the encumbrance, he will indemnify the vendor to the extent of that consideration, in the same manner as if it had been paid in cash and so applied at the time. It is unwise to give an arbitrary, artificial meaning to words commonly used in contracts and conveyances, and thus entrap parties into engagements into which they had no reason to suppose, in the common use of language, they were entering. The act of assembly of June 12th, 1878 (Pamph. Laws, 205), has very wisely provided that the grantor shall not be personally liable unless he shall expressly assume such liability by agreement in writing, or condition in the conveyance."

In *Blood v. Crew Levick Co.* 171 Pa. 328, 33 Atl. 344, the import of the clause "under and subject to the lien of" a mortgage was under consideration, and it was held that an implied covenant to indemnify arose from that language. It was also held that the vendor had no right of action against the vendee in such a deed until he had been forced to pay the mortgage, either in whole or in part. This was also held in a case between the same parties, reported in the same volume (171 Pa.) at page 339, 33 Atl. 348.

The act of June 12, 1878, of the Pennsylvania legislature (P. L. p. 205), provides as follows:

"Grantees of real estate which is subject to ground rent or *bound by mortgage or [452] other encumbrance shall not be personally liable for the payment of such ground rent, mortgage, or other encumbrance unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor, or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability therefor: *Provided*, That the use of the words 'under and subject to the payment of such ground rent, mortgage, or other encumbrance shall not alone be construed so as to make such grantee personally liable as aforesaid.'"

Under the various cases cited, and the statute above quoted, we may assume that by the law of Pennsylvania the grantee who simply takes a deed subject to the lien of a mortgage is at most nothing more than an indemnitor of his grantor against the payment of the mortgage or any part of it by such grantor. There is no liability on the part of the grantee to the mortgagee so that the latter has any cause of action against him for the payment of the mortgage. If the mortgagor be not liable to pay at all there is no liability resting on the grantee to pay.

It then becomes necessary to determine what liability, if any, rested upon the mortgagor. By reference to the fourth article of the mortgage, already set forth in the statement of facts, it will be seen that there is no personal liability on the part of the mortgagor. There is no obligation, therefore, on the part of the Penn company to indemnify the mortgagor company for any personal liability to pay the mortgage or any part

thereof, for no such liability exists. However much below the amount of the mortgage the land should sell for is, so far as this question is concerned, a matter of no legal interest to the mortgagor company, and the fact in no way creates any liability on its part. As there was no liability on the part of the mortgagor to pay any portion of the debt secured by the mortgage, and the liability, if any, to indemnify the mortgagor on its covenant to insure is, as stated by the judge delivering the opinion of the circuit court of appeals, incidental and subordinate to its liability to indemnify the mortgagor regarding the mortgage debt, no such liability to indemnify upon the insurance covenant would seem to rest upon the defendant company *or upon Kann, because there is none such existing in relation to the mortgage debt itself.

The covenant to insure does not run with the land, so that one taking a conveyance comes under a primary obligation to insure, over and above that of a mere indemnitor. *Columbia Ins. Co. v. Lawrence*, 10 Pct. 507, 513, 9 L. ed. 512, 515; *The City of Norwich*, 118 U. S. 468, 494, *sub nom. Place v. Norwich* & N. Y. *Transp. Co.* 30 L. ed. 134, 144, 6 Sup. Ct. Rep. 1150.

But, assuming the law of Pennsylvania to be that there is an obligation on the part of these defendants, by reason of their taking the deeds subject to the mortgage, to indemnify the mortgagor on its covenant to insure, contained in the mortgage, what is the extent and character of that obligation thus assumed? The covenant on the part of the mortgagor, which we assume exists by reason of the language contained in the mortgage, was a personal obligation or covenant. The question then arises, What consequences would follow upon a breach of the covenant by the mortgagor? Suppose it had not conveyed the property and still remained the owner and in possession, and yet refused or omitted to insure, as it had covenanted to do in the mortgage, what remedy under this mortgage existed because of this violation by the mortgagor? The complainant might have taken out insurance and claimed reimbursement, or added the premiums paid to the amount of the mortgage debt. It did not do so. What other remedy it had for a violation of any covenant by the mortgagor is stated in the mortgage. It is therein expressly understood and agreed between the parties "that no other suit or proceeding for the collection of the bonds shall be commenced, except such suits or proceedings as shall be necessary to recover the possession of the premises mortgaged, or to subject the same to the payment of the debts, and that the sale of the mortgaged premises, whether under the power of sale granted or any other power of sale, or by or under any judicial proceeding whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the mortgage and of the obligation of the covenants therein contained, whether the premises should be bidden in for the whole amount of the indebtedness or for a

less price, anything in the bonds or coupons to the contrary *thereof notwithstanding." [454] The sale of the mortgaged premises is by the specific terms of the mortgage to operate as satisfaction of all the covenants contained in the mortgage. And in asking for the sale of the property, by the commencement of this suit, complainant cannot add to the relief it is entitled to by a sale, any other or different relief than that. By the express provisions of the mortgage there was not only an exemption of personal liability for the payment of the bonds and coupons, or any part of them, but there was also an exemption of all personal liability on account of the obligation of any other covenant contained in the mortgage: such exemption covering, not only the obligation to pay the debt, but also any other covenant. Hence the obligation to indemnify the mortgagor on account of any failure by it to insure does not exist, because there is no liability on the part of the mortgagor to answer for its breach of covenant in any other way than by complainant taking possession of the premises, or by a foreclosure of the mortgage and sale thereunder. The mortgagor, having conveyed the premises, has no further interest in them, and hence their sale under the mortgage would be no damage to the mortgagor, and no case for indemnity to it would be made out.

The alleged contractual obligation to indemnify, as well regarding the covenant to insure as that regarding the payment of the bonds and coupons, does not help the complainant in this case, because of the affirmative provisions of the mortgage. Whether the sale, under the foreclosure prayed for in this case, has taken place or not, there is no other or personal liability of the mortgagor to respond for its breach of covenant to insure than that which it has provided for in the mortgage. If it be under none other, then the indemnitor has nothing to indemnify.

In regard to the contractual obligation to insure on the part of defendants, which complainant avers exists as one of the foundations for the equitable lien claimed by it, the judge, delivering the opinion of the circuit court of appeals (43 C. C. A. 134, 103 Fed. 151), said:

"But apart from cases of fraud, it is only when there is such *a contract or promise, [455] which can be so enforced, that courts of equity will recognize for that purpose the existence of an equitable lien. In such case the lien is impressed upon funds or property which, belonging to the promisor, were the very funds or property which constituted the subject-matter of the contract, or to which the contract or promise related. It is essential, therefore, that the funds or other property, which are to be charged with the lien, should have, either at the time of the contract or afterwards, and while it was still unperformed, belonged to the party against whom the contract is to be so enforced, and be so identified, even though at the time of suit the said funds or property have come into the hands of volunteers, or

of others who may be affected with notice. There must therefore exist a contract by the party owning, either *in presenti* or in expectancy, the property sought to be charged, which directly or by necessary implication expresses the intention to charge such property with the lien in favor of the other party to the contract. . . . It is not pretended that there was any contract between Kann or the appellant company and complainant to insure for its benefit, or any promise or declaration of intention, upon any or no consideration, that they, or either of them, would so insure, or that policies or fund arising therefrom should be assigned or charged with a lien in its favor. The first essential requisite to an equitable lien, as above described, is therefore entirely wanting. There is no contractual relation of any kind between the mortgagee and the appellant [respondent in this court], in whose name, and for whose sole benefit, these policies of insurance were taken out. If such a lien, therefore, exists on these insurance funds, in favor of the complainant, it must be on other grounds than these ordinary and well-understood ones. This is not the case of a mortgagee claiming an insurance taken out by the mortgagor, who had covenanted to insure for the benefit of the mortgagee; nor is it the case of such mortgagee claiming such insurance funds, when they had come into the hands of third persons, 'who are either volunteers, or who take the estate [the insurance funds] on which the lien is agreed to be given with notice of the stipulation.' The complainant does not claim that the funds

[456] due on policies taken out *by the mortgagor, and which the mortgagor is held to have promised that he would assign to the mortgagee, have come into the possession of the appellant [respondent], with notice, and are therefore charged with a lien in favor of the mortgagee. Its claim is that the grantee of the equity of redemption, having taken the property expressly subject to the mortgage, which contained a covenant on the part of the mortgagor to insure, on that ground alone came either under a direct obligation to insure the premises for the benefit of the mortgagee, or under an obligation to indemnify the mortgagor for his liability under said covenant. But the property or 'estate' which came to the hands of the appellant, as grantee of the equity of redemption, was the mortgaged premises, subject to the mortgage. There is no difficulty in determining what that estate is to be charged with. The court here, however, is asked to impress a lien in favor of the mortgagee, not on this estate, but upon funds which were never in any sense the property of the mortgagor, and could never have been the subject-matter of a promise on its part. It is the first branch of the claim above stated (*i. e.*, the alleged direct obligation) that we are now considering."

We fail to see any contractual obligation on the part of the defendants to insure for the benefit of the bondholders further than

we have stated, as indemnitors of the mortgagor for its breach, if any, of its covenants.

The case of *Wheeler v. Factors' & T. Ins. Co.* 101 U. S. 439, 25 L. ed. 1055, is founded upon the existence of the obligation of the mortgagor to insure, and it is said that under such circumstances the mortgagee will have an equitable lien upon the money due upon a policy of insurance taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed, and that such equitable lien exists, although the contract provided that in case of the mortgagor's failure to procure and assign that insurance, the mortgagee might procure it at the mortgagor's expense.

If the insurance had been taken out by this mortgagor company, even in its own name, we would have the same principle as decided in the last-cited case, and the complainant herein *might, as its counsel claim, [457] have had an equitable lien upon the moneys arising from such insurance to the extent of the loss under the mortgage. But here is no such case. The mortgagor did not insure after it lost title to the property under the conveyance by its receiver to Kann, and the insurance that was procured was for the interest of the defendants in the property to the exclusion in terms of the interest of the complainant. Although the defendant bought subject to the mortgage and with full knowledge of the insurance covenant, yet it held the property subject only to an obligation on its part, at most, to indemnify the mortgagor on account of the mortgage debt, or on account of its covenant to insure, and we have seen that that obligation, under the terms of this mortgage, was of no materiality because by its terms the mortgagor was under no personal liability, and there was therefore no subject upon which indemnity could rest.

If there is no contractual obligation arising from the terms of the mortgage, and the taking of the deeds with an "under and subject" clause, as above referred to, then there must have been some conduct on the part of the person to be charged which would estop him from setting up as a defense the lack of such obligation. The complainant urges that the defendants have been guilty of conduct which does estop them from denying their liability. This is a different claim from that first remarked upon as to the treatment of defendants as receivers. This claim is based upon a survey of the whole conduct of defendants in connection with the mortgagor company and the insurance upon the property. The record in this case, in our opinion, discloses no conduct on the part of the defendants which estops them or either of them from showing the lack of any obligation on their part to apply any portion of the insurance moneys to the payment of the bondholders. There has been no wrecking of the mortgagor company by either or both defendants, and neither has done anything depriving himself or itself of any defense he or it might otherwise have. In other words, both defendants have, so far as this record shows,

full liberty to set up as a defense the want of any contractual or other obligation to insure. The opinion of the circuit court of [458]appeals *is quite full in regard to this claim, and we feel there is no necessity in ourselves going over this particular ground.

After a careful consideration of the whole case, we are of opinion that *the judgment of the Circuit Court of Appeals was right, and it is therefore affirmed.*

Mr. Justice **Gray** did not hear the argument, and took no part in the decision of this case.

MARCELLUS A. LANDER, as Treasurer of Cuyahoga County, Ohio, *Appt.*,

v.

MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO.

(See S. C. Reporter's ed. 458-477.)

Taxation—equalization of shares—notice—judgment—res judicata.

1. Notice of the time and place of the first meeting of the state board for the equalization of the shares of incorporated banks, given by the provisions of Ohio Rev. Stat. § 2808, designating the time and place for such meeting, is sufficient notice to any banks which may be affected by its action, although such action may be taken at a meeting of the board held after it has adjourned without fixing a date for a subsequent meeting.
2. A judgment which determined that certain assessments for taxation on shares of stock in a national bank were illegal because stockholders' debts were not deducted therefrom, and moneyed capital invested in national banks was therefore unlawfully discriminated against by reason of the practical operation of Ohio Rev. Stat. § 2730, defining credits, in exempting from taxation moneyed capital in the hands of individuals, is not conclusive as to the right of the stockholders in such bank to have their debts deducted from the value of their shares in determining their value for taxation in subsequent years.

[No. 227.]

Argued April 18, 1902. Decided June 2, 1902.

NOTE.—On state taxation of national banks—see notes to McHenry v. Downer (Cal.) 45 L. R. A. 737, and Providence Bank v. Billings, 7 L. ed. U. S. 939.

On the duties of the state board of equalization—see note to Cass County v. Chicago, B. & Q. R. Co. (Neb.) 2 L. R. A. 188.

On the notice of equalization required—see note to Read v. Dingess, 8 C. C. A. 400.

On conclusiveness of judgments generally—see notes to Sharon v. Terry (C. C. N. D. Cal.) 1 L. R. A. 572; Bollong v. Schuyler Nat. Bank (Neb.) 3 L. R. A. 142; Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 577; Morrill v. Morrill (Or.) 11 L. R. A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

186 U. S.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Northern Division of the Eastern District of Ohio, dismissing a bill to restrain the collection of taxes on shares of stock in a national bank, and remanded the cause with instructions to enter a decree in favor of the complainant. *Reversed*, and the judgment of the Circuit Court *affirmed*.

See same case below, 45 C. C. A. 66, 105 Fed. 809.

Statement by Mr. Justice **McKenna**:

*This suit was brought in the circuit court [459] of the United States for the northern division of Ohio, eastern district, to restrain the collection of certain taxes levied by the officers of Cuyahoga county, Ohio, upon the appellee bank. The grounds of the suit were that the acts of the taxing officers of said county were in violation of the "rights of the plaintiff (appellee) and of its shareholders accorded to them by § 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction of the rate and limit of taxes assessed upon their said shares to that assessed upon other moneyed capital in the hands of individual citizens of the state of Ohio."

The bill alleged that the plaintiff (appellee) was a national bank, and stated the capital stock of the bank and the number of shares into which it was divided; that its cashier made the proper returns of the resources and liabilities of the bank to the county auditor; that the latter fixed the value thereof, as required by § 2766 of the Revised Statutes of the state, after deducting the assessed value of the real estate of the bank, and transmitted a statement of his action, and a copy of the report made by the cashier, to the state board of equalization, for incorporated banks, and that board, professing to act under §§ 2808 and 2809 of the Revised Statutes of the state, increased the valuation of the shares without notice to the bank or its shareholders, and that the board was hence without jurisdiction to make such increase, and "its action in respect thereto was void and of no effect."

It was averred "that said state board of equalization knowingly *and designedly did [460] fix a much higher per centum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed upon other moneyed capital in the hands of individual citizens of the state of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland."

Section 2730 of the Revised Statutes of Ohio was set out in the bill, which defines "credits" to be the excess of certain legal claims and demands over and above legal and bona fide debts, and it was averred "that a large amount of moneyed capital in the hands of individual citizens of the state of Ohio invested in promissory notes and other legal obligations, securities, claims, and de-

mands, amounting to several hundred millions of dollars, is by the aforesaid provision, allowing a deduction of legal bona fide debts to be made therefrom, expressly exempted from taxation."

Figures were given in support of the allegation as to individuals, "building and loan incorporations," which, it was alleged, "were empowered and authorized by said statute to borrow and loan money and to do a general banking business with their members and depositors," and savings banks, in which it was alleged that there was on time deposit an amount exceeding the entire capital stock of all the national banks in the state, which deposits were credits belonging to the depositors from which legal bona fide debts were authorized by the statute to be deducted in order to ascertain the taxable value of said deposits.

That on account of such exemptions unlawful discrimination was practised against moneyed capital invested in national banks, and that the tax lawfully assessed and paid on its shares by complainant amounted to upwards of 20 per cent of the income which arose from its operations.

That each of the shareholders was indebted in an amount of bona fide debts, "exclusive of the exceptions allowed by the statute, to an amount equal to the actual and par value of the number of shares specified opposite their respective names, and which said excess of said debts over said credits as aforesaid. *the said shareholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them."

Proof of this indebtedness was submitted to the county auditor, but he refused to make any deduction, and threatened to collect taxes on such shares with said deductions disallowed.

That the right to have such deductions made was adjudicated in a suit brought by plaintiff on the 8th of April, 1887, against Horatio N. Whitbeck, the predecessor of the defendant, as treasurer of Cuyahoga county, and also in other suits brought against other predecessors of the defendant, in which said suits the issues were the same as those in the present suit, and that each of the defendants in said suits "represented the same interest, sustained the same relation, was charged with the same duties to the public as the present defendant," and in which the issues determined and adjudged "involved the same subject-matter, and that the judgments therein given are wholly unreversed and still in full force and operation."

The bill prayed for an injunction of the collection of any of the taxes which were charged on the duplicate tax list of the county, "including those levied on such unlawful increase of valuation by such state board of equalization for incorporated bank shares, permitting, however, said treasurer, without prejudice to his rights in the premises, to receive the amounts so as aforesaid tendered by the plaintiff to him."

The answer admitted some of the aver-

ments of the bill and tendered issue on those upon which complainant based the charge of illegality of and discrimination in the assessment. As to the action of the auditor the answer alleged that "the auditor was greatly deceived and misled by complainant's statement of the true value of its returns to him for taxation, and that the returns so made did not exceed forty (40) per cent of the actual value of said property and assets of complainant; when in truth and in fact the said complainant should have returned the same at its true value in money." And also averred "that said board of equalization began work at the time the statutes require, and continued its work continuously, but for want of the necessary information it could not complete its work earlier than December 6, 1897."

*In an amendment to the answer the[462] deception of complainant cashier as to the true value of the shares was again averred, and the justness and legality of the action of the state board of equalization were circumstantially asserted.

As a second defense it was alleged that § 167 of the Revised Statutes of Ohio was *in pari materia*, and was a part of the taxing system of the state and of the machinery for the collection of the public revenue of the state, and provided that when the amount of taxes to be remitted exceeded \$100, as in the case at bar, that the board of revision provided for by said section, consisting of the governor, auditor of state, and attorney general, was constituted an appellate board to the action of the state board of equalization, of shares of incorporated banks, and had the power and authority and jurisdiction to review, revise, and correct all excessive, illegal, or erroneous assessments, fines, or judgments that might have been made by said board of equalization; that complainant, not having appealed to such board of revision, and by refusing to submit to such board its "cause and the matters in dispute, had not exhausted its usual and ordinary remedy at law," and had not exhausted the remedies provided by the statutes of Ohio, and hence the court had "no jurisdiction in equity to hear and determine said cause, and said plaintiff bank should not be permitted to further prosecute its action herein."

The case was referred to a master, and upon the coming in of his report, and, after considering the exceptions of the parties to it, the court dissolved the injunction which had been granted, and dismissed the bill. 98 Fed. 465. That action was reversed by the circuit court of appeals and the cause remanded, with instructions to enter a decree in favor of the complainant (appellee here). 109 Fed. 21.† Thereupon this appeal was taken. Other facts are stated in the opinion. Most of the sections of the Revised Statutes of Ohio on the subject of taxation, which are applicable to the questions involved, are printed at length in 173 U. S., pp. 209 *et seq.*, 43 L. ed. 670, 19 Sup. Ct.

†This citation should be 45 C. C. A. 66, 105 Fed. 809. A later case in the circuit court is reported in 109 Fed. 21. [Ed.]

Rep. 409. Other sections are inserted in the margin or referred to in the opinion.

Messrs. J. M. Sheets and Smith W. Bennett argued the cause, and with **Mr. R. H. Kaiser**, filed a brief for appellant:

A holder of shares in a national bank has not the right to deduct his legal bona fide debts from the value of his shares for purposes of taxation.

Exchange Bank v. Hines, 3 Ohio St. 1; *Latimer v. Morgan*, 6 Ohio St. 279; *Fayette County Treasurer v. People's & Drivers' Bank*, 47 Ohio St. 503, 10 L. R. A. 196, 25 N. E. 697; *Niles v. Shaw*, 50 Ohio St. 370, 34 N. E. 162; *Chapman v. First Nat. Bank*, 56 Ohio St. 310, 47 N. E. 54, 173 U. S. 205, 43 L. ed. 669, 19 Sup. Ct. Rep. 407.

At the time of the rendition of the judgment by the Federal Supreme Court, in *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. ed. 118, 8 Sup. Ct. Rep. 1121, there had been no decision by the supreme court of Ohio upon the express question.

If the state supreme court has announced no decision on the construction of a state statute, the Federal Supreme Court, in the absence of such construction, will give to the state statute a construction of its own; but if the supreme court of the state afterwards announces a contrary construction, such construction will be followed by the Federal Supreme Court.

First Nat. Bank v. Ayers, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114.

No other notice was required or was necessary beyond the statutory notice fixing the time and place of the meeting of this board.

Glenn v. Raine, 30 Ohio L. J. 30; *Hambleton v. Dempsey*, 20 Ohio, 168; *Desty*,

Taxn. pp. 599, 601; *Wagoner v. Loomis*, 37 Ohio St. 571; *Black*, Tax Titles, § 131; *Adler v. Whitbeck*, 44 Ohio St. 573, 9 N. E. 672; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

Having had notice of the commencement of the proceeding, the law charged the bank with notice of what thereafter was done.

Gager v. Prout, 48 Ohio St. 89, 26 N. E. 1013.

This board has its time of sitting fixed by law. Its sessions are not secret. There is obstruction to the appearance of anyone before it, to assert a right or redress a wrong; and in the business of assessing taxes this is all that can be reasonably asked.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Hyland v. Brazil Block Coal Co.*, 128 Ind. 340, 26 N. E. 672; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 626, 33 N. E. 432; *Newton v. Roper*, 150 Ind. 632, 50 N. E. 749; *Cooley*, *Taxn.* pp. 364, 365; *Sanford v. Poe*, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 552.

A question is *res judicata* when a court having jurisdiction has finally adjudicated upon the merits of the whole controversy. But if the question is different, if the issues of fact and law are not the same, there is no *res judicata*.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; *Buchanan v. Baker*, 54 Ohio St. 325, 43 N. E. 330.

It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision.

"Sec. 2807. The said boards (certain city boards) shall hear complaints and equalize the assessment of all personal property, moneys and credits, new entries and new structures returned for the current year, by the township assessors and county auditors; and they shall have power to add to, or deduct from, the valuation of personal property, or moneys or credits, of any person returned by the assessor or county auditor, or which may have been omitted by them, or to add other items upon such evidence as shall be satisfactory to the said boards, whether said return be made upon oath of each person or upon the valuation of the assessor or county auditor, but when any addition shall be ordered to be made to any list returned under oath, a statement of the facts upon which such addition was made shall be entered on the journal of the boards. *Provided*, That no such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons (if their residence be within the county) whose personal property is sought to be added to or the valuation thereof increased, to appear before said board at a time and place to be fixed by said board, and show cause why such addition should not be made, or why such valuation should not be increased. . . ."

"Sec. 2808. The governor, auditor of state, and attorney general shall constitute a board 186 U. S.

for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the auditor of state, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors as the same shall have been reported by the county auditors to the state auditor."

"Sec. 2809. Said board shall hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and personal property, and if in the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such a percent as will equalize said shares to their true value in money; *Provided*, That said board shall not increase or reduce the grand aggregate value of bank shares as returned by the several county auditors by more than twenty (20) per centum."

"Sec. 2810. The auditor of state shall, forthwith after such equalization shall have been made, certify to the auditors of the proper counties the valuation, as equalized, of the shares of banks situated in such counties, which valuation shall be put on the proper tax list."

Keokuk & W. R. Co. v. Missouri, 152 U. S. 316, 38 L. ed. 457, 14 Sup. Ct. Rep. 592.

A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 316, 38 L. ed. 457, 14 Sup. Ct. Rep. 592; *Newport v. Com.* 21 Ky. L. Rep. 42, 45 L. R. A. 518, 50 S. W. 845, 51 S. W. 433.

Mr. W. W. Boynton argued the cause and filed a brief for appellee:

To increase the valuation of bank shares without notice would not only deprive the taxpayer of his property without due process of law, but would be in express violation of the provision of the statute requiring notice to be given to the property owner.

Champaign County Bank v. Smith, 7 Ohio St. 42.

Whenever one is assailed in his person or his property, there he may defend for the liability and the right are inseparable.

Windsor v. McLeigh, 93 U. S. 274, 23 L. ed. 914; *Horey v. Elliott*, 167 U. S. 415, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 239, 44 L. ed. 751, 20 Sup. Ct. Rep. 620; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

A board of review cannot make any addition to the taxable value of real estate until the owner has been served with a notice of its intention to do so; and the statutory requirements for service must be strictly pursued.

Perkins v. Zumstein, 4 Ohio C. C. 371; *Britt v. Hagerty*, 11 Ohio C. C. 115.

Until the property owner is duly notified and given an opportunity to be heard on the valuation, the board has no power or authority to increase the valuation of the property already valued.

Desty, Taxn. § 114; *State, Van Solingen, Prosecutor, v. Harrison*, 39 N. J. L. 55; *Alleghany County v. New York Min. Co.* 76 Md. 551, 25 Atl. 864.

Where the board has failed to meet as required by law, the increase is invalid.

Slaughter v. Louisville, 89 Ky. 112, 8 S. W. 917; *Cooley*, Taxn. p. 365.

Boards of equalization are vested with special powers, and their record must show all facts necessary to give jurisdiction.

Burroughs, Taxn. 237.

If the board by law is required to meet at a certain specified time, and it meets at another, at which the taxpayers have neither actual nor constructive notice to appear, its action at such time is unauthorized and void. And so it will be if the statute requires notice to be given of its meetings, and the records of the board show no notice.

Burroughs, Taxn. p. 751.

Notice is essential to jurisdiction.

Burroughs, Taxn. p. 422. note; *Jewell v.*

Van Steenburgh, 58 N. Y. 85; *Lewis v. Bishop*, 19 Wash. 312, 53 Pac. 165.

A judgment of affirmance adds nothing to the efficacy or effect of the judgment affirmed, nor does it take anything from it.

Brown v. Aspden, 14 How. 28, 14 L. ed. 312; *Durant v. Essex Co.* 7 Wall. 107, 19 L. ed. 154.

Where the issues are made by the pleadings the question is, What did the court in effect decide, as shown by the record and judgment?

Porter v. Wagner, 36 Ohio St. 471.

This necessarily means the judgment of the court pronouncing the decree,—the court that hears the evidence and ascertains the facts and carries them into judgment. It is the verdict or finding, with the judgment of the court upon it, which constitutes the *res judicata*.

Wells, Res Adjudicata, 296.

A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies upon the same cause of action, so long as it remains unmodified.

Jeter v. Hewitt, 22 How. 364, 16 L. ed. 348; *Mitchell v. First Nat. Bank*, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418; *Bryar v. Campbell*, 177 U. S. 649, 44 L. ed. 926, 20 Sup. Ct. Rep. 794; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 331; *Bank of United States v. Beverly*, 1 How. 134, 11 L. ed. 75; *New Orleans v. Citizens' Bank*, 167 U. S. 399, 42 L. ed. 211, 17 Sup. Ct. Rep. 905.

A right, question, or fact which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the cause of action in the two suits be identical or not.

2 Black, Judgments. § 504; *Hixson v. Ogg*, 53 Ohio St. 361, 42 N. E. 32; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Aurora v. West*, 7 Wall. 82, 19 L. ed. 42; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

And it matters not in the least whether the question was correctly decided or not, whether the law applicable to the case was correctly determined, nor whether the question decided was one of law or fact.

Cooley, Const. Lim. 47; *Hollister v. Abbott*, 31 N. H. 448, 64 Am. Dec. 342; *Wells, Res Adjudicata*, p. 5; *Tate v. Hunter*, 3 Strobb. Eq. 139; *Balkum v. Satcher*, 51 Ala. 82; *Bogardus v. Clark*, 4 Paige, 623.

This principle has become a rule of universal law, founded on the soundest policy.

3 Bouvier, Inst. 3115.

It had its origin in the civil law.

Pothier, ad D. 44 l. l. pr.; *Phillimore*, Rom. L. 47, 53 *et seq.*; *Broom*, Legal Maxims, 328; *Viunius*, lib. 4, tit. 13, § 5.

An issue properly determined is a bar, not only as to any dispute as to the facts, but also to any further consideration of the law bearing on the case.

21 Am. & Eng. Enc. Law, p. 129; *Imrie v. Castrique*, 8 C. B. N. S. 407; *South & North Ala. R. Co. v. Henlein*, 56 Ala. 368.

The rule obtains as well in an action by the government as in an action between individuals.

United States v. Parker, 120 U. S. 89, 30 L. ed. 601, 7 Sup. Ct. Rep. 454.

The very essence of judicial power is that, when a matter is once ascertained and determined, it is forever concluded when it arises again, under the same circumstances and conditions, between the parties or their privies.

New Orleans v. Citizens' Bank, 167 U. S. 399, 42 L. ed. 211, 17 Sup. Ct. Rep. 905.

The judgment pronounced could not have been given without deciding that the Ohio statute created a discrimination forbidden by Congress. Hence the judgment is to be considered as having settled that question for the parties thereto, in all future actions involving the same question.

Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 592, 18 L. ed. 553.

Having identity of the thing demanded, identity of question, and identity of the parties and their qualities, the legal presumption is established in favor of the thing adjudged.

Slocumb v. De Lizardi, 21 La. Ann. 356, 99 Am. Dec. 740.

The rule applies as well to decrees in chancery as to judgments at law.

Hopkins v. Lee, 6 Wheat. 113, 5 L. ed. 219.

It is the matter alleged by the party upon which the recovery proceeds, which creates the estoppel.

Outram v. Morewood, 3 East, 346; *Cromwell v. Sac County*, 94 U. S. 353, 24 L. ed. 198.

The record furnishes the only proper proof of the judgment.

Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. ed. 550; *Wood v. Jackson ex dem. Genet*, 8 Wend. 36, 22 Am. Dec. 603; *Laurence v. Hunt*, 10 Wend. 85, 25 Am. Dec. 539; *Porter v. Wagner*, 36 Ohio St. 471.

The plea of *res judicata* applies to every objection charged in the second suit, when the objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it.

Sheets v. Selden, 7 Wall. 416, 19 L. ed. 166.

It is a fundamental maxim of the law that a man shall not be twice vexed for one and the same cause.

Broom, Legal Maxims, 343; *Sheldon v. Edwards*, 35 N. Y. 289.

Matters once determined in a court of competent jurisdiction may never again be called into question by parties or privies, against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court.

New Orleans v. Citizens' Bank, 167 U. S. 399, 42 L. ed. 211, 17 Sup. Ct. Rep. 905; *Bigelow, Estoppel*, 3d ed. Outline pp. lxi, 29, 57, 103.

186 U. S.

The construction placed upon a contract, will, or statute is conclusively binding on the parties in all future litigation involving the construction of the same contract, will, or statute.

Bank of United States v. Beverly, 1 How. 134, 11 L. ed. 75; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 331.

Where all the issues are found with the party, a judgment on the verdict or special finding becomes *res judicata* as to every one of such issues, no matter what their character may be.

Bryar v. Campbell, 177 U. S. 649, 44 L. ed. 926, 20 Sup. Ct. Rep. 794; *Glenn v. Sumner*, 132 U. S. 152, 33 L. ed. 301, 10 Sup. Ct. Rep. 41; *Sites v. Haverstick*, 23 Ohio St. 626; *Union Cent. L. Ins. Co. v. Sutphin*, 35 Ohio St. 360; *Flournoy v. Las-trapes*, 131 U. S. CLXI, Appx. and 25 L. ed. 406; *Mason Lumber Co. v. Buchtel*, 101 U. S. 635, 25 L. ed. 1072.

A judgment following the overruling of a demurrer is as conclusive as if given upon an issue joined upon all the facts.

Bissell v. Spring Valley Twp. 124 U. S. 232, 31 L. ed. 414, 8 Sup. Ct. Rep. 495; *Clearwater v. Meredith*, 1 Wall. 26, *sub nom. Ferguson v. Meredith*, 17 L. ed. 604; *Goodrich v. Chicago*, 5 Wall. 566, 18 L. ed. 511; *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23 L. ed. 416.

The court could not have given the judgment in the *Shields Case* without finding that the section of the Ohio statutes defining credits by limiting them to what one owns, less his bona fide debts, created a discrimination prohibited by the act of Congress under which the right to tax national bank shares was created. The question was involved and necessarily decided. It was a fact requisite to be proved and established in order to obtain the judgment; hence the question of right determined has passed in *rem judicatum*.

Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455; *Grant v. Ramsey*, 7 Ohio St. 157.

It was the matter upon which we proceeded by our action, and which the treasurer controverted by his demurrer.

Taylor v. Dustin, 43 N. H. 495.

The court will take judicial notice of the fact that the statute defining credits is the same now as when the former decree was given.

Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Gormley v. Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453.

*Mr. Justice McKenna, after stating the[463] case, delivered the opinion of the court:

*The circuit court of appeals based its[464] opinion on two questions: (1) The jurisdiction of the state board of equalization for incorporated banks to increase, without notice to the bank, the valuation fixed by the county auditor on the shares of its stock; (2) the fact of the former adjudications as determining the right to reduce the valuation of the shares by taking bona fide indebtedness therefrom. Counsel for appellee objects to a broader discussion by appellant's

counsel of the case than those questions present, urging they were the only ones made by the appellee in the circuit court of appeals. In view of this insistence, and as appellee took the case to the latter court, we may make them the grounds of our discussion and decision, although the first question was not passed upon by the circuit court.

The findings of the master sustained the allegations of the bill as to the action of the auditor, and that the board of equalization met as required by § 2808 of the Revised Statutes of Ohio, and transacted no business except to adjourn "at the call of the secretary." It met again on the 10th and 20th of September, but took no action as to the valuation of the shares of plaintiff. "On the 4th December, 1897" (the master found), "the members of said board next met at the call of the state auditor to consider unfinished business. The record of the meetings of said board, as originally made by the secretary, shows that at the meeting held June 15, 1897, September 10, 1897, September 20, 1897, the 'board adjourned.' At the meeting held December 4, 1897, the secretary was directed to amend the record as to each of said above-named adjournments by adding these words: 'Amended to read, 'adjourned to meet at the call of the president of the board, Asa S. Bushnell, governor of the state,' and thereupon said board adjourned *sine die*. Some time after December 4, 1897, the record was amended by the secretary as directed by said board. At none of said adjournments was a day named for the next meeting.

"Eighth. At said meeting on December 4, 1897, without complaint from anyone, the members of said board, assuming to act as a board, increased the valuation of the shares of the plaintiff from \$519,320.00, so fixed by the county auditor, to \$642,320.00, and on [465] the 6th day of December certified said 'valuation to the auditor of Cuyahoga county, to be by him placed on the treasurer's duplicate, which was accordingly done; that neither of said meetings of the members of said board following the third Tuesday of June, 1897, was called by said secretary, and no notice or information of any kind or opportunity to be heard was given by said board, its secretary or any other person to said bank, or any of its officers, directors, or shareholders of any or either of said meetings, except such as the statute gave them, to wit, § 2808, Revised Statutes, and succeeding sections; nor did they, or either of them, have any notice of any of said meetings, or appear thereat, and the first information that said bank or any of its shareholders had or received of any action of the board or of the purpose to increase the value of the shares so fixed by the auditor was on the 7th day of December, 1897, after the action of the board was had and such information was conveyed by letter from the auditor of the county to the cashier of the plaintiff, notifying him of the completed action of the board; that thereupon, said bank and its shareholders,

1252

through the officers and agents of the bank duly authorized, applied to the members of said board for a hearing, and was notified that two of the members of said board were out of the state, and that December 28 was as early as the bank officers could be received; that on said day the officers of said bank, on behalf of said shareholders duly authorized, met the members of said board at Columbus, and made application for a hearing respecting the valuation of said shares and the action of said board, and notified said members of said board that such increase made on the shares of said bank was excessive and unwarranted, and protested against the same, but said hearing was denied, the members of said board declaring that the board had adjourned *sine die* and could not reconvene as a state board of equalization for banks to consider any claim or application respecting the value of said shares.

"At the time the persons who had composed the state board of equalization for banks, and who are the same persons required to act under § 167 of the Revised Statutes of Ohio, offered to convene and organize under said § 167 to consider the case of the various plaintiff banks at such time as 'might be convenient for the representa-[466] tives of the Cleveland banks to appear. Some doubt was expressed by some of the members of the committee that the board would not have the power under § 167 to afford as full relief as the board of equalization, and only one of the Cleveland banks appeared before the board when organized under § 167, *viz.*, the First National Bank; the others declined to appear.

"Ninth. That the said auditor of said county of Cuyahoga, upon the receipt of the certificate from said state board of equalization, entered said valuation of \$642,320.00 upon the tax duplicate of said county for the year 1897, and assessed against the same taxes at the rate of 3.03 cents on each dollar, and which amounted on said valuation to \$19,462.30. The taxes on said bank shares at the said rate of 3.03 on each dollar, if assessed on the valuation of \$519,320.00, as fixed by the auditor of Cuyahoga county, would have amounted to the sum of \$15,735.39."

As conclusion of law the master reported that the increase made by the board of equalization was void for want of notice to the bank or its shareholders.

The circuit court of appeals concurred in the legal conclusions of the master upon the ground that "it is an elementary principle of law that tribunals vested with power to affect the property of citizens must act with notice," and in the light of that principle considered the statutes of Ohio, and construed them to require the state board of equalization to give notice to persons to be affected by its action. That is, as we understand, notice other than the statute gives by designating the time and place of the meeting of the board.

The court deduced its conclusion from the provisions of § 2809 of the Revised Statutes

of Ohio. It is there provided that "said board (board of equalization) shall hear complaints and equalize the value of said shares according to the rules prescribed by their title, for valuing and equalizing the values of real and personal property." The title referred to is title 13, and turning to it we find quite an elaborate system. Many boards of equalization are constituted. There are annual county boards, annual city boards, annual state boards for railroads and for banks, decennial state, county, and city boards, and the duties of all the boards are carefully prescribed. In the sections constituting some of these boards there are references to sections constituting other boards. For instance, in § 2804, providing for a county board of equalization, there is this provision: "Said board shall have power to hear complaints, and to equalize the valuation of all real and personal property, moneys and credits, within the county, and shall be governed by the rules prescribed for the government of decennial county boards for the equalization of real property: *Provided*, . . . the annual county board shall not increase or reduce the valuation of any real estate, except upon reasonable notice to all persons directly interested, and an opportunity for a full hearing of the question involved." The rules referred to are contained in § 2814, and pertain strictly to producing uniformity of valuation. In other words, the board is enjoined to raise or reduce the valuations returned in order to make them conform to the standard of valuation prescribed by the statute. There is a limitation upon the power of the board with which we are not concerned. The board afterwards sits as a board of revision.

Again, § 2805 provides for a city board of equalization, and it is given all the "powers," and is to be "governed by the rules, provisions, and limitations prescribed in the next preceding section for the annual county board." § 2804, *supra*. So, again, in § 2805 certain state boards are given "all the powers provided by law for decennial county boards for the equalization of real property, and shall be governed by the rules prescribed for such decennial county boards in equalizing the valuations returned by district assessors." These careful provisions for equalization of valuation seem to have been caused by the command of the Constitution of the state that taxation should be by "uniform rule," and, we think, furnished the key to the meaning of § 2809. In execution of the Constitution of the state that section defined and enjoined the powers of the board in the equalization of values, and did not intend to require personal notice to shareholders of the exercise of those powers.

[468] *We agree with the court of appeals that some notice was necessary to be given, and the question occurs, Did the statute give notice by fixing the time of the meeting of the board? It seems to be conceded that the statute did do so as to the first meeting of the board, and that such notice would have 186 U. S.

been sufficient as to subsequent adjournments if they had been made to days certain.

In the case of *Hambleton v. Dempsey*, 20 Ohio, 168, the supreme court of Ohio decided that the law of the state which fixed the time and place of meeting of a board of equalization, but which provided for no other notice, nevertheless gave notice to every citizen whose property, real or personal, had been returned for taxation.

In *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945, the same proposition was affirmed in passing upon the law providing for the taxation of the property of express, telegraph, and telephone companies. It was contended, and we quote from the opinion of the court:

"The property of the express company, it is alleged, was taken without due course of process of law in this, that the act in question does not provide for any notice to the company, nor for a hearing by the board of appraisers and assessors, nor for an appeal to any superior authority for the correction of illegal, erroneous, or excessive valuations."

Replying to the contention, the court said:

"The law itself states the time when the board shall meet, and the express company could not ignore the time of meeting. The meetings of the board are not secret, and the company had a right to be present and explain the statement rendered of its property and the value thereof. Indeed, without notice from the board, or by the terms of the law, the company would have been unable to make the return prescribed by the statute. And of the company's return it may be said, in the language of the opinion in the *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57: 'This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert.'"

*The court also cited *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663. [469]

In the latter cases, it was claimed that the state board of equalization had no power to increase the assessment or value of railroad property reported by the companies to the state auditor and by him to the board without notice to the companies, and for want of such notice "the whole assessment and the levy of taxes" became void. The court said, by Mr. Justice Miller: "It is hard to believe that such a proposition can be seriously made." After pointing out the "absurdity" of the claim, he added: "Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of anyone before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked." See also *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663;

Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

We do not think the principle of those cases is affected by an adjournment of the Ohio board without fixing a date of meeting. How were the rights of the bank affected and to what inconvenience was it put? It did not appear at the first meeting of the board. It rested on the evidence it had returned to the auditor, and it knew that the report it had made to the comptroller of the state would be before the board, and it knew also the duties and power of the board. The board was a public tribunal, open to be invoked, and charged with duties, and necessarily subject to adjournments. What it had done the bank could have easily ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of every meeting of the board.

2. The master's report on the claim of *res judicata* was as follows:

"The master finds the issues made by the bill and answer, relating to the former adjudications of the question of the right to deduction of legal bona fide indebtedness of the stockholders from the value of their [470] shares in determining their value for taxation, with the defendant: that such fact or right was not directly involved in the actions set up in the bill and it was not therein by said courts adjudicated and decided, and the fact carried into judgment in favor of said bank, that its stockholders were entitled to said deductions of indebtedness from the value of their shares, under the same legislation now existing on the subject, both state and national, and that said judgments are not in full force and effect, as against said defendant."

The circuit court concurred with the master. The court, after expressing that its impressions at the oral argument had been to sustain the plea of former adjudication, said:

"Looking into the bill, however, in the former case, and after an examination of the case of *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. ed. 669, 19 Sup. Ct. Rep. 407, I find that, in order to support the averments of the bill, it was necessary in that case for the complainant to rely, not only upon the statute of Ohio defining 'credits,' but also on its practical operation in exempting moneyed capital in the hands of individuals in Ohio from taxation. The practical operation of a law of that character, to show how much, if any, discrimination there is, is a question of fact to be determined upon the evidence."

And further:

"The adjudication, therefore, upon which the complainant relies, is an adjudication, not of law, but of fact—not of the fact at issue in the present case, but of the fact as to the practical operation of the law at the time of that adjudication, to wit, in 1887, 1893, and in 1894."

The circuit court of appeals reviewed the

Whitbeck Case, 127 U. S. 193, 32 L. ed. 118, 8 Sup. Ct. Rep. 1121, and considered its interpretation by this court in *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. ed. 669, 19 Sup. Ct. Rep. 407. From that review the court declared that it was not "prepared to say that the judgment in that case was *res judicata* as to the rights of complainant's stockholders, to deduct their debts from their shares of national bank stock." But to the other adjudications the court expressed a different view and held them to be prior and conclusive adjudications of the issue now involved. In other words, we understand the court to decide, that in the former cases unlawful discrimination was made by the Ohio statute, "and that it had been [471] adjudicated therein (in the cases pleaded) that national bank shareholders were entitled to deduct their debts from the value of their shares for the purposes of taxation," and that the adjudication should prevail as an estoppel against the appellants, notwithstanding the statute has been subsequently construed not of itself to work such discrimination. The conclusion is claimed to be sustained by the decision of this court in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

A consideration of the records in the pleaded cases becomes necessary.

In the *Whitbeck Case* the plaintiff (appellee here) averred that it was a bank and had been discriminated against; that its cashier had made reports to the taxing officers according to law; the auditor pretended to proceed in fixing value of its shares in accordance with § 2766 of the Revised Statutes of Ohio, and that the value placed by him thereon was knowingly in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the state, city, and county. The state board of equalization assumed, and pretended to comply, with §§ 2808 and 2809, and examined the report of the cashier and return of the auditor, and pretended to equalize said shares to their true value in money, and fixed their valuation at \$495,774.76.

The further action of the board was described as pretended with the design, and the execution of the design, of placing an excessive value on the shares; that a large part of the stock of the bank was invested in United States securities and the lawful money thereof, and the tax levied and assessed was in violation of law and unauthorized and void.

The requirements of the Constitution of the state were cited and the restriction of the taxation of national bank shares by the Revised Statutes of the United States was stated.

The definition of credits by § 2730 was given, and it was averred that the law required persons who listed property for taxation to set forth their credits as defined; that a large part of moneyed capital in the hands of individuals, which was invested in notes, obligations, and credits, were, by the provisions allowing the deduction of bona [472]

fide debts, exempted from taxation, which made a discrimination against national bank shares in violation of § 5219 of the Revised Statutes of the United States.

The names of the shareholders were set out, and it was averred that they were indebted in an amount in excess of credits equal to the value of their respective shares. That at the time of the return and statement to the auditor the fact of such indebtedness was not known, nor was there opportunity given the shareholders to deduct such indebtedness, nor was there provision made for the deduction of such indebtedness from the value of the shares, but before the taxes became due proof of the indebtedness was tendered and a demand made for its reduction. The proof and demand were refused, and the payment of the whole tax insisted on. The illegality of the taxes was asserted for the following reasons:

1. Because in violation of the act of Congress under which the bank was incorporated.

2. The laws of Ohio permitted the owner of credits to deduct therefrom his bona fide debts, and denied such right to the "owner of capital stock" of the bank, and required him to list "the whole number of shares owned by him, and not simply the excess of the value of said shares over his indebtedness." A discrimination was hence averred to result from the taxation of such shares at much greater rate than was assessed upon other moneyed capital in the hands of individual citizens.

3. The property of the bank was not valued and taxed as the property of individuals, nor was equality preserved in the valuation of the shares as compared with other property in the locality, but the valuation was twice as high, while the rate of levy was the same.

4. Illegality of the action of the board of equalization under the state laws.

5. The taxation of the shares was at a greater rate than was assessed upon other moneyed capital in the hands of individuals.

[473] 6. That the proceedings had in the assessment and levy of the taxes had the effect to deprive the bank and its shareholders, "both *in the manner of valuation and equalization, of all benefit of the Constitution and general laws of the state, by which only uniformity in the burdens of taxation upon all description of property could be secured, to take from them the security afforded by the limitations of the acts of Congress, and to impose upon them such excessive exactions as to make the franchise granted by said act comparatively valueless."

There were averments of grounds of relief in equity which we need not quote.

The respondent filed a demurrer to the bill, which was overruled. An answer was then filed, which denied the allegations of the bill, from which it was claimed discrimination against the complainant and its shareholders resulted.

The following are quotations from the answer: The defendant denies "that any of the shareholders of said banking association,
186 U. S.

at the times named in said bill of complaint, were indebted or owing to others of bona fide debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of his said shares or any part thereof. He denies that either of said shareholders was then indebted in any sum whatever, or that, even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares, or that for any reason said shares of stock should not have been placed on the tax duplicate and no tax assessed thereon. This defendant denies the averment in said petition that neither of said shareholders authorized anyone to list his said shares for him. He denies that it was necessary for said shareholders so to do. . . . That any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint. This defendant further denies that the taxes so levied and assessed on the shares of said complainant's stock are, for the reasons alleged in said bill of complaint, or for any reason, unjust, illegal, or void."

A special master was appointed "to examine the evidence and record on file and to report who, if any, of the shareholders of "the[474] complainant, on the day preceding the second Monday of October, 1885, had bona fide indebtedness which should have been deducted from the valuation of the shares."

The master reported "that having examined the evidence and heard the claim of counsel, he finds and reports that all the shareholders are entitled to the deductions as charged in the bill, except the following, who should be taxed for the amount stated. viz.: E. R. Perkins had credits subject to taxation above his indebtedness on the day named to the sum of \$4,374.40; C. L. Murfry had credits subject to taxation above his indebtedness on the day named to the sum of \$724; Robert L. Chamberlain had credits subject to taxation above his indebtedness on the day named to the sum of \$1,448; James Parmelee had credits subject to taxation above his indebtedness on the day named to the sum of \$3,113.60; James Barnett had credits subject to taxation above his indebtedness on the day named to the sum of \$17,792."

A decree was entered in accordance with the finding, and recited that the court found all the allegations of the bill to be true except as to the three stockholders mentioned by the master. Except as to them, the respondent and his successors in office were enjoined from collecting the taxes remaining unpaid.

This decree was afterwards by consent vacated, and two questions certified to this court. The only one with which we are concerned was as follows:

"Whether the taxation of national bank shares in the state of Ohio in the year 1885, without permitting the shareholder to de-

duct from the assessed value of his shares the amount of his bona fide indebtedness existing on the Wednesday next preceding the second Monday in May in 1885, and on the day preceding the second Monday in April, 1885, is a discrimination forbidden by the act of Congress, the said shareholder not having deducted said bona fide indebtedness from any credits owned by him at either of said dates."

In the case against Kimberly, treasurer, the pleadings were substantially the same as in the *Whitbeck Case*, and the following judgment was entered:

"The court further find that there should [475] be deducted from *said first valuation the sum of \$169,235, being the amount on which the particular shareholders named in said bill of complaint are not taxable, the same being less in amount and value than their bona fide debts from which they are entitled to have the same deducted, leaving the sum of \$380,670, which is hereby declared to be the true valuation of the shares of said bank taxable under the act of Congress for said year 1888."

In the *Shields Cases* (there were two, respectively numbered 5122 and 5127) the bills on the merits were the same as in the *Whitbeck Case*, and the *Whitbeck Case* was pleaded as a prior adjudication of the right of the shareholders of complainant to deduct their bona fide debts from the value of the shares of stock. The bill in No. 5122 alleged that "in said suit (*Whitbeck suit*) this complainant alleged by its bill the refusal by the then auditor of said county, to allow a deduction of bona fide debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said deduction, so joined issue as to present the question of the right of said owners of said shares to said deduction, in view of the laws of Ohio, the said laws being the same as the present laws of the state and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and in refusing deductions to be made of bona fide debts of stockholders from the valuation of said shares; and the complainant says that upon the issue so joined the said court at its April term, A. D. 1887, held and determined that said shareholders were by law entitled to said deduction of bona fide debts from the value of their said shares, to an equal amount fixed for taxation." The same allegations were substantially made in case No. 5127.

A demurrer was filed to the bill in No. 5122, which was overruled, and the respondent electing to stand by his demurrer, the following judgment was entered:

"The parties appearing by counsel, this cause came on for hearing, and by consent of the parties the judgment or order *pro confesso* heretofore entered in said case is hereby vacated, and the respondent has leave to demur to said complaint; and

thereupon *came the respondent and de- [476] murred to the bill of complaint; and the cause came on for hearing upon said demurrer and was argued by counsel; on consideration whereof it was ordered, adjudged, and decreed that said demurrer be and the same is hereby overruled, and the defendant electing to stand by his demurrer, the court upon further hearing find the allegations of the complainant's bill to be true, and that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection. It is therefore ordered, adjudged, and decreed that the defendant and his successors in office be and they are hereby perpetually enjoined from collecting, or in any way or manner attempting to collect, the said illegal tax set out and particularly described in said bill of complaint."

In case No. 5127 *Shields* did not appear, and a decree was entered restraining the collection of taxes.

The law of *res judicata* is well settled. Its essential principle is, that questions once litigated shall not be litigated again between the same parties or their privies. And it may be conceded that the appellant in the case at bar is a privy to his predecessors in the suits which are pleaded as prior adjudications, and that *res judicata* applies to tax cases if the cause of action relied on is the "thing" which was "adjudged" in a prior suit. *New Orleans v. Citizens' Bank*, 167 U. S. 371. 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

But the final question is, What was the "thing adjudged" in the prior cases? The answer to the question is found in the pleadings in those cases and in the judgments which were entered. In the *Whitbeck* and *Kimberly Cases* the judgments were substantially alike. They adjudged a deduction of the bona fide debts of the shareholders from the valuation of the shares. The judgment in the *Shields Case*, No. 5122, was more general. It found "the allegations of the bill to be true, and that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection." The judgment in case No. 5127 was equally as general.

But those were conclusions from propositions, not only of law, but of fact, and, granting that one of the propositions of law was the construction of the Ohio statute (a wrong construction, *as has since been held). [477] a necessary element of fact was that the discrimination complained of was effected through the practical operation of the statute in the years the assessments were made. This was pointed out in *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. ed. 669, 19 Sup. Ct. Rep. 407. In that case the same contentions were made as in this, and the same statute was passed upon. And also the effect and extent of *Whitbeck v. Mercantile Nat. Bank* were carefully considered, explained, and defined.

All the cases pleaded as *res judicata* were based on the *Whitbeck Case*, and there was

in each, as we have said, the fact of the practical operation of the Ohio statute exempting from taxation moneyed capital in the hands of individuals, and that fact determined the judgments in each case. In other words, as the circuit court found, the complainant in those cases (appellee here) relied, not only upon the statute, but upon its practical discriminatory operation. And we need not point out that judgments based on such discrimination in 1885, 1887, 1893, or 1894 cannot be conclusive proof of the existence of discrimination in 1896 or 1897.

186 U. S.

In the case at bar the fact of discrimination was put in issue by the pleadings, and on the issue made the circuit court found in effect adversely to appellee. In the other cases the discrimination was either proved or admitted.

The judgment of the Circuit Court of Appeals is reversed and the judgment of the Circuit Court is affirmed.

Mr. Justice **Gray** did not hear the argument, and took no part in the decision.

1257

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

UNITED STATES, *Appellant*, v. CALIFORNIA & OREGON LAND COMPANY [No. 162]; CALIFORNIA & OREGON LAND COMPANY, *Appellant*, v. UNITED STATES. [No. 163.] Appeal from the Circuit Court of the United States for the District of Oregon. Mr. Charles W. Russell for the United States.

Messrs. John F. Dillon and A. B. Browne for the California & Oregon Land Company. April 21, 1902. Ordered for reargument before a full bench.

EDWARD S. RICHARDS, *Plaintiff in Error*, v. MICHIGAN CENTRAL RAILROAD COMPANY. [No. 220.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Messrs. John C. Chaney and Alphonso Hart for plaintiff in error.

Mr. George S. Payson for defendant in error.

April 21, 1902. Dismissed for the want of jurisdiction, on the authority of *Colvin v. Jacksonville*, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; and see *Richards v. Michigan C. R. Co.* 42 C. C. A. 484, 102 Fed. 508; *Richards v. Michigan C. R. Co.* 179 U. S. 686, 45 L. ed. 386, 21 Sup. Ct. Rep. 918; *Richards v. Chase Elevator Co.* 158 U. S. 299, 39 L. ed. 991, 15 Sup. Ct. Rep. 831, 159 U. S. 477, 40 L. ed. 225, 16 Sup. Ct. Rep. 53.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*, *Plaintiffs in Error*, v. H. A. TRUSKETT. [No. 229.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. James Hagerman, Clifford L. Jackson, and Jos. M. Bryson for plaintiffs in error.

Mr. S. M. Porter for defendant in error.

April 28, 1902. Judgment affirmed with costs, on the opinion of the court below, *Missouri, K. & T. R. Co. v. Truskett*, 44 C. C. A. 179, 104 Fed. 728.

186 U. S.

AARON HALL, *Appellant*, v. ADDISON JOHN-SON, Agent, etc. [No. 576.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. Charles Haldane and Frank S. Black for appellant.

Mr. Robert C. Taylor for appellee.

April 28, 1902. Order affirmed with costs, on the authority of *Storti v. Massachusetts*, 183 U. S. 138, 141, ante, 120, 122, 22 Sup. Ct. Rep. 72; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389. See *People v. Hall*, 169 N. Y. 184, 62 N. E. 170.

HENRY C. BROWN, Devisee, etc., *et al.*, *Appellants*, v. CITY OF DENVER *et al.* [No. 264.]

Appeal from the Circuit Court of the United States for the District of Colorado.

Mr. James H. Brown for appellants.

Messrs. H. M. Orahood and Fred. Her- rington for appellees.

May 5, 1902. Decree reversed at the cost of appellants, and cause remanded with directions to dismiss the bill at complainants' costs for want of jurisdiction, on the authority of *Wheless v. St. Louis*, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402.

*NORTHERN CENTRAL RAILWAY COMPANY, *Plaintiff in Error*, v. JOSHUA W. HERING, Comptroller, etc., *et al.* [No. 314.]

In Error to the Court of Appeals of the State of Maryland.

Messrs. Jno. J. Donaldson, Wayne Mac- Veagh, and F. D. McKenney for plaintiff in error.

Messrs. Isidor Rayner and A. S. Worthing- ton for defendants in error.

May 5, 1902. Dismissed for the want of jurisdiction, on the authority of *New Or- leans Waterworks Co. v. Louisiana*, 185 U. S. 336, ante, 936, 22 Sup. Ct. Rep. 691; *Wiscon- sin ex rel. Gates v. Public Land Comrs.* 183 U. S. 693, ante, 393, 22 Sup. Ct. Rep. 934, and cases cited; *California Powder Works v. Davis*, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350.

JOHN E. HANIFEN, ETC., *Petitioner, v. EDWARD A. PRICE et al.* [No. 243.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. W. P. Preble, Jr., for petitioner.

Mr. Edmund Wetmore for respondents.

June 2, 1902. Decree affirmed with costs, by a divided court, and cause remanded to the Circuit Court of the United States for the Southern District of New York.

NATIONAL SURETY COMPANY, *Plaintiff in Error, v. JOHN MCCORMICK.* [No. 533.]

In Error to the Supreme Court of the State of California.

Mr. John J. Bart, for plaintiff in error.

Mr. James A. Loullit for defendant in error.

June 2, 1902. Dismissed for the want of jurisdiction, on the authority of *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 185, 14 Sup. Ct. Rep. 570, and other cases.

BOARD OF COMRS. OF WILKES COUNTY *et al.*, *Petitioners, v. W. N. COLER & CO.* [No. 558.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. A. C. Frey for petitioners.

Messrs. Charles Price, John F. Dillon, Harry Hubbard, and John M. Dillon for respondents.

June 2, 1902. The petition and brief in support of it were stricken from the files because of the scandalous, unwarranted, and irrelevant matter therein; but the application will retain its place on the docket, and may be renewed in proper form on the coming in of the court at the next term.

BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY, *Petitioner, v. EMPIRE STATE IDAHO MINING & DEVELOPING COMPANY* [No. 600]; BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY, *Petitioner, v. EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY et al.* [No. 608.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Curtis H. Lindley for petitioner.

Mr. W. B. Hepburn for respondents.

April 21, 1902. Denied.

CENTRAL OF GEORGIA RAILWAY COMPANY *et al.*, *Petitioners, v. CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY et al.* [No. 625.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Henry C. Cunningham and Alex. R. Lawton for petitioners.

Mr. Augustine T. Smythe for respondents.

April 21, 1902. Denied.

SAMUEL P. TRAIN *et al.*, *Petitioners, v. UNITED STATES.* [No. 637.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Albert Comstock for petitioners.

Attorney General and Solicitor General Richards for respondent.

April 21, 1902. Denied.

J. H. MAYES, *Petitioner, v. SOUTHERN RAILWAY COMPANY.* [No. 639.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Charles W. Tillett for petitioner.

Mr. Charles Price for respondent.

April 21, 1902. Denied.

UNITED STATES, *Petitioner, v. GUGGENHEIM SMELTING COMPANY.* [No. 631.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Attorney General, Solicitor General Richards, and Assistant Attorney General Hoyt for petitioner.

Mr. Paul Fuller for respondent.

April 21, 1902. Denied.

MARC HUBBERT, *Petitioner, v. CAMPBELLSVILLE LUMBER COMPANY.* [No. 627.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

April 21, 1902. Granted.

*LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Petitioner, v. GEORGE W. ELLISON.* [No. 635.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Henry H. Ingersoll and H. W. Bruce for petitioner.

No opposition.

April 28, 1902. Denied.

R. H. SANSOM, Administrator, etc., *Petitioner, v. SOUTHERN RAILWAY COMPANY.* [No. 647.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Heber J. May, E. T. Sanford, and Tully R. Cornick for petitioner.

Messrs. Fairfax Harrison, W. A. Henderson, and Leon Jourolmon for respondent.

April 28, 1902. Denied.

FRANK W. MUNN, Claimant, *Petitioner, v. ROBERT B. BAKER, Owner, etc.* [No. 651.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. James J. Macklin and La Roy S. Gore for petitioner.

Messrs. Harrington Putnam, James K. Symmers, Samuel Park, and J. E. Carpenter for respondent.

April 28, 1902. Denied.

FIRST NATIONAL BANK OF LOUISVILLE *et al.*,
Petitioners, v. THOMAS C. HINDMAN.
[No. 653.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Alex. Pope Humphrey and J. L. Dodd for petitioners.

Messrs. Augustus E. Willson and E. J. McDermott for respondent.

April 28, 1902. *Denied*.

GEORGE F. HARDING, *Petitioner*, v. CYNTHIA C. HART *et al.* [No. 652.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. A. A. Hoehling, Jr., for petitioner.

Messrs. Frederic Ullman and D. J. Schuyler for respondents.

April 28, 1902. *Denied*. (Mr. Justice Brown took no part in the disposition of this application.)

GUARANTY TRUST COMPANY OF NEW YORK, *Petitioner*, v. FREDERICK GROTRIAN, JR., *et al.* [No. 636.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Julien T. Davies for petitioner.

Messrs. James B. Dill and Arthur J. Baldwin for respondents.

May 5, 1902. *Denied*.

BARR CAR COMPANY, *Petitioner*, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY. [No. 648.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. John W. Munday for petitioner.

Messrs. G. S. Payson and G. H. Howard for respondents.

May 5, 1902. *Denied*.

SEYMOUR LUMBER COMPANY *et al.*, *Petitioners*, v. THOMAS J. CARLING. [No. 649.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. John R. L. Smith for petitioners.

Messrs. Washington Dessau, Nathaniel E. Harris, and A. O. Bacon for respondent.

May 5, 1902. *Denied*.

JOHN B. FAIRCRIEVE *et al.*, *Petitioners*, v. MARINE INSURANCE COMPANY (LIMITED) OF LONDON. [No. 657.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Harvey D. Goulder for petitioners.

No opposition.

May 5, 1902. *Denied*.

BOARD OF COMRS. OF STANLY COUNTY, *Petitioners*, v. W. N. COLER & Co. [No. 585.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

May 19, 1902. *Granted*.

186 U. S. U. S., Book 46.

WILLIAM W. PATTON, *Petitioner*, v. SOUTHERN RAILWAY COMPANY. [No. 665.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Theo. F. Davidson for petitioner.

Mr. Charles Price for respondent.

May 19, 1902. *Denied*.

THOMAS P. TAYLOR, *Petitioner*, v. REDDIN W. PARRAMORE. [No. 669.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. J. Edgar Bull and W. G. Henderson for petitioner.

Messrs. Edwin H. Brown and Jas. A. Hudson for respondent.

May 19, 1902. *Denied*.

COLUMBIAN EQUIPMENT COMPANY, *Petitioner*, v. MERCANTILE TRUST & DEPOSIT COMPANY. [No. 673.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Henry D. Hotchkiss for petitioner.

Messrs. Archibald H. Taylor and E. P. Keech, Jr., for respondent.

May 19, 1902. *Denied*.

ROBERT E. DOWNS, *Petitioner*, v. UNITED STATES. [666.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

May 19, 1902. *Granted*.

EDWARD S. BRAGG, Special Administrator, *et al.*, *Petitioner*, v. ELLA WRIGHT. [No. 664.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Edward S. Bragg for petitioner.

Mr. Wm. Worthington for respondent.

June 2, 1902. *Denied*.

THOMAS A. EDISON, *Petitioner*, v. AMERICAN MUTOSCOPE COMPANY. [No. 671.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Richard N. Dyer for petitioner.

Messrs. Drury W. Cooper and T. B. Kerr for respondent.

June 2, 1902. *Denied*.

JULIA ADAM, *Petitioner*, v. NEW YORK LIFE INSURANCE COMPANY. [No. 676.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. C. A. Oulberson for petitioner.

No opposition.

June 2, 1902. *Denied*.

TENTH RULE.

A. J. DAGGS, and D. A. ABRAMS, Assignee of the Bank of Tempo, *Appellants*, v. THOMPSON WALKER *et al.* [No. 12.]
Appeal from the Supreme Court of the Territory of Arizona.
Mr. F. D. McKenney for appellants.
No counsel for appellees.
November 18, 1901. *Dismissed*, with costs, pursuant to the 10th Rule.

HORACE W. PHILBROOK, *Plaintiff in Error*, v. WM. H. BEATTY, Chief Justice of the Supreme Court of California, *et al.* [No. 69]; HORACE W. PHILBROOK, *Plaintiff in Error*, v. WM. J. NEWMAN *et al.* [No. 70].
In Error to the Circuit Court of the United States for the Northern District of California.

Mr. Horace W. Philbrook *p. p.*
Messrs. Robert Y. Hayne, John Garber, F. D. McKenney, and W. H. Anderson for defendants in error.
November 22, 1901. *Dismissed*, with costs, pursuant to the 10th Rule.

BENJAMIN R. WHEELER, *Appellant*, v. BENJAMIN GITHENS *et al.* [No. 87.]
Appeal from the Supreme Court of the District of Columbia.
Mr. D. W. Baker for appellant.
No counsel for appellees.
December 4, 1901. *Dismissed*, with costs, pursuant to the 10th Rule.

JAMES B. SWING, Trustee, etc., *Plaintiff in Error*, v. EDGAR MUNSON. [No. 101.]
In Error to the Supreme Court of the State of Pennsylvania.
Messrs. J. C. Dowell and Clarence E. Sprout for plaintiff in error.
Mr. C. LaRue Munson for defendant in error.
January 13, 1902. *Dismissed*, with costs, pursuant to the 10th Rule.

JOHN M. KIRKMAN, *Plaintiff in Error*, v. WILLIAM BIRD *et al.* [No. 138.]
In Error to the Supreme Court of the State of Utah.
Mr. Charles C. Dey for plaintiff in error.
Mr. Geo. Sutherland for defendants in error.
January 21, 1902. *Dismissed*, with costs, pursuant to the 10th Rule.

J. N. ELLIOTT, Constable, *et al.*, *Petitioners*, v. MURPHY L. ANDERSON *et al.* [No. 168.]
On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Messrs. J. C. Pritchard and Chas. A. Moore for petitioners.
Mr. Charles Seymour for respondents.
January 28, 1902. *Dismissed*, with costs, pursuant to the 10th Rule.

J. K. VAN DYKE, *Plaintiff in Error*, v. COMMONWEALTH OF PENNSYLVANIA by LEVI WELLS, Dairy and Food Commissioner. [No. 173.]
In Error to the Supreme Court of the State of Pennsylvania.
Mr. M. Hampton Todd for plaintiff in error.
Mr. John P. Elkin for defendant in error.
January 30, 1902. *Dismissed*, with costs, pursuant to the 10th Rule.

COMMERCIAL NATIONAL BANK OF CHICAGO, *Plaintiff in Error*, v. CONSUMERS' BREWING COMPANY. [No. 179.]
In Error to the Court of Appeals of the District of Columbia.
Messrs. R. Ross Perry and R. Ross Perry, Jr., for plaintiff in error.
Mr. Lorenzo A. Bailey for defendant in error.
January 31, 1902. *Dismissed*, with costs, pursuant to the 10th Rule.

MARY E. QUINN, *Plaintiff in Error*, v. CAROLINE A. LADD *et al.* [No. 202.]
In Error to the Supreme Court of the State of Oregon.
Mr. James K. Kelly for plaintiff in error.
Messrs. Geo. H. Williams, C. E. S. Wood, and Joseph Simon for defendants in error.
March 18, 1902. *Dismissed*, with costs, pursuant to the 10th Rule.

JAMES W. BARKER, *Appellant*, v. MUTUAL FIRE INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA. [No. 212.]
Appeal from the Court of Appeals of the District of Columbia.
Mr. D. W. Baker for appellant.
Mr. Benj. S. Minor for appellee.
March 21, 1902. *Dismissed*, with costs, pursuant to the 10th Rule.

OHIO NATIONAL BANK OF WASHINGTON, *Appellant*, v. CENTRAL CONSTRUCTION COMPANY. [No. 260.]
Appeal from the Court of Appeals of the District of Columbia.
Mr. Conway Robinson for appellant.
Mr. Tracy L. Jeffords for appellee.
April 30, 1902. *Dismissed*, with costs, pursuant to the 10th Rule.

NINETEENTH RULE.

JOHN D. WEBER *et al.*, *Appellants*, v. JOHN H. DILLON, County Treasurer, etc. [No. 8.]
Appeal from the Supreme Court of the Territory of Oklahoma.
Mr. John C. Moore for appellants.
No counsel for appellee.
October 16, 1901. *Dismissed*, with costs, pursuant to the 19th Rule.

MISCELLANEOUS.

UNITED STATES, *Appellant, v. A. D. MORGAN*, Master, etc. [No. 244.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

Attorney General for appellant.

Mr. Floyd Hughes for appellee.

October 15, 1901. *Dismissed*, on motion of *Mr. Solicitor General Richards* for the appellant.

STATE OF MINNESOTA *ex rel. WILLIAM B. MOHLER, Plaintiff in Error, v. PHIL T. MEGAARDEN*, as Sheriff of Hennepin County, Minn. [No. 23.]

In Error to the Supreme Court of the State of Minnesota.

Messrs. Ralph Whelan and John R. Van Derlip for plaintiff in error.

Mr. W. B. Douglas for defendant in error.

October 15, 1901. *Dismissed*, per stipulation.

PACIFIC STATES SAVINGS, LOAN, & BUILDING COMPANY, *Plaintiff in Error, v. THOMAS F. HOWELLS et al.* [No. 140.]

In Error to the Supreme Court of the State of Utah.

Mr. M. L. Ritchie for plaintiff in error.

No counsel for defendants in error.

October 15, 1901. *Dismissed*, per stipulation.

GRAND ISLAND & WYOMING CENTRAL RAILROAD COMPANY *et al., Appellants, v. THOMAS SWEENEY.* [Nos. 184, 185, and 186.]

Appeals from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Chas. F. Manderson and N. K. Griggs for appellants.

Mr. Charles W. Brown for appellee.

October 15, 1901. *Dismissed*, per stipulation.

NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, *Plaintiff in Error, v. GEORGE RANSBERRY.* [No. 196.]

In Error to the Supreme Court of the State of Washington.

Mr. Frederick Bausman for plaintiff in error.

Mr. John B. Allen for defendant in error.

October 15, 1901. *Dismissed*, per stipulation.

LEAVENWORTH CITY & FORT LEAVENWORTH WATER COMPANY, *Plaintiff in Error, v. CITY OF LEAVENWORTH.* [No. 301.]

In Error to the Supreme Court of the State of Kansas.

Mr. E. F. Ware for plaintiff in error.

No counsel for defendant in error.

October 15, 1901. *Dismissed*, with costs, on motion of counsel for plaintiff in error.

JOHN CADWALADER, Late Collector, etc., *Petitioner, v. CHARLES H. MEYER et al.* [No. 2.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Attorney General for petitioner.

Mr. Frank P. Pritchard for respondents.

October 15, 1901. *Dismissed*, with costs, on motion of *Mr. Solicitor General Richards* for the petitioner.

JOHN K. COWEN *et al.,* Receivers, etc., *Plaintiffs in Error, v. ADELAIDE M. MERRIMAN, Administratrix, etc.* [No. 210.]

In Error to the Court of Appeals of the District of Columbia.

Messrs. Geo. E. Hamilton and M. J. Colbert for plaintiffs in error.

No counsel for defendant in error.

October 16, 1901. *Dismissed*, with costs, on motion of counsel for plaintiffs in error.

J. M. BEAR & Co. *et al., Appellants, v. ROBERT C. CHASE, Trustee.* [No. 44.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Henry A. M. Smith for appellants.

October 16, 1901. *Dismissed*, with costs, on motion of counsel for appellants.

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error, v. JOHN WINELAND.* [No. 106.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Dillon, W. S. Pierce, D. D. Duncan and W. W. Howe for plaintiff in error.

Mr. Waters Davis for defendant in error.

October 17, 1901. *Dismissed*, with costs, on motion of *Mr. W. W. Howe* for plaintiff in error.

NORTHWESTERN LIFE ASSURANCE COMPANY, *Plaintiff in Error, v. SWEETIE VILLENEUVE.* [No. 43.]

In Error to the Circuit Court of the United States for the Western District of Texas.

Messrs. Maurice E. Locke, S. S. Gregory, and Conrad H. Poppenhausen for plaintiff in error.

Mr. J. S. Hogg for defendant in error.

October 21, 1901. *Dismissed*, with costs, on authority of counsel for the plaintiff in error.

ROBERT C. CHASE, Trustee, etc., *Plaintiff in Error, v. THOMPSON & SHIPP et al.* [No. 350.]

In Error to the Supreme Court of the State of South Carolina.

Mr. Charles A. Douglass for plaintiff in error.

No counsel for defendants in error.

October 29, 1901. *Dismissed*, with costs, on authority of counsel for plaintiff in error.

CHICAGO CRIPPLE CREEK GOLD MINING COMPANY *et al.*, *Plaintiffs in Error*, v. MATOA GOLD MINING COMPANY. [No. 34.]

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Charles J. Hughes, Jr., for plaintiffs in error.

Messrs. C. S. Thomas and W. H. Bryant for defendant in error.

November 4, 1901. *Dismissed*.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *Appellant*, v. CITY OF RICHMOND. [No. 161.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Addison L. Holladay, Hill Carter, and George H. Fearons for appellant.

Mr. H. R. Pollard for appellee.

November 7, 1901. *Dismissed*, with costs, on motion of *Mr. George H. Fearons* for the appellant.

LUIGI STORTI, *Appellant*, v. COMMONWEALTH OF MASSACHUSETTS *et al.* [No. 325.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Messrs. Wm. M. Stockbridge and G. P. Wardner for appellant.

Mr. Hosea M. Knowlton for appellees.

November 7, 1901. *Dismissed*, with costs, per stipulation.

COLORADO FUEL & IRON COMPANY, *Appellant*, v. SOUTHERN PACIFIC COMPANY *et al.* [No. 120.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. D. C. Beaman for appellant.

Mr. Joel F. Vaile for appellees.

November 8, 1901. *Dismissed*, per stipulation.

CITY OF MARION *et al.*, *Appellants*, v. JAMES CHARLES. [No. 200.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Messrs. Wm. A. Ketcham and Roscoe O. Hawkins for appellants.

Mr. W. H. H. Miller for appellee.

November 18, 1901. Decree *reversed*, with costs, upon confession of error by counsel for appellee, and cause remanded for further proceedings, on motion of *Mr. Thomas H. Clark* in behalf of counsel for appellee.

NEW ORLEANS PACIFIC RAILWAY COMPANY *et al.*, *Plaintiffs in Error*, v. JOHN E. DE LOACH *et al.* [No. 135.]

In Error to the Supreme Court of the State of Louisiana.

Messrs. W. W. Howe, Wm. Grant, and H. M. Jordan for plaintiffs in error.

November 22, 1901. *Dismissed*, with costs, on authority of counsel for the plaintiffs in error.

J. G. SISLER *et al.*, *Plaintiffs in Error*, v. SLINGLUFF, JOHNS, & Co. [No. 166]; P. S. NEWMYER, Assignee, etc., *Plaintiff in Error*, v. SLINGLUFF, JOHNS, & Co. [No. 167.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. Edward Campbell for plaintiffs in error.

No counsel for defendants in error.

December 2, 1901. *Dismissed*, with costs, on the authority of counsel for the plaintiffs in error.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, *Petitioner*, v. JAMES R. SUTLIFF. [No. 56.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. C. S. Thomas, W. H. Bryant and C. Cavender for petitioner.

Mr. Edmund F. Richardson for respondent.

January 6, 1902. *Dismissed*, with costs, per stipulation of counsel.

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, v. J. H. WILDER AND WIFE. [No. 93.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Dillon, W. S. Picree, and D. D. Duncan for plaintiff in error.

Mr. Wm. H. Pope for defendants in error.

January 6, 1902. *Dismissed*, with costs, on the authority of counsel for the plaintiff in error.

HARRY H. DUDLEY, *Plaintiff in Error*, v. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE. [No. 112.]

In Error to the Circuit Court of the United States for the District of Colorado.

Mr. E. F. Richardson for plaintiff in error.

Messrs. C. Cavender, C. S. Thomas, and W. H. Bryant for defendant in error.

January 6, 1902. *Dismissed*, costs to be paid by defendant in error, per stipulation of counsel.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, *Petitioner*, v. KEENE FIVE CENT SAVINGS BANK. [No. 406.]

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. C. Cavender, C. S. Thomas, W. H. Bryant, and H. B. Johnson for petitioner.

Mr. Edmund F. Richardson for respondent.

January 6, 1902. *Dismissed*, per stipulation of counsel.

CHARLES W. MORSE, *Plaintiff in Error*, v. JOHN C. DAVIES, Attorney General of New York. [No. 438.]

In Error to the Court of Appeals of the State of New York.

Mr. David Willeox for plaintiff in error.

No counsel for defendant in error.

January 6, 1902. *Dismissed*, with costs, on motion of counsel for plaintiff in error.

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error, v. STATE OF LOUISIANA ex rel. CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.* [No. 132.]

In Error to the Supreme Court of the State of Louisiana.

Messrs. W. W. Howe and Rush Taggart for plaintiff in error.

Mr. Henry P. Dart for defendant in error.

January 8, 1902. *Dismissed*, with costs, on motion of *Mr. Rush Taggart* for the plaintiff in error.

FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY, *Plaintiff in Error, v. PRISCILLA McIVER.* [No. 176.]

In Error to the Supreme Court of the State of Georgia.

Mr. Alex. R. Lawton for plaintiff in error.

No counsel for defendant in error.

January 13, 1902. *Dismissed*, with costs, on authority of counsel for the plaintiff in error.

FRAZIER BORATE MINING COMPANY, *Plaintiff in Error, v. CHARLES E. CALIN.* [No. 430.]

In Error to the Circuit Court of the United States for the Southern District of California.

Mr. John D. Works for plaintiff in error.

Messrs. Henry T. Helm, Wm. H. Metson, and Jos. C. Campbell for defendant in error.

January 13, 1902. *Dismissed*, with costs, per stipulation of counsel.

CHARLES M. MCGHEE *et al.*, Receivers, etc., *Plaintiffs in Error, v. SALLIE C. CAMPBELL, Administratrix, etc.* [No. 111.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Milton Humes and W. A. Henderson for plaintiffs in error.

Mr. Lawrence Cooper for defendant in error.

January 15, 1902. *Dismissed*, with costs, on authority of counsel for the plaintiffs in error.

MARGARET HELEN HUTCHINSON, *Plaintiff in Error, v. CITY OF COLUMBUS et al.* [No. 259.]

In Error to the Supreme Court of the State of Ohio.

Mr. Frank C. Hubbard for plaintiff in error.

No counsel opposed.

January 21, 1902. *Dismissed*, with costs, authority of counsel for the plaintiff in

AULTMAN & TAYLOR COMPANY, *Appellant, v. CHARLES BRUMFIELD, Treasurer of Richland County, Ohio* [No. 159]; *GEORGE BRINKENHOFF, Administrator, etc., Appellant, v. CHARLES BRUMFIELD, Treasurer of Richland County, Ohio.* [No. 166.]

Appeals from the Circuit Court of the United States for the Northern District of Ohio.

Mr. Henry W. Harter for appellants.

No counsel for appellee.

January 24, 1902. *Dismissed*, with costs, on authority of counsel for the appellants.

PIERRE J. SMITH *et al.*, *Plaintiffs in Error, v. GEORGE R. BIDWELL.* [No. 467.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Henry M. Ward for plaintiffs in error.

Attorney General for defendant in error.

January 27, 1902. Judgment *reversed* with costs, per stipulation, on motion of *Mr. Solicitor General Richards* for the defendant in error, and cause remanded for further proceedings according to law.

GEORGE C. TALLMAN, *Appellant, v. HUMPHREY C. HILLOCK.* [No. 565.]

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

February 24, 1902. Docketed and *dismissed* with costs, on motion of *Mr. W. D. O'Connell* for the appellee.

ELLIOTT H. PHELPS *et al.*, *Plaintiffs in Error, v. ROBERT BRADFORD BEARD, Receiver, etc.* [No. 6.]

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. John P. Wilson and J. J. Herriek for plaintiffs in error.

Messrs. John H. Hamline and Frank H. Scott for defendant in error.

February 24, 1902. *Dismissed*, per stipulation.

SARAH C. HENDERSON, *Plaintiff in Error, v. HUGHES COUNTY et al.* [No. 294.]

In Error to the Supreme Court of the State of South Dakota.

Mr. Thomas G. Frost for plaintiff in error.

Mr. Ivan W. Goodner for defendants in error.

February 24, 1902. *Dismissed* with costs, per stipulation.

RANNEY-ALTON MERCANTILE COMPANY *et al.*, *Appellants, v. DENISON & NORTHERN RAILWAY COMPANY.* [No. 571.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

February 26, 1902. Docketed and *dismissed* with costs, on motion of *Mr. James H. Hayden* for the appellee.

CORDELIA BOTKIN, *Plaintiff in Error*, v. PEOPLE OF THE STATE OF CALIFORNIA. [No. 422.]

In Error to the Superior Court of the City and County of San Francisco, State of California.

Mr. George A. Knight for plaintiff in error.

Messrs. Tirey L. Ford and *A. A. Moore* for defendant in error.

March 3, 1902. *Dismissed*, with costs, on authority of counsel for the plaintiff in error.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error*, v. UNITED STATES, USE, ETC., OF THE CHAPIN-HALL LUMBER COMPANY. [No. 400.]

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Louis Marshall for plaintiff in error.

Messrs. L. Laflin Kellogg and *Abram J. Rose* for defendant in error.

March 17, 1902. *Dismissed*, per stipulation.

CONRAD D. MAURER, *Petitioner*, v. EDWARD N. DICKERSON *et al.* [No. 583.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Hector T. Fenton for petitioner.

Mr. Livingston Gifford for respondents.

April 7, 1902. *Denied*.

ROBERT PERRIN, *Appellant*, v. UNITED STATES. [No. 97.]

Appeal from the Court of Private Land Claims.

Messrs. John T. Morgan and *Rochester Ford* for appellant.

Attorney General for appellee.

April 7, 1902. *Dismissed*, per stipulation, on motion of *Mr. Solicitor General Richards* for the appellee.

ANIMARIUM COMPANY, *Petitioner*, v. JAMES H. MAHLER *et al.* [No. 605.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Lysander Hill for petitioner.

Messrs. Leslie A. Gilmore and *Frank P. Blair* for respondents.

April 14, 1902. *Denied*.

ANTHONY L. DE GIGNAC *et al.*, *Petitioners*, v. UNITED STATES. [No. 620.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Wm. S. Forrest for petitioners.

Attorney General, *Solicitor General Richards*, and *Mr. S. H. Bethea* for respondent.

April 14, 1902. *Denied*.

L. BUCKI & SON LUMBER COMPANY, *Petitioner*, v. ATLANTIC LUMBER COMPANY. [No. 621.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. H. Bisbee, *Geo. C. Bedell* and *J. E. Padgett* for petitioner.

Mr. Richard H. Liggett for respondent.

April 14, 1902. *Denied*.

UNITED STATES, *Petitioner*, v. A. KLIPSTEIN & Co. [No. 624.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Attorney General, *Solicitor General Richards*, and *Assistant Attorney General Hoyt* for petitioner.

Mr. Albert Comstock for respondent.

April 14, 1902. *Denied*.

MARY A. WALTERS, Administratrix, etc., *Plaintiff in Error*, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. [No. 216.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Mr. N. C. Abbott for plaintiff in error.

Messrs. J. W. Deverece and *Chas. F. Manderson* for defendant in error.

April 14, 1902. Judgment affirmed with costs, on the authority of *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Louisville, N. A. & C. R. Co. v. Louisville Bkg. Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817.

JAMES L. SHARKEY, *Plaintiff in Error*, v. INDIANA, DECATUR & WESTERN RAILWAY COMPANY. [No. 447.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Messrs. John H. Hazelton and *Geo. C. Hazelton* for plaintiff in error.

Mr. Rush Taggart for defendant in error.

April 14, 1902. Order affirmed with costs, on the authority of *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILWAY OF SAVANNAH, *Plaintiff in Error*, v. MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH. [No. 238.]

In Error to the Supreme Court of the State of Georgia.

Messrs. Pope Barrow and *Geo. A. King* for plaintiff in error.

Mr. Samuel B. Adams for defendants in error.

April 21, 1902. *Dismissed*, with costs, on motion of *Mr. George A. King* for the plaintiff in error.

CLARKSBURG ELECTRIC LIGHT COMPANY, *Plaintiff in Error*, v. CITY OF CLARKSBURG *et al.* [No. 233.]

In Error to the Supreme Court of Appeals of the State of West Virginia.

Messrs. W. P. Hubbard and John Bassel for plaintiff in error.

Messrs. M. F. Snider and Jno. W. Davis for defendants in error.

April 21, 1902. *Dismissed*, with costs, on motion of Mr. John Bassel for the plaintiff in error.

WILLIAM H. MOSES *et al.*, Administrators, etc., *Plaintiffs in Error*, v. UNITED STATES. [No. 543.]

In Error to the Court of Appeals of the District of Columbia.

Mr. J. J. Darlington for plaintiffs in error.

Attorney General for defendant in error.

April 25, 1902. *Dismissed*, on motion of Mr. J. J. Darlington for the plaintiffs in error.

JULIAN SANDOVAL *et al.*, Appellants, v. UNITED STATES. [No. 683.]

Appeal from the Court of Private Land Claims.

May 19, 1902. Docketed and *dismissed*, on motion of Mr. Assistant Attorney-General Hoyt for the appellee.

MARSHALL M. MILLER *et al.*, Appellants, v. UNITED STATES. [No. 682.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

May 19, 1902. Docketed and *dismissed* on motion of Mr. Assistant Attorney-General Hoyt for the appellee.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Petitioner*, v. WARREN G. FURRY. [No. 678.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. L. F. Parker for petitioner.

Messrs. Joseph M. Hill and James Brizolard for respondent.

June 2, 1902. *Denied*.

MARSHALL M. MILLER *et al.*, *Petitioners*, v. UNITED STATES. [No. 680.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. George Clark for petitioners.

Attorney General and Solicitor General Richards for respondent.

June 2, 1902. *Denied*.

EDWIN L. VETTER, *Plaintiff in Error*, v. UNITED STATES. [No. 699.]

In Error to the District Court of the United States for the Western District of Pennsylvania.

June 2, 1902. Docketed and *dismissed*, on motion of Mr. Solicitor General Richards for the defendant in error.

LUI TSY TSIN, *Appellant*, v. UNITED STATES. [No. 700.]

Appeal from the District Court of the United States for the Southern District of New York.

June 2, 1902. Docketed and *dismissed*, on motion of Mr. Assistant Attorney General Hoyt for the appellee.

JU FOOK PUN, *Appellant*, v. UNITED STATES [No. 701]; WING LONG and LOY KEE, *Appellants*, v. UNITED STATES [No. 702]; YOUNG SIANG LEE, *Appellant*, v. UNITED STATES [No. 703]; LEE LUI SING and LUI NAM, *Appellants*, v. UNITED STATES. [No. 704.]

Appeals from the District Court of the United States for the Northern District of New York.

June 2, 1902. Docketed and *dismissed*, on motion of Mr. Assistant Attorney General Hoyt for the appellee.

CHIN LEONG GOON, *Appellant*, v. UNITED STATES [No. 705]; LOUIS PANG LUNG, *Appellant* v. UNITED STATES [No. 706]; LING QUONG, *Appellant*, v. UNITED STATES [No. 707]; LING MING, *Appellant*, v. UNITED STATES [No. 708]; WONG SOO BOW, *Appellant*, v. UNITED STATES [No. 709]; WONG FAT, *Appellant*, v. UNITED STATES [No. 710]; WONG HONG YIP, *Appellant*, v. UNITED STATES [No. 711]; WONG CHOW, *Appellant*, v. UNITED STATES [No. 712]; WONG SIC LOON, *Appellant*, v. UNITED STATES [No. 713]; WONG KING, *Appellant*, v. UNITED STATES [No. 714]; WONG AH SIN, *Appellant*, v. UNITED STATES [No. 715]; WONG SIC CHUNG, *Appellant*, v. UNITED STATES [No. 716]; WONG SOW SIN, *Appellant*, v. UNITED STATES. [No. 717.]

Appeals from the District Court of the United States for the District of Vermont.

June 2, 1902. Docketed and *dismissed* on motion of Mr. Assistant Attorney General Hoyt for the appellee.

NEW JERSEY STEEL & IRON COMPANY, *Plaintiff in Error*, v. FREDERICK CHORMANN. [No. 454.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Henry B. Closson for plaintiff in error.

Mr. Arthur H. Masten for defendant in error.

June 2, 1902. *Dismissed*, per stipulation.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1901.

ORDER.

The reporter having represented that, owing to the number of decisions at the present term, it will be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to section 681 of the Revised Statutes.

February 3, 1902.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1901.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided and all the other business of the term not disposed of by the court be, and the same are hereby, continued until the next term of the court.

June 2, 1902.

Ref 348.73 Un35
United States. Supreme
Court.
Cases argued and decided in
the Supreme Court of the

For Reference

Not to be taken from this room



